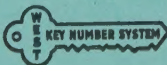


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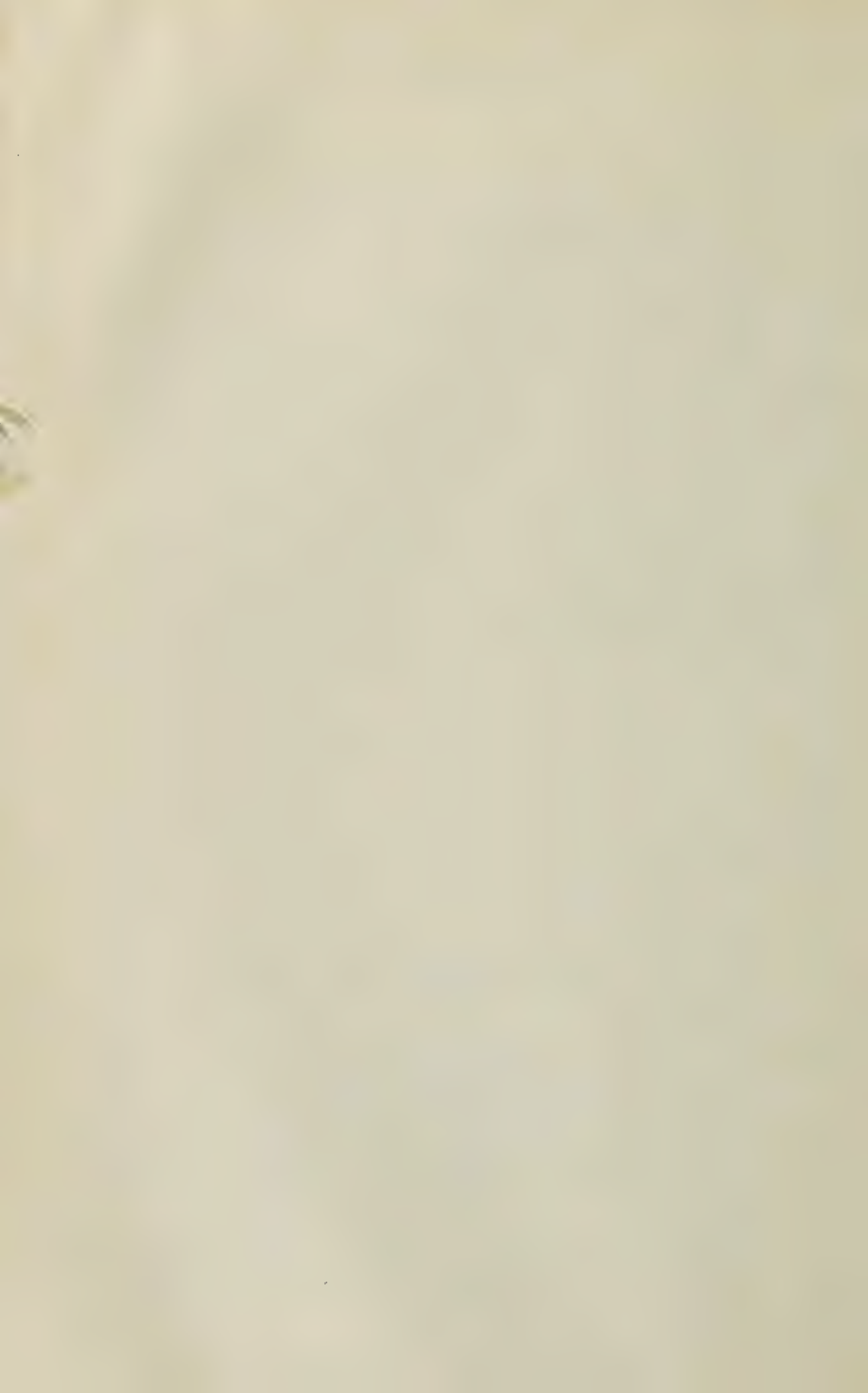
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CALIFORNIA REPORTER

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SECOND SERIES

HANLEY v. MURPHY et al.
(two cases).

REILLY v. CITY & COUNTY OF SAN FRANCISCO et al.
S. F. 18674-18676.

Supreme Court of California, in Bank.
March 30, 1953.

Petitions for writs of mandate. From judgments of the Superior Court, San Francisco County, Samuel F. Finley, J., ordering issuance of writs of mandate requiring restoration of petitioners to their former positions of superintendent of jail under sheriff of City and County of San Francisco and payment of salary fixed for such positions, defendants appealed. The Supreme Court, Spence, J., held that finding, adequately supported by evidence, that sheriff acted in disregard of procedural requirements of civil service regulations and in bad faith in purporting to abolish positions of superintendent of jail without giving civil service commission immediate notice of abolition of positions entitled petitioners to be restored to their former positions under civil service rating.

Judgments affirmed.

Schauer, J., dissented.

Prior opinion 244 P.2d 957.

1. Sheriffs and Constables ⇨38

Under the charter of the City and County of San Francisco, the sheriff is an elective officer and as one in charge of an administrative office he has the powers and duties of a department head.

2. Counties ⇨3

Municipal Corporations ⇨8

Sections of San Francisco charter relating to civil services and county employment and preparation and submission of annual budget and appropriation ordinance

255 P.2d—1

Cal.Rep. 255-256 P.2d—1

must be construed together, giving effect as far as possible to all parts thereof, so as to harmonize them and effectuate the legislative intention as therein expressed.

3. Counties ⇨67, 159

Municipal Corporations ⇨177, 885

San Francisco charter vests in each department head broad power in effecting the reduction of forces under his jurisdiction, and where a department head files budget estimate which decreases number of positions in his department as shown in accompanying schedule, eliminated positions may not be added by the mayor or board of supervisors, except under charter provision permitting board to so act on request by mayor and on recommendation of department head.

4. Municipal Corporations ⇨218(2)

Officers ⇨69.11

Under San Francisco charter, a department head must act in conformity with applicable civil service regulations in removing employees from positions in his department.

5. Officers ⇨11

The civil service system rests on the principle of application of the merit system instead of the spoils system in the matter of appointment and tenure of office.

6. Municipal Corporations ⇨217(3)

Officers ⇨11.2

Under San Francisco charter, civil service commission has exclusive power to provide qualified personnel for various municipal departments and to classify or reclassify positions according to prescribed duties.

7. Municipal Corporations ⇨218(6)

Officers ⇨69.11

Under San Francisco charter, while department head, in exercise of his ad-

ministrative discretion, may effect a reduction of employees in his department pursuant to his judgment as to the needs of the work, he must have due regard for applicable civil service procedure on the subject of personnel classification and protected tenure in office for employees.

8. Administrative Law and Procedure Ⓒ753

The question of motive becomes immaterial only where a public body pursues its authority in strict accordance with law in pursuance of a legal right.

9. Mandamus Ⓒ172

Where sheriff did not proceed in conformity with applicable civil service provisions of San Francisco charter in eliminating positions of superintendent of jail from budget estimate by giving civil service commission immediate notice of abolition of such positions, whether sheriff acted in good faith was a material issue in proceedings for writ of mandate requiring restoration of petitioners to former positions of superintendent of jail.

10. Mandamus Ⓒ168(4)

In mandamus proceedings to require restoration of petitioners to former positions of superintendent of San Francisco jails, evidence sustained finding that removal of petitioners by elimination of such positions from sheriff's budget estimate did not conform with procedural requirements of civil service regulations and was done in bad faith.

11. Officers Ⓒ69

One of the chief purposes of civil service regulations is to safeguard honorable and efficient employees from arbitrary ouster.

12. Officers Ⓒ69.11

Civil service rules do not guarantee to officers or employees the tenure of positions which are no longer required.

13. Mandamus Ⓒ174

Finding, adequately supported by evidence, that sheriff acted in disregard of procedural requirements of San Francisco civil service regulations and in bad faith in purporting to abolish positions of superintendent of jail by omitting such positions from budget estimate without giving civil

service commission immediate notice of abolition of such positions entitled former superintendents to writ of mandate requiring their restoration to former positions under civil service rating.

Dion R. Holm, City Atty., and Bernard J. Ward, Deputy City Atty., San Francisco, for appellants.

Charles P. Scully, San Francisco, for respondent Hanley.

Alfred J. Hennessy, San Francisco, for respondent Reilly.

SPENCE, Justice.

These appeals are from judgments ordering the issuance of writs of mandate requiring the restoration of the two petitioners to their respective former positions of Superintendent of Jail under the Sheriff of the City and County of San Francisco, and the payment to them of the salary fixed for those positions in lieu of the compensation received by them following their demotion. The cases were tried concurrently before the same trial judge and are presented together on these appeals.

The trial court found that the removal of petitioners from their former positions did not conform with the procedural requirements of the civil service regulations and was done in bad faith. The record sustains these findings and the judgments based thereon.

Prior to July 1, 1947, petitioners were the respective superintendents for County Jails No. 1 and No. 2 operated by the city and county. They had occupied these positions since 1935 following their appointment upon the basis of civil service promotional examinations. In 1936 appellant Murphy was elected sheriff of the city and county and, as such, he became responsible for the overall supervision of the jails. In 1947, pursuant to his determination to abolish the two positions of superintendent of jail, he failed to include them in his request for salaries as submitted in the annual budget estimate for the fiscal year 1947-1948 (which began on July 1, 1947). The propriety of this action requires consideration

of applicable provisions of the San Francisco charter.

[1] The sheriff is an elective officer (§ 5) and as one "in charge of an administrative office," he has "the powers and duties of a department head" (§ 20). The last cited section further provides: "He shall act as the 'appointing officer' *under the civil service provisions of this charter* for the appointing, disciplining and removal of such officers, assistants and employees as may be authorized * * *. Non-civil service appointments and any temporary appointments in any department or subdivision thereof, and all removals therefrom shall be made by the department head or bureau head designated as the appointing officer only with the approval of the chief administrative officer or the board or commission in charge, as the case may be * * *. Each department head may suggest the creation of positions subject to the provisions of this charter, and may reduce the forces under his jurisdiction to *conform to the needs of the work for which he is responsible*, any other provision of this charter to the contrary notwithstanding." (Emphasis added.)

Section 140 provides for "a civil service commission * * * charged with the duty of providing qualified" personnel based "solely upon merit and fitness, as established by appropriate tests." The commission has sole power to classify and reclassify positions in both civil services and exempt employment; but its "allocation or re-allocation of a position shall not adversely affect the civil service rights of an occupant regularly holding such position." § 141. "Immediate notice in writing shall be given to the civil service commission by the appointing office * * * of the creation or abolition of any position, or of any change in duties if the position is included in the classified civil service, or of any * * * dismissal or other creation of vacancy therein, with the date of any such change." § 143. "No person employed under the civil service provisions * * * in a position defined by the commission as 'permanent' shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own

defence," pursuant to specified procedure § 154.

Section 69 provides that a budget estimate must be prepared each year by the department head and filed with the controller prior to February 15. Not later than March 15 the controller must consolidate such budget estimates and transmit them to the mayor. The mayor may hold public hearings and increase, decrease or reject any item contained in the estimates, except that he shall not increase any amount or add any new item for personal services.

Section 70 in providing for the form of budget estimates, specifies that the estimates shall include or be accompanied by "(4) a schedule of positions and compensations showing any increase or decreases requested in the number of positions * * *." Section 72 requires the mayor to transmit to the board of supervisors not later than May 1 the consolidated budget estimates and proposed budget, with a draft of the annual appropriation ordinance for the ensuing fiscal year prepared by the controller and based on the proposed budget. A detailed schedule of positions and compensations showing any increases or decreases for any department must be included in the proposed budget, and the board of supervisors shall not increase any amount or add any new item for personal services.

[2] Under settled rules of statutory interpretation, these several sections must be construed together, giving effect and meaning so far as possible to all parts thereof, with the purpose of harmonizing them and effectuating the legislative intention as therein expressed. 23 Cal.Jur. § 134, p. 760; 18 Cal.Jur. § 81, p. 769; Ohlhausen v. Mills, 101 Cal.App. 754, 761, 282 P. 394; Gallagher v. Foerst, 128 Cal.App. 466, 471, 17 P.2d 1065.

[3] It is clear from these provisions that the charter vests in the department head broad power in effecting the reduction of the forces under his jurisdiction (§ 20) and the budget-making procedure accords therewith. Thus, when the department head files a budget estimate which decreases the number of positions in his department

as shown in the accompanying schedule, § 70, subd. (4), such eliminated positions may not be added by the mayor, § 69, or by the board of supervisors, § 72, for both are forbidden "to add any new item for personal services." The only manner in which a position omitted by the department head from his original budget estimate may later be added is the qualification permitting the board of supervisors to so act on request by the mayor and on the recommendation of the department head. § 72. This did not take place here.

[4-7] But at the same time the department head in removing employees from positions in his department, must act in conformity with applicable civil service regulations. § 20. So it was said in *Childress v. Peterson*, 18 Cal.2d 636, at page 639, 117 P.2d 336, at page 337: "While the executive officers of a city, acting under enabling legislation, have plenary power to exercise full administrative judgment and control over city employees and to promote a program of economy in good faith, they are required in the enforcement of their judgment to act in conformity with charter provisions and procedural requirements." The civil service system rests on the principle of application of the merit system instead of the spoils system in the matter of appointment and tenure of office. *Barry v. Jackson*, 30 Cal.App. 165, 169, 157 P. 828. To that end the charter establishes a classified civil service system, with exclusive power in the civil service commission to provide qualified personnel for the various municipal departments and to classify or reclassify positions according to prescribed duties. §§ 140-143. Moreover, in protection of employees who have obtained permanent civil service status, the charter provides that they be given due notice in writing as to the cause of their removal from office. § 154. Accordingly, although the department head, in the exercise of his administrative discretion, may effect a reduction of employees in his department pursuant to his judgment as to the needs of the word "any other provision of this charter to the contrary notwithstanding," § 20, such quoted clause cannot reasonably be construed to mean that the department head

is subject to no limitation under civil service regulations. Rather, under authority of section 20, he must have due regard for applicable civil service procedure on the subject of personnel classification and protected tenure in office for employees.

[8,9] Since appellant Murphy did not proceed in conformity with the applicable civil service provisions, the situation is not one coming within the principle that "where there is a legal right to do a certain act, the motive which induces the exercise of the right is of no importance." *Monahan v. Dept. of Water & Power*, 48 Cal.App.2d 746, 754, 120 P.2d 730, 734; also *Neuwald v. Brock*, 12 Cal.2d 662, 675-676, 86 P.2d 1047. It is only in cases where the public body pursues its authority in strict accordance with law or, in other words, in pursuance of a legal right, that the question of motive becomes immaterial. The trial court therefore correctly determined that the issue of bad faith on the part of appellant Murphy was a material issue in the disposition of these cases.

The record shows that since 1936 and until July 1, 1947, petitioners Hanley and Reilly had held their respective positions of superintendent of jail and performed the classified duties in connection therewith—Hanley at County Jail No. 2 and Reilly at County Jail No. 1. Neither had ever been charged with misconduct or any dereliction of duty in the discharge of his work. The undersheriff testified that at the request of the sheriff, appellant Murphy, he made an investigation of the two jails in October or November, 1946, and recommended that their effective operation would not permit the abolition of the duties of a superintendent, though the position itself were eliminated. Following the termination of the respective positions as of July 1, 1947, the duties thereof were performed partly by the undersheriff, partly by the sheriff's secretary, and largely by captains of the watch stationed at each of the two jails.

Appellant Murphy testified that efficient operation of the two jails requires a responsible person on the premises in charge during the entire day; that prior to the filing of his budget estimate in March, 1947, omitting the salaries for the two super-

intendents for the next fiscal year, he did not advise the civil service commission either of his intent to eliminate such positions or the reasons for their omission; that he never responded to the commission's letters of inquiry of March 19 and April 10, 1947, and that in so proceeding, he acted on his own counsel and was not being advised by any other city official. Both of these letters specifically called to appellant Murphy's attention the "provisions of section 143 of the charter under which appointing officers are required to give immediate notice in writing to the Civil Service Commission of the abolition of any position or of any changes in duties of positions included in the classified service" and expressly requested advice as to "the circumstances surrounding the abolition of these two positions and also * * * who will perform the duties" thereof. Again on June 27 the commission wrote to appellant Murphy inquiring as to the "proposed elimination" and stating that in the event such action was "a bona fide abolition of the duties of the position" and there were no charges filed against petitioners as cause for their removal from office, § 154, petitioners were entitled to return to the former positions they respectively held in the service. Appellant Murphy responded by letter of June 28, 1947, stating that "by virtue of the abolition of the positions of Superintendent of Jail," effective July 1, 1947, he was returning petitioners to "the next highest position which they occupied prior to their promotion to the position of Superintendent of Jail"—Hanley to a position of captain of the watch and Reilly to a position of writ server. This was accordingly done.

Appellant Murphy also was questioned about a newspaper article published as the result of an interview that he had with reporters about the time in March, 1947, when his budget was submitted omitting the positions of superintendent of jail. In the article appellant Murphy had referred to his displeasure at petitioners' success a few months preceding in obtaining a salary increase through a change of classification with the commission, his belief that others in his department work "a lot harder

* * * and for a lot less money," and that there was "a lot of discord after the two 'superintendents' got their big raise." The article also noted appellant Murphy's statement that he was "just forgetting to include their salaries in the budget" and his comment on the likelihood that "there'll be a row and * * * they'll go running to the Civil Service Commission." Appellant Murphy testified that these statements in the article were substantially correct. He further stated that the article's added reference to the purported claim that the superintendents' charges before the Labor Council was the cause for his suspension therefrom was not entirely accurate, as he had then told the reporters that he did not know whether "either or both" of such charges had anything to do with that particular matter.

The personnel director and secretary of the commission testified that he could not see "how you could abolish a Superintendent's job if the institution remained in operation," and that he so informed the undersheriff prior to the latter's investigation of the two jails in the fall of 1946; that the commission was unable to make a ruling as to the propriety of appellant Murphy's action in attempting to abolish the superintendent positions because of the latter's failure to supply the necessary information for reclassification purposes, although previously with respect to another classification in his department appellant Murphy, on advice from the commission as to the appropriate procedure, had submitted the needed information and reclassification occurred; and that the classification of superintendent was accordingly never abolished by the commission. He further testified that appellant Murphy had advised the commission that after July 1, 1947, he and his undersheriff would perform the duties previously assigned to the superintendents in the two jails; that shortly after the "reorganizations had been effected," the commission received a request from an employee organization in the department asking for an investigation of the manner of the operation of the two jails "as far as the assignment of duties was concerned"; that a member of the

commission's staff undertook the investigation and pursuant to the report made in October, 1947, and questionnaires completed by the employees, the commission found that various other "inferior employees" at the respective jails were performing duties that belonged to the position of superintendent according to the scheduled classification of duties; that the questionnaires were reviewed and signed by appellant Murphy without change or comment; that thereafter in November, 1947, the commission met with appellant Murphy and advised the latter as to the result of the survey showing that the duties formerly performed by the superintendent were necessary in the operation of the jails and were then being performed by other "inferior employees"—jailers and captains of the watch—which procedure was not permissible under the classified civil service; that appellant Murphy said that such procedure would be discontinued in his department and he would so advise the commission in writing, but no such communication was ever received from him; and that no further investigation was undertaken by the commission to see if the promised changes were made as "the matter was then in litigation." This witness also stated what constituted a classified civil service, the duty of the commission to classify the positions in the service, the requirement of department heads to submit information for such purposes to the commission, and the inability of the commission to act properly in the classification of positions in a department unless such information is so furnished.

Petitioners testified that from their experience as superintendents of jail and the performance of the classified duties attached to the position, they believed that efficient operation of the jails requires such a responsible person to be in charge. Petitioner Hanley stated that the first advice he had from the department as to the change in his position was the notice from the undersheriff about 4:30 p. m. on June 30, 1947, that he "would no longer be an employee of the Sheriff's office"; that at 5:00 o'clock that afternoon the undersheriff further notified him that he was to "be reduced

to captain of watch" and was to report to County Jail No. 1; that he never was given a reason for his demotion nor was he ever advised by the commission that his former position of superintendent was abolished; that upon reporting to his new assignment, he was placed under another captain of the watch who had less seniority status, and then transferred permanently to a night shift at County Jail No. 1; that while there as a captain of the watch he, other captains of the watch, and even jailers had regularly performed duties previously assigned to the superintendent. Petitioner Reilly stated that the first notice he had from the department as to his change of position was a telephone call from appellant Murphy about 4:40 p. m. on June 30, 1947, ordering him to report the next morning to the city hall as a writ server; that he was never given a reason for his demotion nor did he receive any notice from the commission that his former position had been eliminated.

[10] The evidence summarized above adequately supports the trial court's finding that the removal of petitioners did not conform with the procedural requirements of the civil service regulations and was done in bad faith. See *Childress v. Peterson*, supra, 18 Cal.2d 636, 644, 117 P.2d 336.

[11-13] As above indicated, the civil service system was adopted to protect governmental employees and society from the spoils system in the matter of appointment to office. *Barry v. Jackson*, supra, 30 Cal. App. 165, 169, 157 P. 828. One of the chief purposes of civil service regulations is to safeguard honorable and efficient employees from arbitrary ouster, for the method of dismissal is as important as that of selection and appointment. *Winslow v. Bull*, 97 Cal.App. 516, 523, 275 P. 974. Manifestly, civil service rules do not guarantee to officers or employees the tenure of positions which are no longer required, 10 Am.Jur. sec. 12, p. 933; annotations 4 A.L.R. 207, 37 A.L.R. 816, 172 A.L.R. 1369; and it is highly desirable from a standpoint of personnel efficiency, as well as in accord with considerations of public economy, that the department head may have the power to reduce his staff. But since the record here

supports the trial court's finding that appellant Murphy, in the purported exercise of his power to effect a reduction of the forces, acted in disregard of the prescribed civil service procedural requirements and in bad faith, petitioners are entitled to be restored to their respective positions under civil service rating. *Powers v. Board of Public Works*, 216 Cal. 546, 15 P.2d 156.

The judgments are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I dissent. The Sheriff of the City and County of San Francisco is a department head and by the express provisions of section 20 of the San Francisco charter is authorized to "reduce the forces under his jurisdiction to conform to the needs of the work for which he is responsible, *any other provision of this charter to the contrary notwithstanding*" (Italics added). Acting under this power the sheriff abolished two positions of superintendent of jail. Hanley and Reilly, respondents herein, who had held the two positions were not discharged from employment; they were merely returned to the next highest positions which they had occupied prior to their promotion to jail superintendent. The evidence is undisputed that no one else was appointed to occupy the two positions and no new positions to take over the duties of jail superintendent were created; rather, the duties of the abolished offices were absorbed by personnel already employed; such duties were assumed partly by the undersheriff, partly by the sheriff's secretary, and partly by captains of the watch stationed at the two jails. There was thus no pseudo, but an actual, abolishment of the two superintendent positions, and the finding of the trial court that the sheriff acted in bad faith must necessarily relate to a purely metaphysical concept. In respect to the conduct of the duties of his office the finding simply is not sustained by the evidence.

It is my view that the efforts of governmental heads to reorganize their offices for

purposes of efficiency and the saving of money for the taxpayers without any curtailment of the duties performed is highly commendable and should be supported and encouraged rather than unnecessarily, let alone arbitrarily, stricken down by the courts.

Upon the undisputed law and facts, the judgments should be reversed.



40 Cal.2d 608

**SAPORITO et al. v. PUREX
CORP., Limited.**

L. A. 22408.

Supreme Court of California, in Bank.

April 7, 1953.

Action by wife and husband against corporation, for personal injuries sustained by wife when a bottle of bleaching solution, prepared and bottled by defendant, burst in wife's hands. The Superior Court, Los Angeles County, A. A. Scott, J., rendered judgment for plaintiff, and defendant appealed. The Supreme Court, Gibson, C. J., held that evidence sustained finding that defendant was negligent and that its negligence was proximate cause of wife's injuries.

Judgment affirmed.

Prior opinion, 243 P.2d 910.

1. Explosives ⇌ 8

Manufacturer of a bleaching solution, a bottle of which exploded in customer's hands, was under duty to employ techniques and practices in preparation and bottling which were reasonably designed to prevent dangerously defective bottles of solution from reaching the market.

2. Explosives ⇌ 8

In action for damages resulting from explosion of bottle containing bleaching solution, prepared and bottled by defendant, evidence sustained finding that defendant was negligent and that its negligence was proximate cause of plaintiff's injuries.

Moss, Lyon & Dunn, Sidney A. Moss, Los Angeles, Bert W. Hendrickson, New York City, and Henry F. Walker, Los Angeles, for appellant.

Gray, Binkley & Pfaelzer and John T. Binkley, Los Angeles, for respondents.

GIBSON, Chief Justice.

Mrs. Lenora Saporito and her husband brought this action against defendant, a California corporation, to recover for personal injuries sustained by Mrs. Saporito when a quart bottle of Purex, a bleaching solution prepared and bottled by defendant, burst in her hands. The case was tried without a jury, and judgment was entered for plaintiffs. The question presented on this appeal is whether the evidence is sufficient to support the findings that defendant was negligent and that its negligence proximately caused Mrs. Saporito's injuries.

The bottle which injured Mrs. Saporito was filled in defendant's plant in St. Louis, Missouri, about four months prior to the accident, and it was packed in a corrugated cardboard carton which contained 12 quart bottles. Cardboard dividers inside the carton held each of the bottles firmly in place and prevented any contact between them. The carton was sealed in the plant and was sent to a wholesale distributor who, in turn, shipped it to Jarman's Grocery Store, which was located in Columbus, Kansas, about three blocks from Mrs. Saporito's home. The carton, still sealed and in an undamaged condition, arrived at the store within ten days of the accident, and Jarman knew of nothing that happened which might have injured the bottle while it was in the store.

Mrs. Saporito purchased the bottle of Purex at Jarman's store, took it directly to her home, and started to open it as soon as she arrived there. She held the bottle in her left hand about six inches in front of her chest, a foot and a half from her face, and began to twist the cap with her right hand, using no tools or instruments. Before she was able to loosen the cap, the bottle exploded leaving the bottom portion in her left hand and the top part in her right hand. The explosion propelled Purex and small particles of glass into Mrs. Saporito's

face, causing fragments of glass to puncture her skin and penetrate her eyes. The bottle was later reconstructed, revealing a hole on its shoulder surrounded by several "very obvious bruises."

An expert testified that in his opinion the explosion was caused by a combination of forces set up in the bottle and was the result of internal pressure and some external pressure, such as twisting the cap, combined with the presence of a defect or bruise in the area where the failure of the bottle had its origin. He also stated that bruises can weaken a bottle to such an extent that it will have very little resistance to impact or internal pressure. There was evidence that Purex is an unstable chemical solution which decomposes gradually, forms a gas and, when bottled, creates gas pressure. Some pressure results from decomposition under normal conditions, and considerably more is created when the solution comes into contact with organic or metallic impurities or when it is exposed to heat or ultraviolet light. Defendant used only new bottles and did not wash them or inspect them for impurities.

The bottles were designed to release pressure by means of a diaphragm on the under side of the cap which, when pressure was exerted from within, was supposed to flex upward and expose two notches on the lip of the bottle through which gas could escape. This venting device was supposed to operate when the pressure in a bottle reached six to ten pounds. However, it does not appear that defendant ever ascertained if this was a safe pressure, and an officer who was familiar with production operations in the St. Louis plant testified that he knew of no tests which were made to determine whether the cap actually vented when subjected to that amount of internal pressure.

The bottles used by defendant had the weakest outside surface of any bottles in commercial use and were, therefore, the least likely to resist impact or pressure. Defendant did not examine any bottles to determine the strength of the glass, although a polarscope test was available for this purpose and was in common usage. The bottles were first placed on the production line in groups of 12 arranged as

they would appear in a shipping carton, and, at this time, they were inspected visually at a rate of 48 per minute. Thereafter, another visual inspection was made as they passed along the production line in single file at a rate of 96 per minute. From 38 to 48 bottles were broken each day in the St. Louis plant as a result of mechanical failures and other causes occurring in the production process.

The words "Keep In Cool Place" were written on Purex bottles and on the cartons in which they were shipped. These words were not accompanied by any warning that exposure to heat might produce an excessive pressure. The glass, which was amber-colored, was supposed to shield the solution from ultraviolet light, but it was not tested by defendant to ascertain if it would do so.

[1,2] A serious risk of harm to consumers is created when a product which might explode is offered to the public as a safe household commodity. Defendant was under a duty to employ techniques and practices in the preparation and bottling which were reasonably designed to prevent dangerously defective bottles of the solution from reaching the market. See *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 520, 203 P.2d 522; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436; *DeCorsey v. Purex Corporation*, 92 Cal.App.2d 669, 207 P.2d 616. Since several months might elapse before the product reached a consumer, an unsafe amount of gas could accumulate in a bottle which did not have an adequate venting device, particularly if decomposition of the solution was accelerated by contact with impurities or exposure to heat or ultraviolet light. As we have seen, defendant's venting device was designed to operate when the internal pressure was between 6 to 10 pounds, but it could be inferred from the evidence that defendant made no tests to determine whether the device would in fact operate at that pressure. Of all types of commercial glass for bottles, that used by defendant was the least likely to withstand impact or pressure, yet no tests were made by defendant to measure the strength of its bottles, although a polarscope test was commonly

used for this purpose. Further, defendant failed to take steps to prevent an unsafe accumulation of gas, such as washing and inspecting the bottles for the removal of impurities and testing the glass to determine whether its amber coloring would effectively exclude ultraviolet light. Moreover, the words "Keep In Cool Place" would not necessarily serve to warn purchasers that exposure of the solution to heat could produce an explosion, and they could be read as indicating only that heat would impair the effectiveness of the liquid as a bleaching solution. The violence of the explosion is evidence that the bottle contained a dangerously excessive pressure. Clearly an unsafe amount of gas would not have accumulated if the venting device had functioned as it was supposed to do, and a failure of the device to release the pressure could be attributed to defendant's negligence in not testing its caps properly.

The bottle here involved, when reconstructed, had a hole in its shoulder surrounded by several bruises, and there was expert evidence that the explosion was caused in part by bruises. Inasmuch as bruises can seriously weaken a bottle and reduce its resistance to pressure, defendant should have exercised due care to prevent defective and damaged bottles from reaching the market. It appears that from 38 to 48 bottles were broken each day in defendant's plant by the failure of machinery and similar causes, and it could be inferred that many more were bruised and injured in the production process after the first visual examination. The second inspection was made during production at the rate of 96 bottles per minute, and it could be found that such a rapid inspection was not reasonably designed to prevent dangerously damaged bottles from reaching the market and that defendant should have made a more thorough examination. There was evidence that the bottle was not damaged or mistreated after it left defendant's possession, and it could be inferred that the bottle was defective when it left defendant's plant and that, if defendant had exercised due care, the defective bottle would not have escaped detection and would not have been sold to Mrs. Saporito.

The evidence is sufficient to support the findings that defendant was negligent and that such negligence was the proximate cause of Mrs. Saporito's injuries.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of affirmance but would base the holding of this Court upon the doctrine of *res ipsa loquitur*, as the facts clearly bring the case within the purview of that doctrine. This was the view of the trial court and of the District Court of Appeal by which court the case was first decided, see *Saporito v. Purex Corp., Ltd.*, Cal.App., 243 P.2d 910. In a well reasoned opinion written by Mr. Justice Fox the District Court of Appeal cited and relied upon the numerous cases heretofore decided by this Court and the District Courts of Appeal holding the *res ipsa loquitur* doctrine applicable in exploded bottle cases such as this, see *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436; *DeCorsey v. Purex Corporation*, 92 Cal.App.2d 669, 207 P.2d 616; *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522.

In my opinion there was no justification whatsoever for this Court granting a hearing and redeciding this case as it was correctly decided by the District Court of Appeal. The hearing in this case was granted in harmony with the policy of the present majority of this Court to re-examine fact issues in negligence cases, see *Pirkle v. Oakdale Union etc. School Dist.*, 40 Cal.2d 207, 253 P.2d 1, and particularly cases involving the doctrines of *res ipsa loquitur*, *Hardin v. San Jose City Lines, Inc.*, Cal.App., 252 P.2d 46, and last clear chance, *Daniels v. City & County of S. F.*, Cal.App., 246 P.2d 125; *Sills v. Los Angeles Transit Lines*, Cal.App., 246 P.2d 65 even though such cases have been correctly decided by the District Court of Appeal. I have heretofore stated that I do not agree with this policy as it imposes an unnecessary burden upon this Court which is now faced with the determination of

numerous difficult legal problems to the solution of which the efforts and energies of the members of this Court should be devoted instead of undertaking to re-examine and restate the more simple rules and doctrines which should be and are settled by a long line of well considered cases. Such is the situation in the case at bar and the same situation exists in numerous cases now pending before this Court involving similar problems which were correctly decided by the District Courts of Appeal as will appear when the decisions in these cases are announced by this Court.



116 Cal.App.2d 752

MAXWELL et al. v. PERKINS et al.

Civ. 18891.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1953.

Hearing Denied May 14, 1953.

Subsequent to the signing and filing of a "Memorandum re Ruling on Motion for Change of Venue", which stated that motions were granted, the Superior Court, Los Angeles County, purported to deny said motions, and defendants appealed. The District Court of Appeal, Fox, J., held that the document referred to was in fact an order and that the court could not vacate such order merely because upon re-examination of the issues it decided that it had misapplied the controlling law.

Reversed.

1. Judgment ⚡355

Court has power to correct mistakes in its records and proceedings and set aside judgments and orders inadvertently made which are not actually result of exercise of judgment, but it has no power, having once made its decision after regular submission, to set aside or amend for judicial errors, since court may not vacate an order not of discretionary nature merely be-

cause upon re-examination of issues it decides it has misapplied controlling law.

2. Judgment ⇐294, 336

Motions ⇐58, 59(1)

Trial court may modify or vacate judgment or order only in statutory manner.

3. Motions ⇐40

Where decision of trial court is made after regular submission of motion, it is functus officio, and the court's power in that regard is exhausted.

4. Motions ⇐56(1)

Every direction of a court or judge is an order, whether it be merely made in writing or entered in minutes; and unless required by statute, an order becomes legally effective at time it is signed and filed, regardless of whether it is entered in minutes by clerk. Code Civ.Proc. § 1003.

5. Venue ⇐75

Document, entitled "Memorandum re Ruling on Motion for Change of Venue", which was signed by trial judge and filed and which stated that motions for change of venue was granted, constituted an order of the court. Code Civ.Proc. § 1003.

6. Motions ⇐62

An order of court is subject to same rules of interpretation as any other written instrument.

7. Motions ⇐51

Fact that order may have been referred to as an "opinion" is not of itself controlling. Code Civ.Proc. § 1003.

8. Motions ⇐55

Where order embodying ruling is signed and filed and clerk is instructed to enter such order in minutes, nothing further is needed to give vitality to order, and entry of such order in clerk's minutes serves merely to fix running of time for appeal. Rules on Appeal, rule 2; Code Civ.Proc. § 1003.

9. Venue ⇐75

Trial judge's assertion that it was his intention that his "effective ruling" be set forth in minute order to be prepared and entered in minutes by clerk could not detract from fact that ruling which he had already signed and filed was itself his final

judicial determination on merits of motion for change of venue. Rules on Appeal, rule 2; Code Civ.Proc. § 1003.

10. Venue ⇐75

An order granting or denying a motion for change of venue requires no written findings.

George Devine, Jr., San Francisco, for appellants.

Samuel H. Sherman and A. J. Weiss, Hollywood, for respondents.

FOX, Justice.

Defendants' motions for a change of venue were granted. The court thereafter purported to vacate these orders and to deny said motions. Defendants appeal.

Plaintiffs' intestate brought an action in the County of Los Angeles naming as defendants Reta E. Perkins and her husband, Irving C. Perkins, and a couple named Lindsay. The complaint, which was in two counts, did not designate the place of residence of any of the defendants.

Defendants Reta and Irving Perkins filed separate demurrers and notices of motion for change of venue to Santa Clara County, with affidavits stating that they were residents of Santa Clara County when the action was commenced. The motions were argued and taken under submission on November 12, 1951. On November 19, 1951, the trial court signed and filed in the case a "Memorandum re Ruling on Motion for Change of Venue," which, after discussing his reasons for reaching his decision, concluded as follows:

"The motions of Reta E. Perkins and Irving C. Perkins for change of venue to Santa Clara County are granted. The demurrers of these defendants are ordered off calendar."

A copy of this "memorandum ruling" was mailed to counsel. A minute order bearing the date of November 19, 1951, was entered by the clerk on December 13, 1951, reading in part as follows: "* * * the court now files its Memorandum Ruling and order as follows: The motions of Reta E. Perkins and Irving C. Perkins for

Change of Venue to Santa Clara County are granted."

On November 27, 1951, without any further notice or hearing (and prior to the entry of the above mentioned minute order), Judge Stevens signed and filed another document entitled "Memorandum re Order Vacating Ruling Granting Motion for Change of Venue," which was couched in the following language:

"At the time I granted the defendants Perkins' motion for change of venue to Santa Clara County, I was of the opinion that the law of this State required the granting of such a motion by a nonresident defendant when the complaint contained a transitory cause of action against such nonresident which did not also state a cause of action against a resident defendant. See *Hagan v. Gilbert*, 83 Cal.App.2d 570 [189 P.2d 548]. Since I made my minute order on November 19, 1951, granting the motion, the Supreme Court has handed down its decision in *Monogram Co. v. Kingsley*, 38 Cal.2d 28 [237 P.2d 265], expressly disapproving the holding in *Hagan v. Gilbert*, supra, and specifically ruling that so long as any cause of action in the complaint is against a resident defendant, the motion of a nonresident defendant for change of venue may not be granted on the ground of defendant's residence, even though the latter is named in a count which does not state a cause of action against the resident defendant.

"The minute order of November 19, 1951, heretofore made but not yet entered, in which I granted the motions of the defendants Perkins for change of venue and placed the demurrers off calendar, is hereby vacated and set aside. The motions for change of venue are, and each of them is, denied, and the demurrers to the complaint are reset for hearing on December 7, 1951."

The minute order bearing the date November 27, 1951, was entered by the clerk on December 21, 1951, purporting to set aside "the minute order of November 19,

1951, heretofore made but not yet entered."

On December 5, 1951, Judge Stevens executed an affidavit relating to his acts in connection with his rulings on the motions for change of venue. This statement by the judge declares that on his own notes, made on November 19, 1951, describing his actions with respect to his ruling, the filing of the document entitled "Memorandum re Ruling on Motion for Change of Venue," is referred to as "Memo. op. filed." The judge further avers that he instructed his clerk to prepare a minute order in accordance with the rulings indicated in said memorandum; that said memorandum of ruling was not intended by him to constitute a formal written order or decision on the motion for change of venue; that it was intended merely to indicate his reasons for the decision to be expressed in the minute order, to be prepared and entered by the clerk, which alone was intended to embody the "effective ruling."

[1-3] Defendants contend, with indubitable merit, that the trial court had no power to change its ruling of November 19, 1951, for the purpose of rectifying a judicial error. This proposition of law is clearly announced in *Stevens v. Superior Court*, 7 Cal.2d 110, 112, 59 P.2d 988, 990, as follows: "While a court has power to correct mistakes in its records and proceedings, and to set aside judgments and orders inadvertently made, which are not actually the result of the exercise of judgment, it has no power, having once made its decision * * *, to set aside or amend for judicial error." This same rule finds support in *Phillips v. Trusheim*, 25 Cal.2d 913, 916, 156 P.2d 25; In re Estate of Burnett, 11 Cal.2d 259, 262, 79 P.2d 89; *Drinkhouse v. Van Ness*, 202 Cal. 359, 369, 260 P. 869, and many other cases. This class of error may be corrected only by appropriate statutory procedure and a court may not vacate an order not of a discretionary nature merely because upon re-examination of the issues it decides it has misapplied the controlling law. *Stevens v. Superior Court*, supra; *Phillips v. Trusheim*, supra. It is undisputed that the ruling of No-

ember 19, 1951, was not made as the result of mistake, inadvertence or improvidence, and the only reason for setting it aside and making a new order was the court's admitted belief that its original ruling was based on an application of existing law which had seemingly been superseded by a subsequent pronouncement from the Supreme Court. "The decision of the trial court having been once made *after regular submission of the motion* its power is exhausted—it is *functus officio*." *Eisenberg v. Superior Court*, 193 Cal. 575, 579, 226 P. 617, 618, quoting from *Holtum v. Greif*, 144 Cal. 521, 525, 78 P. 11.

[4, 5] The basic question in this case, therefore, is whether the document signed and filed by the judge on November 19, 1951, constituted an order of the court. Section 1003 of the Code of Civil Procedure states that "Every direction of a court * * * made or entered in writing, and not included in a judgment, is denominated an order." As was stated in *Von Schmidt v. Widber*, 99 Cal. 511, 514, 34 P. 109, 110: "nor is there any provision of law which requires all the orders of a court to be entered at length in its minutes in order that they may be effective; and by section 1003, Code Civil Proc., every direction of a court or judge is an order, whether it be merely made in writing or entered in the minutes. If it is not entered it should, however, be filed, in order that it may form a part of the records in the case." Unless otherwise required by statute, an order becomes legally effective at the time it is signed and filed, regardless of whether it is entered in the minutes by the clerk. *Rose v. Superior Court*, 140 Cal.App. 418, 428, 35 P.2d 605; *Niles v. Edwards*, 95 Cal. 41, 47, 30 P. 134; *Demens v. Huene*, 89 Cal.App. 748, 750-751, 265 P. 389.

We are satisfied from a careful inspection of the several documents previously referred to that the ruling of November 19, 1951, is unmistakably couched in language of decision and constitutes the expressed order of the court. The caption itself indicates that it was intended to be a ruling and it closes with unequivocal words of immediate significance: "The motions of Reta E. Perkins and Irving C.

Perkins are granted." That this was more than a memorandum of opinion is reflected in the manner of its subsequent entry in the minute order of December 13, 1951, which states "the court now files its Memorandum Ruling *and order* as follows: 'The motions of Reta E. Perkins and Irving C. Perkins for change of venue to Santa Clara County are granted.'" (Italics added.) Adverting to the vacating order signed and filed on November 27, 1951, that document opens with the words: "At the time I *granted* the defendants Perkins' motion for change of venue * * *" Continuing, it states: "Since I made my *minute order* on November 19, 1951, *granting* the motion * * *" and it concludes: "The minute order of Nov. 19, 1951, *heretofore made* but not yet entered in which I *granted* the motions * * *." This internal evidence is strong recognition of the court's understanding on November 27, 1951, that it had previously made an order granting the motion for change of venue. Were this not so, were the previous ruling nugatory and of no effect until entered in the minutes, what need would exist for the making of a formal order to vacate it? It may be observed in passing that the order of November 27, 1951, purports to vacate the "minute order of Nov. 19, 1951, heretofore made but not yet entered"; if it succeeded in anything, it would have vacated a non-existent minute order, but not the ruling signed and filed with the clerk.

[6, 7] An order of a court is subject to the same rules of interpretation as any other written instrument. *Ex parte Ambrose*, 72 Cal. 398, 14 P. 33. The fact that it may have been referred to as an opinion is not of itself controlling. *Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co.*, 67 Cal. App. 420, 227 P. 938. In the *Gulf* case, the trial court signed an "opinion" (rather than a "ruling" as was here done) outlining his reasons for granting a new trial, including the ground of insufficiency of the evidence. The opinion concluded "for these reasons I am constrained to grant defendant's motion for a new trial * * *, and it is so ordered". In entering his minute order, the clerk failed to note that the new

trial was granted on the ground of insufficiency of the evidence. In commenting on the effect of the "opinion" the court stated: "An examination of this so-called 'opinion' convinces us that it rises to the dignity of a written order signed and filed by the trial judge; while it contains language giving the reasons of the trial judge for making the order, with which reasons we are not concerned [citation], it shows indubitably that the motion for a new trial was granted upon the grounds above stated, * * *." 67 Cal.App. at page 423, 227 P. at page 939. This language is peculiarly applicable to the "Memorandum re Ruling on Motion for Change of Venue" in the instant case, which, on its face, shows it to be the court's rendition of its ruling rather than an "opinion" or some preliminary announcement of a decision which the court contemplated making. Furthermore, the court placed the demurrers "off calendar." This order must have been predicated on the fact that he had *actually* granted the motion for a change of venue.

[8,9] The trial court's affidavit itself plainly indicates that the court did not propose to take further action or make any other order. The order embodied in his ruling, signed and filed in the case, was the order he instructed the clerk to enter in the minutes. Nothing further was needed to give vitality to the order. *County of Humboldt v. Kay*, 57 Cal.App.2d 115, 119, 134 P.2d 501. The entry of such order in the clerk's minutes served merely to fix the running of time for appeal. Rules on Appeal rule 2; *Jablon v. Henneberger*, 33 Cal.2d 773, 205 P.2d 1. The judge's assertion that it was his intention that his "effective ruling" be set forth in a minute order to be prepared and entered in the minutes by the clerk cannot detract from the fact that the ruling which he had already signed and filed was itself his final judicial determination on the merits of the motion

for change of venue. *Von Schmidt v. Widber*, 99 Cal. 511, 514, 34 P. 109; *Rose v. Superior Court*, supra. It is important that parties should not be misled when a ruling phrased in the unequivocal language of the present order and decision is signed and filed in the case and a copy sent to counsel; the parties should not be required to speculate on the undisclosed intent of the court as to the time such order is to become his "effective ruling," and the cases previously cited do not so hold. As suggested by defendant, we must conclude that at the time the judge made his affidavit he was unclear as to the legal effect of the signing and filing of his order as distinguished from its entry in the clerk's minutes, hence his statement that he intended his conclusion to be expressed in a minute order.

[10] Plaintiffs cite, *Scholle v. Finnell*, 173 Cal. 372, 376, 159 P. 1179, and *Putman v. Superior Court*, 209 Cal. 223, 227, 286 P. 425, in support of their argument that the ruling of November 19, 1951, was merely an antecedent expression of the judge which cannot "in any way restrict his absolute power to declare his final conclusion in the only manner authorized by law". [173 Cal. 372, 159 P. 1181.] These cases have no pertinency to the present situation, since the court was there concerned with preliminary opinions in conflict with the judge's subsequent findings of fact and conclusions of law on which his final judgments were based. Such findings and conclusions must necessarily prevail, being "the only manner authorized by law" on which the judgments therein could be founded. An order granting or denying a motion for change of venue requires no written findings.

The orders are reversed.

MOORE, P. J., and McCOMB, J., concur.

117 Cal.App.2d 230

SIGESMUND v. SIGESMUND.

Civ. 19418.

District Court of Appeal, Second District,
Division 2, California.

April 8, 1953.

As Amended on Denial of Rehearing
April 29, 1953.

Husband's action for divorce. The Superior Court, Los Angeles County, Stanley Mosk, J., awarded custody of children to wife and required husband to pay \$900 a month for support and \$10,000 attorney's fees, and husband appealed. The court granted wife \$2,500 attorney's fees and \$600 costs to resist appeal and husband appealed from these orders. The District Court of Appeal, Fox, J., held that where it appeared that only expense wife incurred was printing of 26 page brief, reasonable cost of which was not in excess of \$110, allowance of costs would be reduced from \$600 to \$110.

Order awarding attorney's fees affirmed, order requiring husband to pay \$600 costs modified by requiring husband to pay \$110 costs.

1. Divorce ⇨284, 312.4

Where husband was worth more than \$400,000 and was actively engaged in securities and investment business, and wife was not gainfully employed but devoted her time to making a home for herself and two young children, allowance of attorney's fees to wife to resist appeal from order granting wife attorney's fees for trial in lower court and awarding her custody of children and support was not abuse of discretion, even though wife owned securities worth \$80,000 and automobile and home worth \$40,000 but incumbered to extent of \$15,000.

2. Divorce ⇨223

In divorce action, amount of attorney's fees to be allowed is within sound discretion of court. Civ.Code, § 137.

3. Divorce ⇨286

In divorce proceeding, order fixing attorney's fees will not be reversed except on showing of abuse of discretion. Civ.Code, § 137.

4. Divorce ⇨182

Where substantial issues were involved on appeal in divorce proceedings, substantial amount of money was involved, clerk's transcript consisted of 115 pages and reporter's transcript consisted of 1088 pages, wife's attorney estimated time necessary to resist appeal would be about 300 hours, wife's brief contained 47 authorities, and counsel argued cases orally, allowance of \$2,500 attorney's fees to wife was not abuse of discretion. Civ.Code, § 137.

Burby & Broderick, William E. Burby, Los Angeles, for appellant.

Bautzer, Grant, Youngman & Silbert, Bernard M. Silbert, Ralph A. Fields, Beverly Hills, for respondent.

FOX, Justice.

In a divorce action defendant was awarded the custody of the four children of the parties, and plaintiff was required to pay \$900 per month for their support and \$10,000 attorney's fees. Plaintiff having perfected an appeal, defendant made a motion for attorney's fees and costs to resist the appeal. The court granted defendant \$2,500 attorney's fees and \$600 costs. Plaintiff contends that the court abused its discretion in making the award.

[1] Plaintiff first argues that defendant should be required to pay the attorney's fees and costs on the appeal because she has securities worth approximately \$80,000 from which she receives an annual income of \$4,440, an automobile, and a home worth approximately \$40,000 which, however, is incumbered to the extent of \$15,000. Defendant pays \$150 a month on the home, which leaves her an annual income of \$2,600 less income and property taxes.

In the divorce case defendant waived alimony. The children are young, two of them being of tender years. Defendant is not gainfully employed but must devote her time to making a home for and taking care

of the children. She must, therefore, look to her own property and the income therefrom for her support and maintenance. Plaintiff is worth more than \$400,000 and is actively engaged in the securities and investment business. The parties had developed a standard of living commensurate with their wealth. The court could, therefore, reasonably conclude that it would require all defendant's income from her property for her personal living expenses; in fact, the court might well have concluded that she would not be able to maintain herself without encroaching upon her capital which, in turn, would serve to reduce her only income. To compel her to pay attorney's fees on appeal and costs would make further inroads on her capital. However, "the law does not require a wife to have recourse to her own resources first, to the impairment of the capital of her own separate estate." *Sigismund v. Sigismund*, 115 Cal.App.2d 628, 252 P.2d 713, 715, and cases there cited. Under these circumstances it was not an abuse of discretion to require plaintiff rather than defendant to pay the attorney's fee and costs on appeal.

[2, 3] Plaintiff also questions the reasonableness of the fee. The amount of such an award is within the sound discretion of the court and an order fixing such fee will not be reversed except upon a showing of an abuse of discretion. Civ.Code, § 137; *Heck v. Heck*, 63 Cal.App.2d 477, 479, 480, 147 P.2d 114.

[4] The Clerk's Transcript consists of 115 pages and the Reporter's Transcript of 1088 pages. Defendant's attorney estimated the total time necessary to properly resist the appeal would be in the neighborhood of 300 hours. Respondent's brief contained 47 authorities. Counsel also argued the cases orally. The judgment was affirmed. *Sigismund v. Sigismund*, supra. Substantial issues were involved and the questions to be decided were of tremendous importance to the parties. A substantial amount of money was also involved. In view of all the circumstances, we cannot say as a matter of law that the court abused its discretion in fixing the attorney's fee.

Defendant's estimate in the trial court of her necessary expenses in resisting plain-

tiff's appeal from the judgment was somewhat excessive. It now appears that the total of such expense is approximately \$410.

The order requiring plaintiff to pay \$600 as costs is modified by striking out the figures "\$600.00" and substituting in lieu thereof "\$410.00." As so modified, the order is affirmed. The order awarding \$2,500 as attorney's fees is affirmed.

Each party to bear his own costs on this appeal.

MOORE, P. J., and McCOMB, J., concur.



117 Cal.App.2d 144

COLVIN v. SIBLEY et al.

Civ. 4614.

District Court of Appeal, Fourth District,
California.

April 2, 1953.

Quiet title action. The Superior Court, Fresno County, Milo Popovich, J., denied defendants' motion to set aside default judgment and defendants appealed. The District Court of Appeal, Barnard, P. J., held that there was no such showing of mistake, inadvertence, surprise or excusable neglect as would warrant vacating default judgment.

Affirmed.

1. Judgment $\Leftarrow$ 143(10)

Defendants are chargeable with any neglect of their attorney in permitting entry of default judgment, as respects setting aside such judgment on ground of excusable neglect.

2. Judgment $\Leftarrow$ 139

Application to vacate default judgment is addressed to trial's court sound discretion.

3. Appeal and Error ⇨957(1)

Trial court's ruling on application to vacate default judgment will not be disturbed on appeal except for clear abuse of discretion.

4. Appeal and Error ⇨935(2)

Where oral evidence received in connection with motion to set aside default judgment was not included in record, it would be presumed on appeal from order denying motion that oral evidence supported the order.

5. Judgment ⇨139, 161

Where proposed answer failed to disclose existence of plausible defense to action, and defendants seeking to set aside default judgment stated no facts with regard to what was done during period of about three months other than that former attorney had advised a defendant to raise money to pay plaintiff's claim and had finally returned complaint to such defendant after entry of default judgment, and trial court gave defendants time in which to produce additional evidence after they made their motion and none had been produced when order denying motion was entered six weeks later, order denying motion was not abuse of discretion.

N. Lindsay South, Fresno, for appellants.

David E. Peckinpah, Harold M. Child, Fresno, for respondent.

BARNARD, Presiding Justice.

The defendants have appealed from an order denying their motion to set aside their default and a default judgment entered against them.

A complaint was filed on January 10, 1952, seeking to quiet title to an acre of land in Fresno County. Summons was personally served in that county on January 15, 1952. On March 19, 1952, at the request of the plaintiff, the defaults of the defendants were entered. A judgment quieting title to the property in the plaintiff was entered on March 24, 1952, the decree reciting that evidence on the part of the plaintiff had been introduced. On April

23, 1952, notice was filed of a motion for an order setting aside the default judgment, and permitting the defendants to file an answer. The affidavit of defendant John R. Sibley and a proposed answer were also filed. This motion was heard on April 30, 1952, and after taking some evidence the court gave the defendants two days in which to submit an affidavit from their former attorney. On June 12, 1952, the court entered the order appealed from, the order reciting that the court had, on April 30, 1952, given the defendants two days in which to file the affidavit of their former attorney showing excusable neglect; that the time had been further extended; and that no affidavit or any further evidence had been brought before the court. This appeal followed.

The affidavit filed in support of the motion alleged that within ten days after the service of summons the affiant took the summons to an attorney in Fresno; that he called on this attorney a number of times thereafter and was finally advised that it was advisable for him to raise a sum in excess of \$5000 to pay the plaintiff's claim; that this attorney advised affiant that he would arrange for the matter to be continued; that finally, on April 19, 1952, this attorney returned the complaint to the affiant; that affiant then learned for the first time that a default judgment had been entered; and that affiant then took the complaint to another attorney.

The proposed answer alleged that in December, 1945, the defendants bought an acre of land from the plaintiff for \$1250 and gave the plaintiff a note for that amount; that the plaintiff agreed to deliver a proper conveyance of the property; that defendant John R. Sibley performed "certain services" for the plaintiff "for seven and one-half years"; that during said time the defendants also borrowed "certain sums" of money from the plaintiff; that during said 7½ years the defendants paid to the plaintiff sums of money far in excess of \$1250; that in the fall of 1946, the defendants gave the plaintiff another note for \$3100; that the plaintiff has failed and refused to have an accounting with the

defendants, and has failed to deliver a deed to the property; that said land was sold to the defendants on an open book account and has long since been paid for; that the note for \$3100 is barred by the statute of limitations; and that if an accounting is had the defendants are willing to pay any amount found due to the plaintiff.

[1-5] The affidavit filed fails to show any mistake, inadvertence, surprise or excusable neglect. It fails to state any fact with regard to what was done during a period of about three months other than that the former attorney had advised the affiant to raise the money to pay plaintiff's claim, and had finally returned the complaint to affiant on April 19. Nothing is said in the affidavit to show negligence on the part of the former attorney, and if such negligence existed the appellants are chargeable therewith. *United States ex rel. Hoey v. Duesdieker*, 118 Cal.App. 723, 5 P. 2d 916. It also appears that the trial court gave the appellants time in which to produce additional evidence, and that none had been produced when the order was entered six weeks later. The matter of granting relief from such a default rests largely in the discretion of the trial court, and its action will not be disturbed on appeal unless it clearly appears that this discretion was abused. *Alferitz v. Cahen*, 145 Cal. 397, 78 P. 878. No such showing is here made. The oral evidence received was not included in the record, and it must be presumed that it supports the order made.

It further appears that the proposed answer failed to disclose that a plausible defense to the action existed. It alleged an oral purchase of the land on an open book account, and that the price of the land had been paid. However, it alleged that a note had been given for the purchase price; that a year later another note for \$3100 was given; that unspecified sums had been borrowed from the plaintiff over a period of seven years; and that during the same period the defendants had performed certain services for, and paid certain money to, the plaintiff without specifying any particulars, or alleging any specific facts. The vagueness and indefiniteness of the pro-

posed answer tend to emphasize the deficiencies in the affidavit, and furnish further support for the order made.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



117 Cal.App.2d 200

PEOPLE v. GERUNDO.

Crim. 2404.

District Court of Appeal, Third District,
California.

April 3, 1953.

Rehearing Denied April 17, 1953.

Hearing Denied April 30, 1953.

Defendant was convicted in the Superior Court, Napa County, of theft of an automobile. Thereafter he filed a petition which was in the nature of a petition for writ of error coram nobis. The Superior Court of Napa County, Lernhart, J., entered an order denying the petition, and the defendant appealed, and the People moved to dismiss the appeal. The District Court of Appeal, Van Dyke, P. J., held that petition was insufficient to state a cause for issuance of writ of error coram nobis.

Appeal dismissed.

1. Criminal Law $\S$ 912, 951(1)

Where defendant was convicted on May 8, and his motion for new trial was denied, petition filed by him on November 13, asking for new trial on ground of newly discovered evidence, if treated as motion for new trial, could not be granted, both because of lapse of time and because of denial of previous motion for new trial.

2. Criminal Law $\S$ 997

Petition alleging that court in prosecution for theft of automobile had ordered that all documents, which defendant had executed in obtaining automobile, should be produced in court for defendant's use, but that certain memorandum, which would

allegedly have shown that witness for prosecution had testified falsely, had been turned over by sheriff to a federal officer, and that the memorandum was not produced in court was insufficient to state a cause for issuance of writ of error coram nobis. Pen.Code, § 484.

3. Criminal Law — 1131(4)

Ordinarily, when ruling on motion to dismiss appeal on ground that appeal is frivolous, District Court of Appeal will not examine into merits of the appeal.

Vito Gerundo, in pro. per.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Motion to dismiss appeal upon the ground the appeal is so completely without merit as to be frivolous.

On May 8, 1951, Vito Gerundo was convicted of a violation of Section 484 of the Penal Code and was granted probation. His motion for new trial was denied and he appealed. The order appealed from was affirmed, see *People v. Gerundo*, 112 Cal.App.2d 797, 247 P.2d 374, on August 23, 1952, and his petition for a hearing was denied by the Supreme Court September 18th following. In the meantime and on November 13, 1951, Gerundo filed a petition in the trial court, supported by an affidavit. He asked a new trial upon the ground that newly-discovered evidence was available tending to show that the complaining witness at his trial had testified falsely, that his conviction was procured by fraud and perjury and that these matters, with knowledge thereof, were wrongfully concealed by the People. On November 30th a hearing was had on the petition and evidence was received, the trial court apparently treating the petition as in the nature of a petition for a writ of error coram nobis. The petition was denied and this appeal was taken from the order of denial.

[1] Treated simply as a motion for new trial the trial court was, of course, without jurisdiction to grant the desired relief in

the matter, both from the lapse of time and from the fact that a previous motion for a new trial had been denied. Considering the motion, however, as one for a writ of error coram nobis, we will, by way of introduction, quote from our opinion in *People v. Gerundo*, supra, 112 Cal.App.2d at page 801, 247 P.2d at page 376:

"Regarding the fifth assignment of error, defendant argues, as he does in other connections, that there was a valid existing contract of sale between him and the owners of the automobile which he is alleged to have stolen, and that he therefore had a right to the possession of the car and could not be accused of stealing his own property. There is ample evidence to the contrary. It shows that Smith and Palzis, a corporation in Napa, owned a used car lot. On Monday, April 17, 1950, defendant visited that car lot and stated to the attendant that he wanted to buy a certain Hudson car there exhibited. The salesman gave him a price of \$900 and defendant stated that he would buy the car if his wife, in San Francisco, approved; and he requested permission to take the car, promising to return it the following Wednesday. Defendant was referred to the head office of the corporation where he signed an agreement to purchase, which described the car, gave the total price as \$939, and provided for a down payment of \$339, in cash, the balance to be paid in designated monthly installments. There was written upon this instrument: 'This deal to be completed on wife's Okeh—Wed. A.M. Otherwise this contract void.' It also contained the provision: 'This contract shall not become binding upon the seller unless and until the same shall have been accepted in writing signed by Smith & Palzis, Inc.'

"Mr. Smith testified that the foregoing was merely a 'work sheet', that a conditional sales contract was to be executed thereafter when the car was returned the following Wednesday and the down payment made. Gerundo took the car but did not return it on

Wednesday or at all, never executed a conditional sales contract or made any payment whatsoever; and no communication from him was ever thereafter received by Smith and Palzis or either of them."

[2] By his petition Gerundo states that there existed a memorandum in the handwriting of the said Don Smith outlining the terms upon which an insurance policy was to be obtained by Gerundo, naming the Commercial Credit Company as the loss payable party as a mortgagee; that notwithstanding Don Smith testified the subject of insurance had never been mentioned between himself and Gerundo and that they had given Gerundo no authority to make his own arrangements with the credit company in connection with the purchase of the car. Says the petitioner, the memorandum would have shown that Don Smith testified falsely, but the memorandum had been turned over to the Napa County sheriff and by him turned over to a federal officer for purposes of a federal investigation being made, with the result that the same was not produced at Gerundo's trial, although the court had ordered that all of Gerundo's documents that were in the possession of the sheriff should be produced in court for his use. There is nothing in the foregoing that states a cause for the issuance of a writ coram nobis. The most that petitioner says about the matter which even attempts to charge any sort of fraud upon the part of the People was that the memorandum had been extracted from the other papers of Gerundo unknown to him and then "illegally and unlawfully turned over to a certain special agent." This does not amount to a fraudulent suppression of evidence upon the part of the People.

Of course, petitioner's statement that the memorandum constituted newly-discovered evidence is false upon its face, for if such a memorandum existed he knew about it; and had he during the trial demanded its production and made a showing that it had been taken from him he would have been permitted to introduce secondary evidence of its contents. These things he did not do.

[3] While in ruling upon the motion to dismiss an appeal upon the ground that the appeal is frivolous the court will not ordinarily examine into the merits of the appeal, we have in this matter taken the precaution of reading the brief transcript of the hearing of the petition. One witness was sworn, to-wit, the deputy sheriff who was accused of having concealed or suppressed the memorandum, and he testified exactly to the contrary, and the petitioner did not himself take the stand to contravene this testimony.

Under the circumstances the appeal must be and it is hereby dismissed.

PEEK and SCHOTTKY, JJ., concur.



117 Cal.App.2d 217

BRAINARD v. JONES et al.

No. 15454.

District Court of Appeal, First District,
Division 1, California.

April 7, 1953.

Suit for declaratory judgment that defendant, as assignor of claims against corporation, had no interest in fund created by sale of realty deeded to trustee by corporation's president. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment from which defendant appealed. The District Court of Appeal, Bray, J., held that when realty had been deeded for benefit of corporation's general creditors executing extension agreement, defendant's assignors who had signed waiver subordinating their claims to those of general creditors on condition that interest be paid during extension granted by general creditors, were not beneficiaries of the fund so created, but even if beneficiaries, their claims were barred by limitations when statutory period had expired since notice from attorney of trustee that interest would no longer be paid on their claims.

Judgment affirmed.

I. Corporations ⚡547(1)

Where corporation in financial distress had procured signing of waivers by two claimants against corporation in order to procure extension of time from general creditors and waivers were upon condition that interest be paid upon claims waived pending payment to other creditors, and president of corporation delivered deeds of property owned individually by him to trustee for pro rata use and benefit of creditors executing the extension, trust thereby created did not inure to benefit of claimants who had signed waiver and they were not entitled to assert claim against proceeds from sale of such realty.

2. Limitation of Actions ⚡103(3)

Even if claimants who signed waiver subordinating their claims to those of general creditors of corporation on condition that interest be paid during extension granted by general creditors, were beneficiaries of trust fund created by proceeds of realty deeded by corporation's president to trustee, when attorney for trustee informed claimants that payments of interest on their claims would be discontinued, there was termination or repudiation of trust which started running of statute of limitations, and passage of statutory period from such notice gave rise to bar to assertion of claim by their assignee to such proceeds. Code Civ.Proc. §§ 337, subd. 1, 339, subd. 1.

Chas. N. Douglas, San Francisco, for appellants.

Norman A. Eisner and Haskell Titchell, San Francisco, for respondent.

BRAY, Justice.

Defendant Douglas, sued as First Doe, appeals from a declaratory relief judgment against him.

Facts.

There is no dispute as to the facts. In 1930, Ellery Arms Company, a corporation, owed approximately \$101,000 to some 300 general creditors, more than \$100,000 to its president and principal stockholder William Ellery, \$11,500 to Christopher Ellery, and \$2500 to James H. Jones. (The latter two

assigned their claims to defendant and will hereafter be referred to as assignors.) Through the San Francisco Board of Trade the corporation sought an extension of time of payment from the general creditors. After negotiations and to induce those creditors to grant the extension, an agreement was entered into between the general creditors, the corporation, and William Ellery. It extended the time of payment of the claims of the creditors for one year, to December 15, 1931, upon certain conditions, including (1) the delivery by William Ellery to Brainard, the secretary of the Board of Trade, "acting as Trustee, for the pro rata use and benefit of creditors executing this" instrument, of deeds to certain real property owned by William individually. Power of sale was given the trustee. (2) The corporation's business was to be continued under a manager selected by the creditor's committee. (3) If a net loss incurred between the date of the agreement and March 15, 1931, the business was to be liquidated. (4) William was to deliver to the trustee a full release of all corporation indebtedness to him. Assignors did not sign this agreement. As an inducement to the general creditors to sign this agreement, the corporation offered to obtain from assignors waivers or subordinations of their claims. Assignors signed waivers to the effect that in consideration of the general creditors extending the time of payment of their claims, assignors agreed not to attempt to collect their claims until after the general creditors' claims had been fully satisfied. These waivers were upon condition that (1) interest be paid upon assignors' claims "pending the payment to the other creditors," and (2) that the waivers would not prejudice assignors' rights in the event of bankruptcy of the corporation or William. As agreed, William deeded his property to the trustee. A manager operated the business for the creditors, but the business proved unprofitable. June 13, 1931, at the request of the creditors' committee and pursuant to the agreement, the corporation executed an assignment for the benefit of creditors to Brainard as trustee, since he was the secretary of the Board of Trade. The business was not liquidated until February 12, 1932. The

assets of the business were then sold. Interest had been paid to assignors on their claims and continued to be paid until October 13, 1933. On that date, Wren, attorney for the Board of Trade, wrote assignors to the effect that under the terms of their waivers it was agreed that interest would be paid them during the extension of the general creditors' claims; that the extension had long since expired and the business had been liquidated on February 12, 1932. In spite of that fact, the committee had permitted interest to be paid assignors up to the present time with the result that while the general creditors had received only 10 per cent of their claims, assignors had received 16 per cent of theirs. He then stated that the funds received in liquidation had been exhausted "by the payment of these interest charges and the payment of taxes and other carrying charges in connection with the real properties which are being held, make it necessary for us to discontinue the payment of any further interest on these claims." Assignors are then notified that no further interest will be forthcoming on their claims. At this time Brainard still had as trustee the William Ellery realty. Later and in 1939 one parcel was sold, the other in 1946. From the proceeds dividends were made to the general creditors which, including the previous 10 per cent, returned them 36½ per cent of their claims. Nothing was paid assignors. In 1937 assignors brought suit against Brainard and others for interest on their claims. In 1943 the suit was dismissed for lack of prosecution. From the proceeds of the sale of the realty there is a balance of \$7,055.95 in the hands of the trustee. Plaintiff brought this action to have it declared that defendant has no interest in said fund.

Findings.

The trial court found among other matters, that assignors were not included among those for whose benefit William transferred his realty; that there was no agreement to pay interest to assignors but the continuation of payment of it was optional with the general creditors, and that upon failure to pay interest assignors' waiver terminated and any restriction on their

right to enforce their claims likewise ended; that any cause of action of assignors against the trustee arose at that time and is now barred by sections 337(1) and 339(1), Code of Civil Procedure; that defendant is not entitled to any portion of the balance held by the trustee.

Defendants' Claims Barred.

[1] In spite of the facts that assignors were not a party to the realty trust agreement, that their waiver agreement was unilateral and that there was no agreement by the creditors or trustee to continue to pay them interest, defendant strenuously insists that the trust formed when William transferred his property to the trustee was for the benefit of assignors. The foregoing recital of the undisputed facts shows unquestionably that it was not. The authorities concerning trusts cited by defendant are not in point for the reason that the facts here demonstrate no relationship between assignors and the William Ellery trust.

[2] Assuming that there was, the notice sent assignors in 1933 by the trustee, through his attorney, constituted a termination of such trust, and started the statute of limitations running. Defendant cites authorities such as *In re Estate of Murphey*, 7 Cal.2d 712, 62 P.2d 374, and *Bank of California v. Superior Court*, 16 Cal.2d 516, 106 P.2d 879, to the effect that neither the trustee nor other beneficiaries of a trust may change its terms without the consent of all beneficiaries. Here there was no attempt to change terms by anyone. It was a repudiation of the trust, if any existed. The statute of limitations begins to run from the date of the repudiation. *Rafferty v. Mitchell*, 4 Cal.App.2d 491, 41 P.2d 563. Defendant contends that the notice of repudiation is not effective because it was signed by the attorney for the trustee rather than by the latter. There is no merit to this point. Defendant also has confused the trust created by the assignment of the corporation business and assets to Brainard as trustee for the benefit of creditors and the trust created by William. The former did include assignors, and it was from the corpus of that

trust that assignors received their interest until that corpus was exhausted.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



117 Cal.App.2d 186

PEOPLE v. FUDE.

Cr. 4962.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1953.

Hearing Denied April 30, 1953.

Defendant was convicted of burglary. The Superior Court, Los Angeles County, William B. Neeley, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Burglary Ⓒ41(1)

Evidence was sufficient to sustain conviction for burglary.

2. Criminal Law Ⓒ1111(1)

Trial court's minutes cannot be impeached by the ipse dixit of appellant.

3. Criminal Law Ⓒ1088(1), 1111(1)

The trial court's minutes are a part of record of the action and import absolute verity.

4. Courts Ⓒ116(1)

Where defendant in criminal proceeding disagrees with contents of trial court's minutes, it is incumbent upon defendant to move trial court for an amendment to have minutes conform with truth.

5. Criminal Law Ⓒ617

Where accused fails to object to a continuance, he is presumed to have consented thereto.

6. Criminal Law Ⓒ1137(2)

In prosecution for burglary, where defendant requested continuance beyond sixty

day period within which he was entitled to trial, upon appeal, he would not be heard to complain of grant of such continuance.

7. Criminal Law Ⓒ1171(1)

In prosecution for burglary, public defender's statement that defendant was telling quite a bit of truth was not prejudicial to defendant.

8. Criminal Law Ⓒ1165(1)

In prosecution for burglary, where defendant had admitted his guilt to arresting officers and was convicted, probation officer's statement that defendant had admitted his guilt was not prejudicial.

Richard Erwin Fude, in pro. per.

Edmund G. Brown, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted on the findings of the court, appellant with many words and no logic seeks a reversal on the grounds that (1) the proof was insufficient to warrant the judgment and (2) he was deprived of his constitutional rights.

In violation of the Penal Code, sec. 459, this prisoner entered a telephone booth in the lobby of a downtown hotel in Los Angeles, July 10, 1952 and stuffed the instrument's coin-return chute with paper. His movements were observed by two special officers, inspectors for the telephone company. All telephones in the lobby were found in working order except the one in booth 7. They found its coin-return chute stuffed, the coins resting on the wadding. Inspector Blum, having notched five dimes with an *x* and having marked each with an ink spot on the eye, replaced them with the money in the chute on the paper, inserted an "out of order" sign and watched for the transgressor. At 6:00 p. m. appellant strolled past, glanced at the booths and at the two strangers and disappeared. At 8:00 p. m. he entered booth No. 1 and soon made his exit. The inspectors entered the same booth and found wadding in the coin-return chute, but no money upon it. At 8:10 p. m. they removed the

marked coins from the instrument in booth 7 put them in the telephone in booth 1 and placed an "out-of-order" sign on it. At 9:15 o'clock appellant entered booth 1 and soon departed. The inspectors found the wadding still there but the coins gone. They pursued appellant, but lost him. On July 11 they checked all the instruments in the lobby and found not only the instrument in booth 1 stuffed, but that in booth 7 also. At 7:30 p. m. they marked five dimes and put them in the chutes of the two instruments, inserted in each an "out of order" sign and waited. At 9:15 appellant entered booth 1, followed by the inspectors who accused him of stealing the money from the chute. In compliance with their demands he laid ten dimes on the table, two of which bore the marks placed thereon by Inspector Blum on the preceding night. When he was advised of their three observations of his attempts to purloin the moneys from the telephonic instruments, he offered to tell more if he "could plead out to petty theft."

At his trial the inspectors produced the money. Having exhibited the marked coins, they testified to the character of the markings. Also, Officer Billingsley testified that appellant told him that he had plugged the instrument in booth 1 and later returned and extracted the money; that he had a long record and was interested in getting the charge of burglary reduced to petty theft.

Appellant called to the stand Officer Bell who had accompanied Inspector Blum in pursuit of the thief. He testified that when appellant entered the lobby on the night of July 10, the latter walked immediately to booth 1, remained a few seconds, and stepped out; Mr. Blum on promptly checking the instrument, found both plug and money gone; appellant had already departed; when the two inspectors returned to the hotel on the eleventh, Bell saw appellant enter booth 1 at 9:15, remain two or three seconds, step out as Mr. Blum approached the door, and answer that he was there to make a telephone call; he stated to the officer that he had 20 cents for that purpose, but when he removed the contents of his pocket, he had ten dimes, two of

which bore the markings described by Officer Blum.

[1] From such testimony the finding of guilt was not unreasonable or arbitrary. The witnesses were intelligible and credible. There is neither shortage in substance nor discount in verity in the testimony adopted by the court to prove appellant's guilt. Whether he took money from the instruments was for the trial court to find, *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, and whether he did so with the intent then and there to appropriate it to his own use and to deprive the telephone company of it was also for the trial court to determine. *People v. Ragone*, 84 Cal.App.2d 476, 481, 191 P.2d 126.

There is nothing in the record to justify appellant's claim that he was deprived of his constitutional rights in the matter of examination of the witnesses. Both appellant and his counsel were present at every stage of the proceedings. No objection was made to the procedure in any respect; no request was made to be allowed to examine any witness further. No motion for a new trial was filed.

[2-6] Appellant has misconceived the meaning of an appeal. While the information was filed on August 1, 1952 and while he was entitled to a trial within sixty days thereafter, when the cause was called for trial on that day, appellant requested a continuance to October 3, 1952. The minutes prove it and they cannot be impeached by the *ipse dixit* of appellant. The minutes are a part of the record of the action, *Ex parte Murray*, 43 Cal. 455, 457, and they import absolute verity. *Shellhaas v. Petrolane, Ltd.*, 98 Cal.App.2d 171, 174, 219 P.2d 797. Where a litigant disagrees with their contents, it is incumbent upon him to move the trial judge for an amendment to have the minutes conform with the truth. 98 Cal.App.2d at page 175, 219, P.2d 797. Not having objected to a continuance, an accused person is presumed to have consented, *Ray v. Superior Court*, 208 Cal. 357, 358, 281 P. 391, but where he himself has requested it, he will not be heard to complain. *People v. George*, 91 Cal.App.2d 537, 540, 205 P.2d 464.

[7, 8] In addition to his appropriate assignments, appellant complains (1) that a statement by his counsel, the Public Defender, that "defendant is telling quite a bit of truth" prejudiced him, and (2) that the probation officer stated erroneously to the court that appellant had admitted his guilt. It is inconceivable that a prisoner at the bar could be prejudiced by his counsel's forensic statement that the accused had told the truth. Certainly, it cannot prejudice a prisoner who has admitted his guilt to arresting officers and has been convicted of the crime, for a probation officer to repeat to the court what has already been proved against the accused.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



117 Cal.App.2d 126

PROFIT v. PROFIT et al.

Civ. No. 19376.

District Court of Appeal, Second District,
Division 3, California.

April 1, 1953.

Action for annulment of marriage and settlement of property rights. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment dividing property equally, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that each party owned certain parcels of realty, that they agreed upon sufficient consideration that each should own a half interest in each of the properties, that plaintiff performed agreement upon her part by making necessary conveyances, and that defendant refused to perform upon his part, justifying court in giving effect to agreement by equally dividing property involved.

Affirmed.

1. Marriage ⚭63

In action for annulment of marriage and settlement of property rights, finding

255 P.2d—2 ½

that plaintiff and defendant mutually agreed that all property should be held by them in equal shares, was not at variance with pleadings which contained no allegations of such agreement, where complaint alleged that items involved were community property and answer alleged that they belonged to defendant, thus placing question of property interests of parties before the court, and where defendant did not object to plaintiff's evidence of such agreement. Code Civ.Proc. §§ 469, 470.

2. Marriage ⚭63

In action for annulment of marriage and settlement of property rights, evidence sustained finding that each party owned certain parcels of realty, that they agreed upon sufficient consideration that each should own a half interest in each of the properties, that plaintiff performed agreement upon her part by conveying to defendant, and that defendant refused to perform upon his part, justifying court in effectuating such agreement by equally dividing property involved.

3. Marriage ⚭63

In action for annulment of bigamous marriage and settlement of property rights, wherein plaintiff claimed an oral agreement that property involved should be held by parties in equal shares, plaintiff's rights were not dependent upon her cohabitation with defendant, but relationship in which they lived was of importance mainly as circumstantial evidence bearing upon plaintiff's claim and her testimony as to how the properties were acquired.

4. Frauds, Statute of ⚭144

Where it is clearly and unequivocally made to appear that there has been performance of an oral agreement required by statute to be in writing, under such circumstances as to make it inequitable to allow party receiving benefit thereof to invoke statute, he is estopped from so doing.

5. Frauds, Statute of ⚭129(3)

Where parties agreed orally to hold their real properties in equal shares, and plaintiff performed agreement on her part

by conveyances to defendant, defendant was barred from relying upon statute of frauds, and was under duty to comply with his agreement.

6. Marriage 63

In action for annulment of marriage and settlement of property rights, finding as to equal ownership of parties by reason of agreement necessarily established the status of the property, precluding necessity for specific finding as to whether property was community property.

Prichard & Brenner and S. V. O. Prichard, of Beverly Hills, for appellant.

Crispus A. Wright, Los Angeles, for respondent.

SHINN, Presiding Justice.

In April, 1946, Elizabeth Cooper (Profit) and Wesley Profit were married in Tijuana, Mexico. The marriage was invalid because defendant had another wife living and the prior marriage had not been dissolved. On December 28, 1949, plaintiff and defendant separated. This action for annulment of the marriage and settlement of property rights was filed the next day. The trial court annulled the marriage and divided equally four parcels of real property, a trust deed note, various items of personal property and \$1,451.70, all of which is more particularly described later. Defendant appeals from the portion of the judgment dividing the property, specifically attacking division of two parcels of real property, the trust deed note and the sum of \$1,451.70.

By her complaint plaintiff alleged that there were various items of "community" property and prayed that an equitable division be made of it. Defendant denied that there was any community property and alleged that all the property set out in the complaint was his sole and separate property. There was no prayer for affirmative relief. The court found that plaintiff had knowledge at all times that defendant's former marriage was not dissolved. It further found that "about the time of said purported marriage it was mutually

agreed between the plaintiff and defendant that all property then owned or thereafter acquired by either during the continuance of said relationship should be held by them in equal shares." There was no express finding that the property set out in the complaint was not community property. However, all the property was found by the court to be owned in equal interests pursuant to the agreement, and the judgment so declared.

The major parcels of property involved are four in number. The first two are a parcel located at 3038—6th Avenue in Los Angeles and one at 1720 South Central Avenue in Los Angeles. At the time of the Tiajuana marriage both of these parcels stood in the name of Elizabeth Cooper. The third parcel is located at 1037—43 East Vernon Avenue in Los Angeles and was deeded to Mr. Profit by his father. The fourth parcel is located in Riverside, California, and was acquired in 1947, the deed being made out to the parties in joint tenancy. The Central Avenue parcel was sold in 1948 and a second trust deed and note made out in the name of Mr. Profit alone. Also in controversy are the sums of \$1,100 withdrawn from an escrow by Mr. Profit after the complaint was filed, and sums of \$315 and \$38.70 withdrawn by Mr. Profit from bank accounts, the first in joint tenancy, the second in his name alone, after complaint was filed. The judgment gave the parties equal interests in all of these items.

Because there were no allegations of an agreement to share equally, defendant contends that there was a material variance between the pleadings and the findings and therefore the findings do not support the judgment. He also contends the evidence does not support the finding of an agreement to share equally in property interests. Lastly, he contends that since plaintiff's only allegation with respect to the property was that it was community, and since the findings of knowledge of invalidity of the purported marriage preclude treatment of the property as community, the court should have found the property allegation of the complaint not true and rendered judgment for defendant.

We will discuss these contentions in order.

[1] Defendant's contention of prejudicial variance is not well taken. As will be developed, evidence of the agreement was given by plaintiff without objection by defendant. Furthermore, the question of property interests of the parties was before the court. The complaint alleged the several items were community property, the answer alleged they belonged to defendant. There clearly then was no surprise, defendant was not misled by the pleading and he did not object to evidence of an agreement as to status of the property. Under these circumstances there is no basis for a claim of material variance, or even of variance at all. One may not complain of a variance which has not misled him to his prejudice. Code Civ.Proc. §§ 469, 470.

[2] Although numerous questions of law are discussed in the briefs, it will appear from what we have to say that very little of consequence is involved on the appeal, other than the determination by the trial court of questions of fact. When all is said and done, we have only a case in which the court found that each of the parties owned certain parcels of real property; they agreed upon sufficient consideration that each should own a half interest in each of the properties; plaintiff performed the agreement upon her part by making the necessary conveyances and defendant refused to perform upon his part. If these findings, both express and implied, are supported by the evidence the court could not properly have refused to give effect to the agreement. Although the evidence was voluminous, and unsatisfactory with respect to that produced by each of the parties, we will recite enough of it to show that it fully sustains the findings in all material respects.

Mrs. Profit testified that about two weeks after the Tiajuana marriage Mr. Profit came to her and revealed that the Vernon Avenue property had been deeded to him by his father. She further testified that at the time he said: "I want to be as fair with you as you have been with me * * *

from now on there won't be any question about whose property is whose," and that she then agreed to give Mr. Profit a half interest in her 6th Avenue and Central Avenue properties in return for a half interest in his Vernon Avenue property. There was substantial evidence to corroborate plaintiff's testimony of an agreement. The 6th Avenue property was bought before the marriage and in her name alone, \$7,400 being paid in cash. Mrs. Profit testified that this was her money, \$3,000 of it having been received from her father. It appears that Mrs. Profit was a real estate broker and a woman of affairs. Her testimony also was that she made the down payment on the Central Avenue property before the marriage. Title to the Riverside property, purchased a year after the marriage, was taken in joint tenancy, and the parties jointly obtained loans to improve the Vernon Avenue property some two years after the marriage. It was also shown that plaintiff had opened a bank account a year before the marriage with an initial deposit of \$5,000.

There was in evidence a deed of the Vernon Avenue property to Mr. Profit from his father, dated August 22, 1946. At the request of Mr. Profit an attorney drew deeds by which Mrs. Profit deeded to Mr. Profit the 6th Avenue property and the Central Avenue property; they were executed August 24, 1946, in the office of the attorney in the presence of the parties, and it is not questioned that they were delivered to Mr. Profit. There was evidence that Mrs. Profit later took them from Mr. Profit or from a box in which they had been placed by him and burned them. The deeds were proved by copies which the attorney had retained. They conveyed the entire interest in the property and not merely a half interest, but there was evidence that they were given pursuant to the oral agreement under which Mrs. Profit was to receive a half interest in the Vernon Avenue property. Mr. Profit did not convey to her that interest.

Plaintiff says her case falls squarely within the rule stated in *Vallera v. Vallera*, 21 Cal.2d 681, 685, 134 P.2d 761, 763: "Plaintiff's lack of good faith in alleging

the belief that she had entered into a valid marriage would not, however, preclude her from recovering property to which she would otherwise be entitled. If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property." The rule would be applicable to earnings and accumulations, if any, subsequent to the making of the agreement, but the controversy in the present case involves properties owned by the parties at the time of the agreement and not subsequent earnings or accumulations.

[3] Plaintiff's rights do not depend upon her cohabitation with the defendant. The relationship in which they lived was of importance mainly as circumstantial evidence bearing upon plaintiff's claim of the oral agreement and her testimony as to how the different properties were acquired. Even if the parties had been strangers and had entered into an agreement to exchange interests in the respective properties, settled principles would have called for its enforcement upon the facts found. It is true, as defendant contends, that a wholly unexecuted agreement to exchange real properties is unenforceable if not in writing. This is not such a case. Mrs. Profit conveyed two of the properties to Mr. Profit. Although full legal title was vested in Mr. Profit, the court could properly have inferred from the evidence that it was the intention of the parties that Mrs. Profit would continue to own a half interest therein.

[4, 5] A principle which is as well established as any other to be found in the books is stated as follows: "Where it is clearly and unequivocally made to appear that there has been a performance of an oral agreement required by the statute to be in writing under such circumstances as to make it inequitable to allow the party

receiving the benefit thereof to invoke the statute, he is estopped from doing so." *Price v. Smith Mfg. Co.*, 53 Cal.App. 303, 200 P. 53, 54. It was said in *Pearsall v. Henry*, 153 Cal. 314, 326, 95 P. 154, 157, 159: "Where there is a verbal agreement under which each of the parties is to convey land to the other, it is generally held that a conveyance by one on the faith of the agreement constitutes such part performance as will in equity take the case out of the operation of the statute." Under this rule defendant is barred from relying upon the statute of frauds, and is under a duty to comply with his agreement.

One of the properties was sold and a trust deed was taken back in the name of Mr. Profit, but the form of this transaction did not require the court to determine that Mrs. Profit had no interest in the trust deed, and the sums that had been paid on account. Although it is contended that plaintiff was awarded too large a share in the balance of the trust deed, our examination of the evidence does not disclose the error claimed by defendant. It may be noted with respect to his calculations that 16 payments of \$50 each amount to \$800, and not \$1,600.

The court heard evidence as to the details of the transactions at great length, and after a painstaking study made an apportionment that appears to us to be fair and fully justified by the evidence.

[6] The court made no specific finding as to whether the property was community property, and this is urged as an omission which is fatal to the judgment. The point is without merit. The finding as to equal ownership of the parties by reason of the agreement necessarily established the status of the property, and that it was not held in a community status.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

116 Cal.App.2d 610

CUMMINS v. LEVY et al.**LEVY et al. v. CUMMINS et al.**

Civ. 19133.

District Court of Appeal, Second District,
Division 2, California.

April 1, 1953.

Action for injunction against certain use by defendants of real property purchased from plaintiff, and for damages for trespass and reformation of instrument of purchase. The defendants cross-complained for damages for breach of purchase agreement. The Superior Court of Los Angeles County, William R. Gallagher, J., entered judgment from which plaintiff appealed. The District Court of Appeal, McComb, J., 253 P.2d 975, affirmed the judgment. On petition for rehearing, the same court held that the plaintiffs could not assert that the written agreement did not represent the true intent of the parties and in the same breath object to the defendants' explanation of that intent.

Rehearing denied.

Frauds, Statute of §158(3)

Reformation of Instruments §44

In action for, inter alia, reformation of instrument of purchase, evidence as to representations and statements of intention by party to agreement was admissible, notwithstanding statute of frauds and parol evidence rule.

Bernard C. Brennan, Los Angeles, Caidin & Bloomgarden, Beverly Hills, and Newton Kalman, Los Angeles, for appellants.

PER CURIAM.

The issues raised by appellants in their petition for rehearing are largely those raised in their previous briefs and expressly or impliedly rejected by this court. The claim that "representations and statements of intention" made by appellant Adeline are inadmissible by virtue of the Statute of Frauds or of the parol evidence rule is without support in view of the fact that appellants proposed and demanded reformation of the agreement. Hence, such "representations and statements of intention" are admissible to explain the contents of that writing. It is elementary that appellants

cannot assert that a written agreement does not represent the true intent of the parties and in the same breath object to respondents' explanation of that intent.

However, the opinion should be corrected in one particular. The word "easement" in the first sentence of paragraph 4 should be changed to *driveway*.

It is therefore ordered that the word "easement" be stricken from the first sentence of paragraph 4 on page 5 and in lieu thereof, the word *driveway* be and is substituted.

Rehearing is denied.

FOX, J., did not participate.



117 Cal.App.2d 147

**UHLER v. SUPERIOR COURT IN AND
FOR FRESNO COUNTY et al.**

Civ. 4639.

District Court of Appeal,
Fourth District California.

April 2, 1953.

Modified on Denial of Rehearing

May 1, 1953.

256 P.2d 90.

Petition by county auditor for writ of review seeking to set aside judgment rendered against him in contempt proceedings in Superior Court of Fresno County. The District Court of Appeal, Mussell, J., held, inter alia, that since petitioner, in performance of his official duty, endeavored in good faith and with reasonable promptness to obtain determination of legality of claim presented to him, and no determination thereof was made until hearing on order to show cause why petitioner should not be adjudged in contempt for failure to comply with court order directing issuance of warrant for such services, at which time petitioner promptly drew his warrant as again ordered by the court, and petitioner had not wilfully and contemptuously refused to obey the first order of the court, petitioner should not have been punished for contempt.

Order and judgment of contempt vacated and reversed.

1. Contempt *§*40, 54(4), 61(6), 63(1)

A proceeding to punish for contempt is in its nature a criminal proceeding, and the charge, findings thereon, and judgment are to be strictly construed in favor of accused and no intendments or presumptions can be indulged against him.

2. Criminal Law *§*308

There is a strong presumption that person is innocent of crime or wrong. Code Civ.Proc. *§* 1963, subd. 1.

3. Contempt *§*54(1), 58(1), 60(1)

In constructive contempt proceeding, affidavits on which citation is issued constitute the complaint, and affidavits of defendant constitute answer or plea, and issues of fact are thus presented upon which hearing must be had at which hearing competent evidence must be produced.

4. Contempt *§*60(3)

A contempt proceeding is of such a distinctly criminal nature that mere preponderance of evidence is insufficient to support complaint. Code Civ.Proc. *§* 1963, subd. 1.

5. Contempt *§*66(7)

The District Court of Appeal may consider evidence before trial court for purpose of determining whether it was sufficient to give trial court jurisdiction to render judgment of contempt.

6. Contempt *§*66(7)

Review of evidence in contempt proceeding is limited to determining whether there was any substantial evidence before trial court to sustain its jurisdiction.

7. Contempt *§*21

No one may be punished in contempt for disobedience of void order.

8. Mandamus *§*185

County auditor was entitled to reasonable time after receipt of court order directing him to draw warrant on county treasurer for services performed by accountants within which to examine claim and draw warrant therefor, and it was his duty to refuse to draw the warrant if the claim were illegal. Government Code, *§§* 24054, 29803, 29804; Pen.Code, *§* 928.

9. Contempt *§*21

Proper method of testing validity of claim for accountants' services and validity of Superior Court order directing auditor to draw warrant for such services was by mandate, not by contempt proceedings. Government Code, *§§* 24054, 29803, 29804; Pen.Code, *§* 928.

10. Contempt *§*3

In contempt proceeding, intent to commit forbidden act is as essential to guilt as in case of criminal offense.

11. Contempt *§*20

Mere showing of failure of county auditor to draw warrant for accountants' services immediately upon presentation of claim was not sufficient to show such intent to commit forbidden act as to warrant punishment for contempt of Superior Court which had entered order directing auditor to draw such warrant. Government Code, *§§* 24054, 29803, 29804; Pen.Code, *§* 928.

12. Contempt *§*21

Where county auditor, in performance of official duty, endeavored in good faith and with reasonable promptness to obtain determination of legality of claim, and no determination thereof was made until hearing on order to show cause why auditor should not be adjudged in contempt for failure to abide by Superior Court order directing issuance of warrant, at which time auditor promptly drew warrant as again ordered by court, auditor should not have been punished for contempt. Government Code, *§§* 24054, 29803, 29804; Pen.Code, *§* 928.

Robert M. Wash, County Counsel of Fresno County, and John E. Loomis, Fresno, for petitioner.

E. Clarke Savory, Dist. Atty. of Fresno County, and Richard L. Shepard, Asst. Dist. Atty., Fresno, for respondents.

MUSSELL, Justice.

In these proceedings petitioner, county auditor of Fresno County, seeks to set aside a judgment rendered against him in

contempt proceedings in the Superior Court of Fresno County.

On January 26, 1953, a Judge of the Superior Court, by written order, directed the petitioner, upon presentation thereof, to draw his warrant on the county treasurer in the sum of \$5,284.32 for distribution among certain accountants for services performed by them in accordance with the provisions of a contract with the Fresno County Grand Jury. Included in the amount ordered paid was a charge for \$749.91 claimed by the accountants as compensation for the services of experts in making a special survey of mechanization of the assessment roll in the assessor's office of said county. On January 27, 1953, one of the accountants presented this order, together with a statement to petitioner for payment. According to an affidavit filed by one of the accountants, petitioner told the accountant he would not be able to pay the entire bill; that he would be able to pay only that which was strictly labeled as work on audit of the county of Fresno and suggested that they see the county counsel about it. They then proceeded to the office of the county counsel who told petitioner not to pay that portion of the bill which was labeled as a special investigation in the assessor's office and was billed separately. Petitioner returned to his office, prepared a warrant for the amount of the order, less the item of \$749.91 and delivered the warrant to the accountant.

On January 30, 1953, the same Judge of the Superior Court issued an order to show cause, reciting that petitioner had committed a contempt of court in refusing to draw his warrant in compliance with the order of January 26th. Petitioner was ordered to appear in court on February 4, 1953, to show cause why he should not be punished for contempt. Petitioner filed a return to this order, stating therein that he had not finally refused the payment of the excepted portion of the statement pending the advice of counsel as to whether or not the same should or should not be paid; that the legality of the claim appeared questionable by reason of the fact that Section 928 of the Penal Code did not

appear to authorize the employment of experts for the purposes stated in the claim; that the contract between the 1952 Grand Jury and the said accountants did not provide for such services and did not so provide at the time such services were rendered; that the order had not been amended or modified by the court to include such services, and that he was uncertain as to its legal effect. Petitioner then alleged that he acted without intent to violate any lawful order of the court; that he was endeavoring to fully and faithfully perform his duties as county auditor and was acting upon the advice of the county counsel, who, by law, is made his legal advisor; that said counsel had advised him to withhold payment until he could determine whether it was or was not legal.

A hearing was had on the order to show cause on February 4th, at which time the order to draw the warrant was introduced in evidence, together with the accountant's statement attached thereto, and the contract made with the Grand Jury.

Petitioner testified that he received this order and statements; that on January 27, 1953, he wrote a letter to the county counsel asking for a written opinion regarding the legality of the claim for \$749.91; that on January 28th he received a reply from said counsel stating in part as follows: "We are of the present opinion that there is sufficient doubt as to the legality of paying this portion of the claim to justify your withholding payment pending our further research, consideration, and final opinion thereon, which we will give you as expeditiously as possible;" that he had since consulted with the county counsel and was advised by him that an opinion of the Attorney General had been asked for but had not been received and that further legal research was being conducted in the matter; that he had no intention, desire or wish to violate an order of the court and that every step he had taken was in an effort to ascertain what his legal duties, rights and responsibilities were.

The court asked petitioner what he would do if informed by the court, after hearing the evidence, that it was his duty to draw the warrant. Petitioner replied

that he would draw the warrant. Whereupon, the court said "Well, it is your duty and you are so ordered." Court was then recessed and plaintiff immediately prepared and delivered the warrant for the amount involved. The court then continued the matter to February 6th, at which time he read the following portion of his judgment:

"It is, therefore, ordered, adjudged and decreed that all of the allegations in the affidavit for contempt on file herein are true and the court so finds; that the respondent wilfully and contemptuously refused to obey the lawful order set forth in the affidavit on file herein, ordering him to draw his warrant on the Treasurer of Fresno County in the sum of \$5,284.32 in payment of expenses incurred by the 1952 Fresno County Grand Jury and presented to him on January 27, 1953.

"As punishment for said contempt, it is ordered that respondent, Maurice Uhler, pay a fine of \$50.00 on or before 12:00 o'clock noon Monday, February 9th, 1953, and that if the fine be not so paid, he be committed to the Fresno County Jail to serve one (1) day for each two dollars of the fine remaining unpaid."

The question here involved is whether the trial court's findings and judgment are supported by substantial evidence. We conclude that this question must be answered in the negative.

[1-4] A proceeding to punish a defendant for contempt is in its nature a criminal proceeding. The charge, the findings thereon, and the judgment of the court are to be strictly construed in favor of the accused and no intendments or presumptions can be indulged against him. There is also a strong presumption that a person is innocent of crime or wrong. Code Civ. Proc. Sec. 1963, subd. 1; *Bennett v. Superior Court*, 73 Cal.App.2d 203, 224, 166 P.2d 318. In a prosecution for constructive contempt the affidavits on which the citation is issued constitute the complaint. The affidavits of the defendant constitute the answer or plea, and the issues of fact are thus presented. A hearing must be had

on these issues at which competent evidence must be produced. The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient. *Hotaling v. Superior Court*, 191 Cal. 501, 505, 217 P. 73, 29 A.L.R. 127.

[5,6] In passing upon the question of the trial court's jurisdiction, we may consider the evidence before the trial court for the purpose of determining whether it was sufficient to give that court jurisdiction to render its judgment finding the accused guilty of contempt. The review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction. *Bridges v. Superior Court*, 14 Cal.2d 464, 485, 94 P.2d 983; *City of Vernon v. Superior Court*, 38 Cal.2d 509, 517, 241 P.2d 243.

County auditors are required to issue warrants on the treasurer in favor of the persons entitled thereto in payment of all claims chargeable against the county which have been legally examined, allowed, and ordered paid by the board of supervisors. Government Code, Sec. 29803. County auditors are also required by law to issue warrants on the treasurer for all debts and demands against the county when the amounts are fixed by law or are authorized by law to be allowed by a person or a tribunal other than the board. Government Code, Sec. 29804. Section 23006 of this code provides that any contract, authorization, allowance, payment, or liability to pay is made or attempted to be made in violation of law, is void, and shall not be made the foundation or basis of a claim against the treasury of any county. Section 24054 of said code provides that:

"Any officer authorizing, aiding to authorize, auditing, allowing, or paying any claim or demand upon or against the treasury of any county, or any fund thereof, in violation of law or of the constitution is liable personally and upon his official bond to the person damaged by such illegal action, to the extent of his loss by reason of the nonpayment of his claim."

In *Walton v. McPhetridge*, 120 Cal. 440, 444, 52 P. 731, it is said that an auditor ought not to draw his warrant for an illegal demand, even though allowed by the board, and if he does so knowingly and wilfully he is personally responsible, and may be made to refund the money thus illegally paid. And in *Linden v. Case*, 46 Cal. 171, 174, it is said that "If illegal claims are allowed by the board against the county, it will be the duty of the auditor to refuse to draw warrants therefor." In *County of Calaveras v. Poe*, 167 Cal. 519, 521-522, 140 P. 23, 24, the court said: "The office of auditor is created by statute. The duty of the defendant as auditor was to refuse to sanction any illegal claim against the county, * * * and he might only issue warrants for debts or demands against the county which were authorized by law to be allowed to some person."

The contract with the accountants employed by the grand jury was executed pursuant to Section 928 of the Penal Code, which provides in part as follows:

"It shall be the duty of the grand jury annually to make a careful and complete examination of the books, records and accounts of all the officers of the county * * * and if, in their judgment, the services of an expert are necessary, they shall have power to employ one, at an agreed compensation, to be first approved by the court * * *.

"* * * It shall also be the duty of every grand jury to investigate and report upon the needs of all county officers in its county, including the abolition or creation of offices and the equipment for, or the method or system of performing the duties of, the several offices * * *.

"Any and all expenses incurred under this section, and also the per diem and mileage where allowed by law, of the grand jurors, shall be paid by the treasurer of the county out of the general fund of said county upon warrants drawn by the county auditor upon the written order of the judge of the superior court in said county."

Expenses incurred under the section are required to be paid upon warrants drawn by the county auditor upon written order of the judge of the Superior Court. In view of the code sections cited herein and the stated duties and responsibilities of county auditors, we conclude that the petitioner herein had the right to examine the claim presented and it was his duty to refuse to draw the warrant if the claim was illegal.

[7,8] No one may be punished in contempt for the disobedience of a void order, *Kreling v. Superior Court*, 18 Cal.2d 884, 885, 118 P.2d 470 and while we are not here deciding the validity of the order involved, the petitioner, under the circumstances, should have been allowed a reasonable time within which to examine the claim and draw his warrant therefor. The evidence shows that he took immediate steps upon presentation of the order to ascertain the legality of the claim. Three days later he was served with an order of court reciting that he had committed a contempt thereof in refusing to draw his warrant. At the hearing of the order to show cause held on February 4, 1953, the court, after hearing the evidence, for the first time, advised plaintiff that it was his duty to draw the warrant. Whereupon plaintiff drew the warrant in accordance with the court's order then made.

[9] We are of the opinion, under the circumstances shown that the proper method to test the validity of the claim and order was by mandate and not by contempt proceedings. As was said in *Woody v. Peairs*, 35 Cal.App. 553, 558-559, 170 P. 660, 662:

"Conceding that the services rendered by the claimant to the grand jury constitute a legal charge against the county, and that it was legally required that the auditor rather than the judge of the superior court should audit the claim to authorize its payment by the treasurer, the remedy of the claimant as against the refusal of the auditor to audit the claim or demand would be by mandate; for in such case the duty of the auditor to

audit the claim would be one expressly enjoined upon him by law. Code Civ. Proc., §§ 1085, 1086. And in such case the auditor would be made and become a party to the action and accorded an opportunity to defend his position. If then the claim was determined to be a valid charge against the county and it had been regularly and duly allowed, and the auditor still refused to give it his official approval as prescribed by the law, he then might and probably would be subject to an adjudication of contempt of the court's mandate. In the present case, however, the auditor, who is not an officer of the court, was not a party to the proceeding in which the order allowing the claim was made, and the court certainly had no inherent power to make an order placing him in the perilous position of either auditing the demand or suffering imprisonment for contempt. *Ex parte Widber*, 91 Cal. 367, 370, 27 P. 733; *Ex parte Truman*, 124 Cal. 387, 57 P. 223."

[10-12] The evidence before us is that petitioner, in the performance of his official duties, endeavored in good faith and with reasonable promptness to obtain a determination of the legality of the claim presented to him; that no determination thereof was made until the hearing on the order to show cause, at which time petitioner promptly drew his warrant as ordered by the court. There was no substantial evidence that petitioner wilfully and contemptuously refused to obey the order of the court. In contempt proceedings an intent to commit a forbidden act is as essential to guilt as in the case of a criminal offense. *City of Vernon v. Superior Court*, supra, 38 Cal.2d at page 516, 241 P.2d at page 247. The mere showing of a failure to draw the warrant imme-

diately upon presentation is not sufficient to show such an intent. Petitioner herein may well have concluded, in good faith, that it was his duty as a public officer, charged with the administration of a trust, to temporarily delay drawing the warrant pending an investigation with respect to the validity of the claim. When this issue was passed upon by the court at the hearing on the order to show cause the warrant was immediately drawn. It was not then necessary to punish petitioner to secure performance of the order presented to him on January 27, 1953. Under such circumstances petitioner should not have been punished for contempt. *City of Vernon v. Superior Court*, 39 Cal.2d 839, 843, 250 P.2d 241.

Following the submission of this matter on review, counsel for respondent filed a letter herein asking that certain facts be made a part of the record. It is stated in the letter that on December 30, 1953, the county counsel informed the foreman of the Fresno County Grand Jury that the claim involved was illegal; that on January 20th petitioner and his counsel called upon respondent and counsel advised the judge that he considered the claim illegal and suggested that the court look up some authorities on the matter; that the judge then stated that no order had been presented to him at that time for the payment of the claim; that he would make such orders as he considered proper. These facts, some of which were stated to be inaccurate and incomplete in a letter filed by the county counsel, if made a part of the record and considered with it, would not be sufficient to support the judgment.

The order and judgment of contempt are vacated and reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

117 Cal.App.2d 245

PEOPLE v. ARELLANES.

Cr. 4985.

District Court of Appeal, Second District,
Division 3, California.

April 9, 1953.

Defendant in court trial was convicted for burglary in second degree. The Superior Court, Los Angeles County, Kenneth C. Newell, J., entered judgment of conviction, and defendant appealed from judgment and from order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order denying motion for new trial affirmed.

Burglary $\Rightarrow$ 41(1)

Evidence sustained conviction for burglary in second degree.

Frank Arellanes, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Frank Arellanes was convicted in a court trial of the crime of burglary of the second degree and was sentenced to a term in the county jail. He filed a Notice of Appeal in propria persona which we shall construe to be an appeal from the judgment and from an order denying his motion for a new trial. He has filed a single page of typewriting which will be considered as his opening brief.

We have read the reporter's transcript of the trial, in which defendant was represented by an attorney. The evidence was ample to prove commission of the offense by defendant and there was no error of law committed in the trial.

Trial by jury was waived by defendant, his counsel, and the district attorney. Anthony Arellanes, a cousin of defendant, testified that he and defendant burglarized a cafe on East Colorado Street in the City of Pasadena in the nighttime; defendant climbed to the roof of a building on a ladder, entered the building through a ventilator on the roof, opened the door for

Anthony, who entered a small office room through a false ceiling and opened the door thereof for defendant. They took about \$500 in currency from the office and \$25 or more from some slot machines, and defendant took a .45 calibre revolver from the office. The gun was loaded and defendant threw it away in some shrubbery outside the building. The money was divided between Anthony and defendant. Apparently there were two women in Anthony's car in which they had driven to the location but the women, who were not involved in the burglary, drove the car home while Anthony and defendant returned in a taxi. The evidence was that defendant was well intoxicated. Under stipulation there was introduced testimony given by the witnesses at a preliminary examination. Both Anthony and defendant testified at the trial. Anthony, who confessed to the police, testified to the commission of the crime by himself and defendant as related above. The revolver was found and turned over to the police. It was identified by the proprietor of the cafe as his own. He also testified that the currency, which was in the office, amounted to \$900 or \$1,000. There was testimony that shortly after 2 a. m. on the morning of the robbery, when the cafe was closed, the doors and windows were locked, and that the back door was unlocked when the employees came to work later. Defendant was questioned by the police officers after his arrest some two weeks following the burglary. At first he claimed he could remember nothing of what occurred after 10 or 11 o'clock the night of the burglary, but later testified that he vaguely remembered climbing a ladder to the roof of the building, looking down, entering the building, getting out of it and riding in a taxi. At the trial defendant testified that on the night of the burglary he worked till 9:30 and was drinking heavily; he remembered seeing Anthony's car that night but did not remember going anywhere with him, did not remember going to the cafe and recalled nothing of the occurrences testified to by Anthony for the reason that his mind was asleep. He testified that he had had the same affliction at times before he went into the service and

while in the service. It appears that Anthony Arellanes had served a term in prison after a conviction of robbery and that defendant was, at the time of the trial, on probation following a conviction of burglary and forgery for which he had been given a sentence in the county jail.

Defendant had a fair trial and the finding of guilt was the only one which would have been justified by the evidence.

The judgment and the order denying motion for a new trial are affirmed.

PARKERWOOD and VALLÉE, JJ.,
concur.



117 Cal.App.2d 42

BRANDIS et al. v. GOLDANSKI et al.
Civ. 15279.

District Court of Appeal, First District,
Division 1, California.
March 27, 1953.

Hearing Denied May 21, 1953.

Action by widow and adult children for death of their husband and father against driver and part owner of truck in which deceased rode and against co-owner. The Superior Court, City and County of San Francisco, Anthony Brazil, J., rendered judgment of nonsuit and widow and children appealed. The District Court of Appeal, Peters, P. J., held that where driver and deceased were motoring to church picnic and driver, instead of furnishing food, was furnishing use of his truck, deceased's showing driver the route was not "compensation" within automobile guest statute and recovery could not be had against driver for death resulting from mere negligence of driver.

Judgment affirmed.

I. Automobiles ⇨181(2)

Where special tangible benefit to automobile driver is a motivating influence for furnishing transportation "compensation" is given, within automobile guest statute. Vehicle Code, § 403.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Compensation".

2. Automobiles ⇨181(2)

Where driver and rider were motoring to church picnic and driver, instead of furnishing food, was furnishing use of his truck, rider's showing driver the route was not "compensation" within automobile guest statute, and recovery could not be had against driver for rider's death which resulted from mere negligence. Vehicle Code, § 403.

Ralph Wertheimer, San Francisco, for appellants.

Charles V. Barfield and Franklin A. Plank, San Francisco, for respondents.

PETERS, Presiding Justice.

Where a participant in a church-sponsored picnic volunteers the use of his truck to carry supplies to the picnic, and one of the members of the church, with others, helps to load the truck, and that member agrees to ride with the owner of the truck to show him the route to the picnic grounds, and enroute the owner drives the truck negligently so that the rider is killed, was the rider a guest or a passenger within the meaning of the California guest law? That is the sole question presented on this appeal. In this action for the wrongful death of the driver brought by his widow and two adult children, the trial court decided that the rider was a guest and not a passenger, and, since wilful misconduct was neither pleaded nor proved, granted a nonsuit in favor of the defendants. On this appeal the plaintiffs contend that, under the evidence, it was a question of fact as to whether the deceased was a passenger or a guest, and that the nonsuit should not have been granted.

The facts disclosed by the record are as follows: Frank Brandis was killed in a collision on Bayshore Highway while riding in a truck owned by Israel Goldanski and Max Fourkas, partners in Drabkin's Fish Market, which truck was being operated by Goldanski when it collided with an auto-

mobile being driven by defendant John Wilder. Brandis was a member of a certain synagogue in San Francisco, and Goldanski, who had immigrated to this country in 1949, attended the same synagogue but was not a member of it. The two men were friends.

The synagogue decided to give a picnic. Goldanski and Brandis intended to attend. A few days before the date fixed for the picnic the rabbi called a meeting to discuss plans for the affair. Goldanski volunteered the use of the partnership truck, a cash register, and his services in driving and in loading and unloading the truck. No remuneration was asked for, promised, or expected. Brandis was present at this meeting. The rabbi stated that others would also help with the loading and unloading.

There is considerable conflict in the evidence as to what happened between Brandis and Goldanski prior to their arrival at the synagogue where the food and equipment for the picnic were to be collected. Mrs. Brandis testified that her husband and Goldanski had agreed in advance that they would go together, and that Goldanski should pick up Brandis at 5:30 a. m. One of the sons of decedent corroborated the existence of such prior agreement, except that he testified the agreed upon time was 7 a. m. Mrs. Brandis testified that on the morning of the picnic Goldanski did not arrive until 5:45 a. m., and that her husband had already left for the synagogue. Goldanski denied the existence of this prior arrangement to pick up Brandis, and denied that he endeavored to pick him up that morning.

The agreement among those who were to attend the picnic was that some were to donate food, and others were to donate services. Busses were to be available for all who desired that means of transportation. Some twenty-five or thirty persons were present at the synagogue to assist in loading the trucks. Goldanski's truck was loaded with food and equipment with his help, that of Brandis, and with the help of some seven or eight others. Goldanski, who cannot speak English, did not know the way to Bayshore Highway. He

requested that one Levenson, who was present, or Brandis, should ride with him to point out the route. The truck would not comfortably accommodate three adults, so Brandis suggested that he would ride with Goldanski and that Levenson could travel on one of the busses. Brandis and Goldanski thereupon departed in the truck, with Goldanski driving. Undoubtedly it was impliedly understood that Brandis and others would help to unload the truck at the picnic grounds. It is admitted that Brandis did not agree to pay, nor did Goldanski expect to be paid, for the trip. Shortly after the truck arrived at the Bayshore Highway the truck and Wilder's automobile collided and Brandis was killed.

At the close of plaintiff's evidence a motion of nonsuit was first granted as to defendant Wilder on the ground that there was no evidence at all that he was negligent. Then the court granted a motion of nonsuit as to defendants Goldanski and Fourkas on the grounds that Brandis was a guest and not a passenger, and that the evidence, at most, showed but ordinary negligence on the part of Goldanski.

This appeal is from the judgment of nonsuit entered in favor of Goldanski and Fourkas. No contention is made that the evidence shows anything more than ordinary negligence, the sole contention being that it was a jury question as to whether Brandis was a guest or a passenger within the meaning of section 403 of the Vehicle Code. That section reads as follows: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

[1] This section has been a prolific source of litigation. The policy it embodies, its constitutionality having been es-

tablished, *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221, is a matter of legislative and not judicial concern. In the many cases decided under the section, certain principles have been established with reasonable clarity. To constitute "compensation" within the section, actual money need not pass. If the rider confers a tangible benefit on the driver this will be sufficient to constitute "compensation" and hence make him a passenger and not a guest. *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909; *Lerma v. Flores*, 16 Cal.App.2d 128, 60 P.2d 546. But the tangible benefit thus conferred must not be the mere exchange of social courtesies. In the leading case of *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909, the owner of a car and his wife agreed with the plaintiff and his wife to take their car on a pleasure trip, each family to pay one-half of the trip's expenses. It was held that, as a matter of law, the joint payment of expenses was not "compensation," but was a mere exchange of social amenities. For that reason, plaintiff and his wife were guests. At page 286 of 9 Cal.2d, at page 913 of 70 P.2d the court laid down the applicable rule as follows: "Therefore, where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants. The payment of a portion of the expense, as for gasoline and oil consumed on the trip, is merely incidental and does not constitute the moving influence for the transportation. The provocation for the offer of transportation remains the joint social one of reciprocal hospitality or pleasure."

On the other hand, where the main purpose of the trip is business, there is no doubt that evidence of a benefit of the type here involved—guidance as to route and helping to load and unload—is sufficient to sustain a finding of compensation within the meaning of section 403 of the Vehicle Code so as to render the rider a passenger. Thus in *Yates v. J. H. Krumlinde & Co.*, 22 Cal.App.2d 387, 71 P.2d 298 it was held

that where the rider expressly or impliedly agreed to help unload a truck and to assist in guiding it through some gates, such was sufficient benefit to sustain a finding that the rider had given "compensation" and was therefore a passenger and not merely a guest. That case involved a business trip. In *Christiana v. Rattaro*, 81 Cal. App.2d 597, 184 P.2d 682, the plaintiff, a boy, was taken on a business trip by the driver to assist the driver in unloading melons. This was held sufficient to sustain a finding of payment of compensation within the meaning of section 403. *Lerma v. Flores*, 16 Cal.App.2d 128, 60 P.2d 546, was one where the rider went along to advise the driver as to route, and this was held sufficient benefit, the adequacy of which would not be examined, to sustain a finding of compensation within the meaning of the section. Again the purpose of the trip was business—the carriage for hire of plaintiff's goods from one town to another. In *Walker v. Adamson*, 9 Cal.2d 287, 70 P.2d 914, a companion case to the *McCann v. Hoffman* case, the splitting of expenses on a business joint venture was held to be compensation within the meaning of the statute. See, also, *Fedler v. Hygelund*, 106 Cal.App.2d 480, 235 P.2d 247.

But while the appellate courts have been extremely liberal in holding, as a matter of law, or in allowing the jury to find, that a benefit amounts to compensation where the purpose of the trip is business, they have, with certain exceptions hereafter noted, both before and after the decision of *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909, strictly applied the rule that, where the purpose of a trip is pleasure, the mere exchange of social courtesies is not a benefit within the meaning of the statute. *Rogers v. Vreeland*, 16 Cal.App.2d 364, 60 P.2d 585, contains an elaborate discussion of the rationale of the rule embodied in the statute and holds that, as a matter of law, the mere sharing of expenses on a pleasure trip is not the giving of compensation. The court, 16 Cal.App.2d at page 367, 60 P.2d at page 586, carefully differentiates between a business and a pleasure trip, pointing out that a benefit on a

business trip is rendered to produce a profit to the driver, while such benefit on a pleasure trip is a social amenity. In *Stephen v. Spaulding*, 32 Cal.App.2d 326, 89 P.2d 683, a judgment in favor of the rider was reversed where the rider paid a share of the gasoline bill on the way to a bridge party. Such payment was held not to be compensation but, on a pleasure trip, a mere exchange of "social amenities." The same rule was applied, as a matter of law, in *Fiske v. Wilkie*, 67 Cal.App.2d 440, 154 P.2d 725.

But appellant contends that these cases are no longer the law, and that recent cases have tended to apply the business trip rule to pleasure trips. The cases cited do not support that contention. All that they establish is that, even though the purpose of a trip is pleasure or social, the rider may be a passenger if the driver actually receives for the trip something intended as compensation. The first case so holding was *Whitechat v. Guyette*, 19 Cal.2d 428, 122 P.2d 47, where the receipt by the driver of \$5 from the Y.M.I. to drive members to a meeting was sufficient to submit the question of compensation within the meaning of section 403 to a jury. The court expressly held that benefits of joint attendance at a social event or of companionship on the trip would not be sufficient, and that the mere splitting of expenses was not enough. The court placed considerable weight on the fact that a third person paid the \$5—the Y.M.I.—and held that, even though the main purpose of the trip was social, it was a question of fact for the jury whether the \$5 was accepted as compensation for the trip.

This case was followed by the case of *Whitmore v. French*, 37 Cal.2d 744, 235 P.2d 3, which is the case most strongly relied upon by appellants in the instant case in support of their contention that it was for the jury to decide whether the benefits here conferred were accepted as compensation. There, two plaintiffs, husband and wife, on a pleasure trip, paid one-half of the total trip expenses, including food, lodging and sight-seeing, and the two defendants paid the other one-half of such

expenses, but the defendants also brought along their two sons, twelve and fourteen. The majority of the Supreme Court held that, as a matter of law, this payment of one-half of the expenses, constituting more than the plaintiffs' proportionate share, constituted a tangible benefit and thus was compensation within the meaning of section 403. The court stated the rule as follows, 37 Cal.2d at page 746, 235 P.2d at page 5: "The designations 'passenger' and 'guest' have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 of the Vehicle Code from one carried gratuitously. *Kruzie v. Sanders*, 23 Cal.2d 237, 241, 143 P.2d 704. A person who accepts a ride does not cease to be guest and become a passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls (see Rest., Torts, § 490, Comment a), and it has been held that the sharing of expenses does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality. *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909. Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. [Citing cases.] This is, of course, true whether the trip is for the joint pleasure of the participants or is of a nonsocial nature."

This case was followed by the appellate court in *Harris v. Harfmann*, 113 Cal.App.2d 615, 248 P.2d 501. There a trip was taken by a mother and her two daughters. One of the daughters, the defendant, owned an automobile. The other daughter, the plaintiff, had two small children. The mother, the defendant, and the plaintiff and her children took an automobile trip to Oklahoma. The defendant agreed to furnish and to drive her automobile, and the plaintiff agreed to pay for all gasoline and oil. The purpose of the trip was to permit the mother to investigate some property of hers in Oklahoma and Colorado, and to permit plaintiff to see her son who was

in Oklahoma. While driving in New Mexico the defendant was guilty of ordinary negligence, resulting in injuries to plaintiff. The trial court found that the plaintiff was a guest and not a passenger. The appellate court held that under the rule of *Whitmore v. French*, 37 Cal.2d 744, 235 P.2d 3, the case must be reversed. At page 616 of 113 Cal.App.2d, at page 502 of 248 P.2d the court stated:

"That case states the rule that where the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. And where one makes a substantial contribution toward the cost of the journey, as a matter of law he is a passenger and not a guest. * * *

"In the case at bar the agreement to pay for gas and oil used on the trip was such a substantial contribution as to make plaintiff a passenger, * * *."

It will be noted that in both the *Whitmore* and *Harris* cases, the court stated that the tangible benefit only had to be "a motivating influence" for taking the trip, but in *Clifford v. Ruocco*, 39 Cal.2d 327, in a footnote on page 328, 246 P.2d 651, 652, the author of the *Whitmore* case states that the tangible benefit must be "the motivating influence".

[2] Under these cases there can be no doubt that the courts have now applied the tangible benefit rule to social journeys. Under these cases, "compensation" can be found if there is an intent to receive compensation or if there is the conferring of an actual tangible substantial benefit on the driver where the benefit conferred is at least "a" motivating influence for taking the trip. But the *Whitmore* case expressly excluded "extending customary courtesies of the road" from the category of tangible benefits, and reaffirmed the "exchange of social amenities" rule stated in *McCann v. Hoffman*, supra. In the instant case the parties were attending a church picnic. The driver, instead of furnishing food was furnishing services—the use of his truck. Brandis rode with

him to get to the picnic and to show the driver the route. That was a mere incidental courtesy, the granting of a social amenity, and was not the conferring of a tangible, substantial benefit that was a motivating influence for the taking of the trip. Therefore, Brandis was a guest and was not a passenger. The trial court correctly so held.

The order and judgment appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.



PEOPLE v. WEITZ et al. *

Cr. 2339.

District Court of Appeal,
Third District, California.

March 30, 1953.

Rehearing Denied April 13, 1953.

Hearing Granted April 27, 1953.

Defendant was convicted in the Superior Court, San Joaquin County, for grand theft, forgery and for violations of the Corporations Code, and he appealed from the judgment and from order denying him a new trial. The District Court of Appeal, Van Dyke, P. J., held that evidence warranted convictions for forgery and violations of the Corporations Code but did not warrant conviction for grand theft.

Reversed in part and affirmed in part.

I. Common Law ☞7

The English statute declaring that every person who shall by any false or fraudulent representation or pretense defraud any other person of money, labor or real or personal property is guilty of theft became a part of the American common law. Pen.Code, § 484.

2. False Pretenses ☞7(5)

To constitute "false pretense" within statute defining crime of theft, the pretense must be representation as to existing fact or past event and not as to something

* Subsequent opinion 267 P.2d 295.

to take place in future, and false or fraudulent promise is not pretense, but promise combined with representation of fact is pretense. Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "False Pretense".

3. False Pretenses ⇨7(5)

Concealed intent not to keep promise as to future action is not "false pretense" within statute interdicting obtaining of property by use of false pretense. Pen. Code, § 484.

4. Courts ⇨90(4)

Where statute interdicting obtaining of property by use of false pretense has had a long history of judicial interpretation and has been given meaning of parent English statute from which the language was taken, it is not permissible for court to place within scope of statute cases which have been excluded for so long. Pen.Code, § 484.

5. False Pretenses ⇨49(3)

Evidence relating to false pretenses consisting solely in giving of contractual promises with no intent to perform such promises was insufficient to sustain convictions for grand theft. Pen.Code, § 484.

6. Forgery ⇨44, 44(3)

Evidence warranted forgery convictions in respect to forging, uttering and passing conditional sales contract with intent to defraud.

7. Licenses ⇨42(4)

Evidence warranted convictions for violations of the provisions in Corporations Code having to do with issuance of securities in nonconformity with commissioner's permit and with making of false statements to commissioner in various proceedings before him. Corporations Code, § 26104(a, b).

8. Criminal Law ⇨1134(3)

Reviewing court would not discuss assignments that court erred in giving and refusing instructions having to do with counts the convictions for which were reversed.

9. Criminal Law ⇨1171(1)

Prosecuting attorney's questioning of prospective jurors on voir dire as to their

being members of a particular religious group was not prejudicial error where none of prospective jurors were members of such group and it did not appear that any one connected with trial was member of such group. Const. art. 1, § 4.

O'Gara & O'Gara, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Dep. Atty. Gen., William Biddick, Jr., Dep. Dist. Atty., Stockton, for respondent.

VAN DYKE, Presiding Justice.

Appellant was indicted by the grand jury of San Joaquin County. The indictment contained ten counts of grand theft, one count of conspiracy to commit grand theft, two counts of forgery, and two counts charging violation of sections of the Corporations Code, Corporate Securities Act. After trial by jury appellant was convicted of the ten counts of grand theft, the two counts of forgery and the two counts of violating the Corporations Code; he was acquitted of the charge of conspiracy. He appeals from the judgment and from the trial court's order denying him a new trial.

The period of appellant's activities covered by the evidence ranged from April, 1949 until his indictment in November of 1950. During most of that time appellant was associated with a Mr. Nelson and a Mr. Golding. These men originally formed a partnership for the purpose of selling what is known as the Zestomat Freezer, an automatic ice cream making machine manufactured by an admittedly nationwide and reputable concern, the Taylor Freezer Corporation of Wisconsin. The partnership obtained a franchise from the Taylor Corporation granting to it an exclusive sales territory in several western states, including California. In April of 1949 the partnership became a corporation with its principal place of business at Lodi, its corporate name being Zesto Dairy Products, Inc. We shall hereafter refer to the corporation as "Zesto Corporation". The purpose and plan of the business was to sell to prospective operators of retail ice cream out-

lets, hereafter called retailers, what might be called a "package deal", which consisted of the lease of a specially designed building in which the retailer would operate a retail ice cream store, the purchase and installation of the Zestomat Freezer and related equipment, and the right to purchase raw materials and other products to be supplied by Zesto Corporation. Most of the active selling was done by appellant and for the greater part of the period involved he was the active actual head and the driving force of the enterprise. The selling, generally speaking, was accomplished as follows: Appellant would exhibit to prospective retailers a sales kit which pictured and described in detail the building to be constructed and the specially designed and manufactured machinery to be installed therein. There is no claim that any false statement or representation was made with respect to these matters. The sales kit contained also a "profit chart" wherein was estimated the profits that might be made and it is not claimed there was anything false about that statement as being an opinion not honestly entertained. It is not claimed, and could not be claimed on the record here, that to induce the prospective retailer to sign the proposed contract evidencing the agreements between himself and Zesto Corporation there was any false statement or representation concerning a past or existing fact save only this, that it is claimed by the People that the contractual promises made by Zesto Corporation were false and fraudulent in that they were made with an existing intent not to perform the same. When a retailer indicated he wanted to go into the deal proposed by Zesto Corporation he made a down payment on the purchase price of the machinery to be installed, generally amounting to around \$2,500. The total purchase price approximated \$11,000. He often also made a deposit for rental to be paid for the lot and building, which building generally cost in the neighborhood of \$10,000. He received a written receipt which stated an agreement between himself and Zesto Corporation. In substance, the agreement stated the following. It acknowledged the receipt of the money; stated that Zesto Corporation agreed to use due

diligence and make reasonable endeavor to find a location suitable for the purposes of a retail store within a designated general area; provided that if such location was found within a stated time then the retailer would take a lease on the location on a standard lease form commonly used by the corporation and would sign the standard form of agreement between the corporation and its licensees who operated such retail outlets; provided that if the retailer complied with the provisions applicable to him the money received would be applied as a down payment on the sum that would be owing to the corporation under the standard agreements to be executed, but if such compliance was not had the amount so received would be retained by the corporation as liquidated damages; and provided that if the corporation was not able to find a suitable location within the stipulated time then the money received would be refunded to the retailer. The additional agreements thus referred to were two, one a lease and the other a so-called operating agreement. The lease was in the ordinary form of leases and provided for a monthly rental for a term of ten years which term was also the term of the operating agreement. The operating agreement may for our purposes here be sufficiently summarized as follows: It contained an agreement of purchase and sale of the machinery to be installed and the store to be built; it licensed the retailer for ten years in the use of the Zestomat Freezer being purchased along with other supplemental machinery and equipment as definitely described in the agreement; it bound the Zesto Corporation during the entire period not to sell or lease to anyone else or permit to be used in any manner any like Zestomat machine within a described territory, usually within a radius of a mile or more from the store location; it bound the retailer to use mix, flavors, toppings, cones, cups, etc., of high quality and to purchase all the ice cream and ice milk mix he should require for processing in the automatic machinery from a source of supply recommended by Zesto Corporation, which undertook to see that the retailer was properly supplied; it fixed the prices for mix, fluctuating accord-

ing to wholesale price of a certain score butterfat per pound at a designated market such as San Francisco; it contained many other detailed provisions fixing the rights and the contractual obligations of the parties to the agreement which need not be stated here. No claim is made that the document executed did not fully cover the contractual arrangements of the parties or that they did not legally bind each of the parties to the performance of the promises therein exchanged. During the period involved numerous agreements were made with retailers, the number not being specifically shown, but being asserted to be from 1 to 200 and during the period approximately 30 retail stores were built, equipped and placed in operation. As to the others it may be said generally that the stores were not built nor the machinery furnished, and while some undetermined amount, approximating \$65,000 of moneys received from retailers were restored to them, many others found themselves at last without either a machinery equipped store or a refund of their money. Yet it is not and could not be claimed that any trust relation arose with respect to funds paid in or that title thereto did not pass to the Zesto Corporation as the money was received. The accountant who testified for the People and who had examined the books, records and transactions of the Zesto Corporation and its personnel stated that the corporation received during the period involved something over \$500,000 and that the money had, according to the books, been expended as follows:

Equipment purchased	\$135,000
Cash refunds, equipment deposits	48,000
Cash refunds, lease deposits	23,000
Construction of store-buildings	65,000
Rent and lease deposits	43,000
Payroll and officers' salaries	55,000
Ice cream mix (Challenge Creamery), cartons, cones and toppings	80,000
Travel expense	25,000
Payments to lending agencies on contracts	12,500
Real estate brokers and subdistributors	10,000

Legal expense, freight, postage and other expenses	20,000
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Total Approximate Expenditures \$516,500

The accountant testified that in his opinion 90% of the receipts were spent for proper business purposes.

After July, 1950, Zesto Corporation got into financial difficulties. In September Taylor Freezer Corporation cancelled Zesto Corporation's franchise and following that Zesto Corporation filed a petition for reorganization under the Bankruptcy Laws of the United States. In December a petition for involuntary bankruptcy was filed by its creditors—and the corporation was declared a bankrupt.

There is a voluminous record of testimony addressed to collateral matters intended to show wrongful diversion of corporate funds and other improper activity on the part of appellant and his associates respecting the corporate management. In fact, the transcript runs to nearly 5,000 pages. But so far as grand theft be concerned, the foregoing we think is a sufficient statement for the decision of the cause. We shall hereafter refer to the counts of forgery and of violation of the Corporate Securities Act and state the evidence pertinent thereto.

All of the counts of grand theft were similar and one will suffice as a sample. Count One charged that appellant, together with Golding, on or about June 18, 1950, feloniously took \$4,383 in money from Lena and Ella Strimska in violation of Penal Code Section 484. This money was paid when the contracts were executed between the alleged victims and Zesto Corporation and it was never restored. Mr. Strimska testified that Zesto Corporation had found a location for him in Santa Cruz and that a lease of the ground had been obtained but the building had not been built nor the machinery delivered.

[1, 2] Appellant contends that the evidence is not sufficient to support his conviction upon any of the grand theft counts. Respondent contends to the contrary and states it to be the theory of the prosecu-

tion that appellant by means of his operations in the Zesto Corporation wilfully engaged in a course of conduct consisting of securing deposits from prospective operators of Zesto stores with no intention on the part of appellant to perform the contracts or to return the deposits, but on the contrary with an intention on his part to appropriate the moneys paid in to his own use. Respondent says: "The evidence both direct and circumstantial shows that in obtaining the money from each of the victims named in the indictment, there was an intent to defraud, that there was actual fraud committed, false pretenses were used in obtaining the money, and that the victims parted with their money under the belief that appellant intended to abide by his representation that the money would be refunded in the event no store was erected or no equipment was placed therein." (Though respondent speaks of false pretenses it is made clear that reference is solely to a fraudulent intent not to keep the contract.) In short, as it appears from what has been heretofore said concerning the evidence and from respondent's own statement of the theory of the prosecution, respondent seeks to sustain the convictions upon the theory that the false pretenses consisted solely in the giving of contractual promises, with no intent to perform the same. This, argues respondent, constitutes a violation of Section 484 of the Penal Code and that part thereof concerned with the obtaining of property by false pretenses. That section declares that "Every person * * * who shall * * * by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property * * * is guilty of theft." This language faithfully reproduces the language of the original statute declaring this crime (St. 30 George II, c. 24), which became a part of the common law in this country. That act provided that: "All persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same shall be deemed offenders against Law", etc. Most, if not all,

of the states of the Union have the same statute and as to what constitutes a false pretense within the meaning thereof not only English law but with surprising unanimity the judicial interpretations of the various states have declared that: 1. The pretense must be a representation as to an existing fact or a past event and not as to something to take place in the future. 35 C.J.S., False Pretenses, § 8, p. 646; see also *People v. Wasservogle*, 77 Cal. 173, 19 P. 270; *People v. Jordan*, 66 Cal. 10, 4 P. 773; *People v. Green*, 22 Cal.App. 45, 133 P. 334; *People v. Carpenter*, 6 Cal.App. 231, 91 P. 809; *People v. Jackson*, 24 Cal.App.2d 182, 74 P.2d 1085; *People v. Downing*, 14 Cal. App.2d 392, 58 P.2d 657; *People v. Reese*, 136 Cal.App. 657, 29 P.2d 450; *People v. Robinson*, 107 Cal.App. 211, 290 P. 470; *People v. Moore*, 82 Cal.App. 739, 256 P. 266; *People v. Cale*, 106 Cal.App. Supp. 777, 288 P. 430. 2. "A promise, although false, will generally not serve as a pretense; but, where a promise is combined with a representation of fact, there is a sufficient pretense unless the prosecution relied wholly on the promise and not at all on the representation." 35 C.J.S., False Pretenses, § 9, p. 648; see, also, *People v. Kahler*, 26 Cal.App. 449, 147 P. 228; *People v. Bowman*, 24 Cal.App. 781, 793, 142 P. 495; *People v. Green*, supra; *People v. Schenone*, 19 Cal.App. 280, 125 P. 758; *People v. Selk*, 46 Cal.App.2d 140, 115 P.2d 607; *People v. Daniels*, 25 Cal.App.2d 64, 76 P.2d 556; *People v. Downing*, 14 Cal. App.2d 392, 58 P.2d 657; *People v. Reese*, supra; *People v. Moore*, supra; *People v. Walker*, 76 Cal.App. 192, 244 P. 94; *People v. Mace*, 71 Cal.App. 10, 234 P. 841; *People v. Cale*, supra. And such a promise will not suffice as a pretense, however false or fraudulent it may be. 35 C.J.S., supra; see, also, *People v. Jackson*, supra, 24 Cal.App. 2d 203, 74 P.2d 1085.

[3] But it is the further contention of respondent that, notwithstanding the foregoing well-settled definitions of what may serve as false pretenses within the meaning of the statute and what may not so serve, this case is brought within the scope of the statute because, from the evidence here, the jury could have inferred that

when the contractual promises were made there was no intent to keep them and that there was by the very execution of the contracts containing those promises an implied representation that the appellant intended they should be kept, which was false in that he then intended they should not be kept. A promise made without intention to keep it is, of course, a false promise and is declared to be fraudulent by Section 1572 of our Civil Code, which section defines what constitutes actual fraud within the meaning thereof. Such fraudulent contract may give rise to a cause of action in civil law. We are not here concerned with the civil law but with what is embraced within the meaning of the language used in Section 484 of the Penal Code which interdicts the obtaining of property by the use of false pretenses; and it has often been specifically held that though the representation of an existing intent to perform a promise when made may be, if false, the statement of an existing fact, since intent is a fact, yet such a pretense is not within the statute. In short, concealed intent not to keep a promise as to future action is not a false pretense within the meaning of the Penal Code. 24 A.L.R., Annotation, 397; *State v. Shevlin*, 81 N.H. 121, 123 A. 233; *Commonwealth v. Althause*, 207 Mass. 32, 93 N.E. 202, 207, 31 L.R.A., N.S., 999 (holding that though as a general proposition of law, apart from statutes making it a crime to obtain property by false pretenses, it would seem that a man's present intention as to a future act is a fact, yet a false statement as to such intention is not a false pretense within the statutes making it a crime to obtain property by false pretenses. Said the court: "* * * the fraud of obtaining property by buying it intending not to pay for it is not, as matter of construction of the statute creating it, the crime of obtaining property by a false pretense.")

The great weight, indeed it might be said the overwhelming weight, of authority in this country and England, where the parent statute has received interpretation for approximately 200 years, is in strict accord with the foregoing statement quoted from *Commonwealth v. Althause*. Early in the history of the act the proposition was ad-

vanced that, since a man impliedly declared his intention of keeping a contractual promise when made, he might be found guilty of a lack of such intent if he thereafter broke it and be guilty of the crime of obtaining property by false pretenses. There was nothing new in the basic proposition which was in accord with established theories as to fraud which governed civil law. A man's present intention it has been said is as much a fact as the state of his digestion and it can be reasonably argued that a man impliedly represents he will keep his promise if and when he makes it. A promise made without intent to perform has always been considered an act of fraud and such a declaration is contained in Section 1572 of our Civil Code. But in applying the criminal statute the English courts and nearly all of the courts in this country rejected the contention, refusing to indulge in such reasoning in a circle in respect of the criminal statute involved.

Perhaps the most noted of the cases of recent vintage dealing with this ancient controversy is that of *Chaplin v. United States*, decided April 15, 1946, and reported in 81 U.S.App.D.C. 80, 157 F.2d 697, 698, and in 168 A.L.R. 828, 830. Refusing to adopt the view that the statute had been wrongly construed for so long a time the majority declared:

"Not only is the rule deeply rooted in our law, but moreover, we think the reasons upon which it is founded are no less cogent today than they were when the early cases were decided under the English statute cited by Wharton, *supra*. It is of course true that then, as now, the intention to commit certain crimes was ascertained by looking backward from the act and finding that the accused intended to do what he did do. However, where, as here, the act complained of—namely, failure to repay money or use it as specified at the time of borrowing—is as consonant with ordinary commercial default as with criminal conduct, the danger of applying this technique to prove the crime is quite apparent. Business affairs would be materially incumbered by the ever present threat that a debt-

or might be subjected to criminal penalties if the prosecutor and jury were of the view that at the time of borrowing he was mentally a cheat. The risk of prosecuting one who is guilty of nothing more than a failure or inability to pay his debts is a very real consideration. It is not enough to say that if innocent the accused would be found not guilty. The social stigma attaching to one accused of a crime as well as the burdens incident to the defense would, irrespective of the outcome, place a devastating weapon in the hands of a disgruntled or disappointed creditor." (See also 21 Tulane Law Review, October-June, 1946-1947, page 639.)

It may be well to say at this point that a number of cases which seem to be in opposition to the rule as stated in *Chaplin v. United States*, supra, are cases decided under statutes which expressly include false promises with false pretenses. Such is *Knickerbocker Merchandising Co. v. United States*, 2 Cir., 13 F.2d 544, a case decided under United States Criminal Code 215, making it a crime to use the mails in furtherance of schemes to defraud through false pretenses and false promises.

Notwithstanding the great number of California cases which have held unqualifiedly for so long a time that promises, however false, were not pretenses within the meaning of our statute there are a few cases which apparently are to the contrary. They are *People v. Ames*, 61 Cal.App.2d 522, 143 P.2d 92, *People v. Gordon*, 71 Cal.App.2d 606, 163 P.2d 1110; *People v. Mason*, 86 Cal.App.2d 445, 449, 195 P.2d 60; *People v. Jones*, 36 Cal.2d 373, 224 P.2d 353.

[4, 5] It is to be noted, however, that in all of these cases except *People v. Ames* there were false pretenses in that there were false statements of fact, excluding the promise false for want of intention to perform the same. Therefore it was unnecessary to hold that a promise false for want of intention to perform the same when made would serve as a false pretense under the statute, and the cases were in fact not decided on that basis. We feel that these cases cannot control here. When a statute

has the history of judicial interpretation which our statute has, and in its interpretation has been given the meaning of the parent English statute from which its language was taken, it is not permissible at this late date to place within its scope cases excluded for so long. To do that is to amend the statute; to usurp the functions of the legislature and to be guilty of judicial legislation. If it be desirable to place in the hands of disappointed promisees so powerful an instrument of extortion as will be placed therein by the interpretation stated in the California cases above mentioned, then in fairness the recommendation that it be so placed therein should be made to the legislature. We surmise if that were done and the legislature considered the evils of such an amendment the proposition to so amend the statute would be rejected. For the reasons given, the ten convictions of grand theft must all be reversed.

[6] Appellant was convicted on two counts of forgery and contends that the evidence is insufficient to justify the verdicts. The facts may be briefly stated. Each count for forgery charged appellant and his wife with forging, uttering and passing a conditional sales contract with the intent to defraud Zesto Corporation, its creditors and one Fred A. Wertz. Appellant's wife signed the name of Wertz to each contract and there was ample evidence she had no authority to do so. Each contract was in form one of the retailer contracts which Zesto Corporation executed with proposed operators of retail outlets. One of these purported to bind Fred A. Wertz as such retailer to buy Zestomat equipment for \$9,983, and contained all of the other promissory obligations concerning the operation of a retail store that appeared in the regular form of such contracts. The other contract was in like form and purported to bind Fred A. Wertz to purchase equipment and to operate a store, the equipment being priced at \$11,483. The evidence disclosed that Wertz at the time these documents were executed knew nothing concerning the execution thereof. These contracts were executed for the corporation by Mr. Golding. But it appears

that appellant planned and directed the creation of these documents and the use thereof. He testified at length concerning these matters and the uttering of the documents. He must be held guilty as a principal. Appellant asserts there is no evidence of an intent to defraud. But the jury could conclude that the attempt through a forgery to bind Wertz to such heavy and numerous obligations was proof of an intent to defraud him.

[7] Appellant was convicted of two counts of violation of the Corporations Code, one a violation of Section 26104 (a) and the other a violation of Section 26104 (b). The first subsection has to do with the issuance of securities in nonconformity with the commissioner's permit and the second with the making of false statements to the commissioner in various proceedings before him. Appellant makes no contention with respect to these convictions and a reading of the record shows them to be fully supported by the evidence.

[8] Appellant contends that the court erred in giving certain instructions and in failing to give others that were requested. These assignments of error have to do with the grand theft counts and since we are reversing the convictions thereunder we deem it unnecessary to discuss the assignments.

[9] The appellant contends that the prosecuting attorney was guilty of prejudicial misconduct in his examination of the jury on voir dire and that the court erroneously overruled objections to the questions being asked and permitted the prosecutor to continue in his wrongful course with the result, says appellant, that he was denied a fair trial. This contention applies to all convictions. The conduct com-

plained of was the repeated questioning of prospective jurors by the prosecuting attorney as to their being Seventh Day Adventists. There was no issue involving members of that church and none involving the church itself. So far as the record shows, no one connected with the trial in any capacity was a member of that church. If the defendants, including appellant, were such members the matter was not brought out. The prosecutor made no explanation of his conduct nor did he give any reasons why he wanted to know whether the prospective jurors were or were not members of that church. All of the jurors to whom the question was addressed replied they were not such members. Appellant contends that the conduct of the prosecuting attorney amounted to a violation of Article I, Section 4, of the California Constitution which guarantees the free exercise and enjoyment of religious profession and worship and declares that no person shall be rendered incompetent as a juror on account of religious opinions. We ourselves cannot say from this record what the purpose was in the asking of these questions. No explanation was made. On such a record we cannot say that prejudice was suffered and certainly no person was disqualified as a juror for membership in the Adventist Church since all to whom the question was addressed declared they were not members of it. Appellant's contentions of prejudicial error in this regard cannot be sustained.

The judgments of conviction of grand theft are all reversed. The judgments based on convictions of forgery and violations of the Corporations Code are affirmed, as are also the orders denying new trial in respect thereto.

PEEK and SCHOTTKY, JJ., concur.

117 Cal.App.2d 211

TESONE v. REIMAN et al.**Civ. 8207.**District Court of Appeal, Third District,
California.

April 6, 1953.

Action against plaintiff's grandparents, and their employee, for personal injuries sustained when two year old plaintiff caught her hands between roller and shoe of a mangle at grandparents' home, and was burned. The Superior Court, Merced County, entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that instruction that the accident was not unavoidable and that jury should not consider matter of unavoidable accident, was prejudicially erroneous in that it told jury, in effect, that it was not to consider the defense raised by the denial of negligence.

Judgment reversed.

1. Negligence ☞32(4)

In action for personal injuries sustained by two year old child allegedly through negligence of her grandparents and their employee while at grandparents' home, the exact status of the child while upon her grandparents' property was unimportant, for reason that negligence, if any, was in conduct of active operations on the property with knowledge of presence of child, and defendants had duty to use ordinary care to avoid injury to child through such operations.

2. Negligence ☞32(2.2)

In cases involving injury resulting from active conduct, as distinguished from condition of premises, landowner or possessor may be liable for failure to exercise ordinary care toward licensee whose presence is known or should reasonably be known.

3. Negligence ☞139(1)

In action for personal injuries to two year old plaintiff, based on allegedly negligent conduct rather than on condition of premises, neither the giving of an instruction which removed from jury the question as to what was status of plaintiff while on defendants' property, nor refusal of instruction dealing with status, was error, in

view of fact that the case was not one wherein any distinction would be made dependent upon such status.

4. Appeal and Error ☞1064(2)**Trial ☞194(16)**

In action against plaintiff's grandparents and their employee for personal injuries sustained by two year old plaintiff when she caught her hands between roller and shoe of a mangle at grandparents' home, and was burned, instruction that the accident was not unavoidable and that jury could not consider matter of unavoidable accident was prejudicially erroneous in that it, in effect, told jury it was not to consider the defense raised by denial of negligence.

5. Negligence ☞63

By term "unavoidable accident" is not meant an accident that could not be avoided at all, but simply an accident which is caused by something other than the actionable negligence of the parties involved.

See publication Words and Phrases, for other judicial constructions and definitions of "Unavoidable Accident".

6. Negligence ☞63

The defense of inevitable or unavoidable accident is nothing more than a denial by defendant of actionable negligence.

7. Negligence ☞116

Defense of inevitable or unavoidable accident need not be specially pleaded and is raised by general denial.

8. Master and Servant ☞332(1)

In action against plaintiff's grandparents and their employee, for personal injury sustained by two year old plaintiff when she caught her hands between roller and shoe of a mangle at grandparents' home, and was burned, whether employee was negligent in leaving the mangle in the condition in which she left it, knowing that plaintiff was on the premises, was question for jury.

Hansen & Barstow, Chester O. Hansen, Fresno, for appellants.

C. Ray Robinson, Merced, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff and respondent was at the time of the accident which resulted in her injuries a girl child of the age of two years and two months. She was injured while on the premises of her grandparents, Milton and Elma Reiman. Alleging her injuries were caused by the negligence of defendant and appellant Laura S. Bennett, an employee of the Reimans, she brought action against the three and recovered a judgment in the sum of \$45,000, from which said defendants have all appealed. Basically, the testimony is without conflict. At about 9 o'clock in the morning of December 28, 1950, appellant Bennett was engaged in doing the family ironing for her employers, using for that purpose an ironer or mangle situated in a room called the service room. While she was so engaged, and at about noon, respondent with her mother came to the Reiman residence. Mrs. Bennett saw the child and her mother enter the home and knew therefore that the child was on the premises. There was present in the residence at that time Elma Reiman and two daughters other than the mother of Karen. The four women began talking and the child was running about the house. A few minutes after the child and her mother arrived Mrs. Bennett left the mangle to take some towels into the kitchen. She there saw the other women and a short conversation ensued. She said she had intended to be gone about a minute. While talking she heard a scream and all went into the service room where it was found that Karen had her hands caught between the roller and the shoe of the mangle. Before they could extricate the child she had been severely burned. When Mrs. Bennett left the mangle the electric cord was plugged into the socket; the hood that could be put over the machine was off; the chair in which she had been sitting was close to the mangle; the mangle had been deactivated through either the manual or the knee control so that the roller was not turning and the shoe was not down on the roller. When found the child was either standing or kneeling on the chair in front of the machine. She was not tall enough to touch the hot shoe or the upper part of the roller

without the aid of the chair. The mangle had been reactivated. After the accident and in conversation with Mrs. Reiman, Mrs. Bennett stated that she felt it was her fault because she did not pull the plug. Karen was not in the service room when Mrs. Bennett left and must have entered within the short space of time after Mrs. Bennett left the room and before the scream was heard, a time interval of about one minute.

In support of their appeal the appellants urge that the judgment should be reversed for misdirection of the jury to their prejudice, that the court wrongfully refused instructions based upon the appellants' theory of the case, and that by reason of the instruction given at respondent's request concerning unavoidable accident the trial court in effect removed the issue of negligence from the jury.

[1,2] The first two assignments have to do with the status of respondent while upon the property of appellants Reiman. We think that under the admitted facts of the case the question of the respondent's status is of no import. At respondent's request the trial court instructed the jury: "It is established in this case that at the time of the accident the plaintiff, Karen Tesone, was present at the home of the defendants, Mr. and Mrs. Reiman, and on their service porch, by virtue of the invitation, permission, consent and approval, and with the knowledge, of the defendants, Mrs. Bennett and Mr. and Mrs. Reiman. Therefore, it was the duty of the defendant, Mrs. Bennett, to use reasonable care to operate, control, maintain and supervise the ironer or mangle in such a manner as to avoid injuring or endangering the safety of the plaintiff, Karen Tesone." Appellants complain that this instruction removed from the jury the question as to what was the status of respondent and fixed the duty of care toward her as the duty owed to an invitee. The exact status is unimportant here for the reason that the negligence, if any, was in the conduct of active operations on the Reiman property with the presence of the respondent known. Under such circumstances it was the duty of the appellants to use ordinary care to avoid injury to re-

spondent through such operations. We quote the following from *Oettinger v. Stewart*, 24 Cal.2d 133, 138-139, 148 P.2d 19, 22, 156 A.L.R. 1221:

"* * * [I]t is now generally held that in cases involving injury resulting from active conduct, as distinguished from condition of the premises, the landowner or possessor may be liable for failure to exercise ordinary care toward a licensee whose presence on the land is known or should reasonably be known to the owner or possessor. Rest., Torts, § 341; Prosser on Torts (1941), 630; 45 C.J. 803-805. In Prosser on Torts, supra, the author explains: 'Some courts have gone so far as to say that there is no duty to a licensee other than to refrain from inflicting wilful or wanton injury upon him. As in the case of trespassers, however, an increasing regard for human safety has led to a retreat from this position. It is now generally held that as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee. He must run his train, operate his machinery, or back his truck with due regard for the possibility that the permission given may have been accepted and the guest may be present.' The more recent California decisions have adopted this rule. (Citing cases.) The cases cited herein suggesting that a lesser standard of care is applicable where injury results from active conduct of the landowner or possessor are inconsistent with the later decisions and must be disapproved."

[3] Under the circumstances here we see no error in the instruction in so far as the points in contention be concerned. True, it does not distinctively define invitees and licensees and set up a standard of care owed to each. Where the action is based on negligent conduct rather than on the condition of the premises and the standard of care therefore is that of ordinary care to avoid injury it would only confuse the jury to enter into the subject of status.

Appellants contend that they were entitled to have the jury instructed upon their theory of the case and that they submitted proper instructions to that end. The instructions requested defined invitees; declared that a social guest would not fall within that classification and was regarded in law as being only a licensee; and stated that where the licensee's presence was known to the licensor or ought to have been so known the licensor was bound to exercise ordinary care to avoid injuring the licensee by an overt act. This overt act was especially defined in the instruction as meaning some active negligence as distinguished from passive omission to alter some condition on the premises existent when the licensee entered, as to which condition the licensee assumed the risks incident thereto. Here again what we have said heretofore demonstrates that there was no error in refusing the instruction, since the case was not one wherein any distinction would be made dependent upon the status of respondent while upon the property of appellants. *Fernandez v. American Bridge Co.*, 104 Cal. App.2d 340, 344, 345, 231 P.2d 548.

[4] Appellants contend that prejudicial error amounting to a miscarriage of justice was committed by the trial court in the giving at respondent's request of the following instruction: "I instruct you that the evidence in this case establishes as a matter of law that the defendant, Mrs. Bennett, could have avoided this accident by the exercise of reasonable care under the circumstances. Therefore, the accident was not unavoidable and you will not consider the matter of unavoidable accident." For the giving of this instruction the judgment must be reversed. By other instructions the court had told the jury that it was the duty of Mrs. Bennett to use reasonable care to avoid injuring the respondent; that it was ordinarily necessary for Mrs. Bennett in operating the ironer to exercise greater caution for the protection and safety of respondent because of her tender years than would have been necessary for adult persons possessing normal and mature faculties; that the presence of the child near the ironer was in itself a warning requiring

greater caution for her safety and that Mrs. Bennett owed a duty to use reasonable care to anticipate the thoughtlessness and impulsiveness of respondent. When, added to these instructions, the trial court told the jury that the evidence in the case established as a matter of law that Mrs. Bennett could have avoided the accident by the exercise of reasonable care under the circumstances the issue of negligence or none was removed from the jury with the result that there has been no real trial thereon. The rationale of the instruction is this: As a matter of law the accident could have been avoided by the use of ordinary care; it happened, therefore, as a matter of law, ordinary care was not exercised.

[5-7] The error is demonstrated with equal ease if we consider the meaning of the term "unavoidable accident". By this term is not meant an accident that could not be avoided at all. The term simply means an accident which is caused by something other than the actionable negligence of the parties involved. *Parker v. Womack*, 37 Cal.2d 116, 120, 230 P.2d 823. The so-called defense of inevitable or unavoidable accident amounts to nothing more than a denial by the defendant of actionable negligence. It need not be specially pleaded and is raised by general denial. *Id.*, 37 Cal.2d 121, 230 P.2d 823. When therefore the trial court said that as a matter of law the jury were not to consider the defense of unavoidable accident it told them it was not to consider the defense raised by the denial of negligence.

[8] Respondent contends that prejudice was not suffered because Mrs. Bennett was negligent as a matter of law. We do not agree. We think the issue was one of fact which the jury was required to pass on. Mrs. Bennett was operating the mangle in the usual course of her duties as an employee of the Reimans. She desired, in the course of those duties, to place some finished ironing in the kitchen, expecting to be gone upon this errand about a minute. The child was not then in or near the service room and was under the supervision of its mother. Before the child could be injured she would have to do the following things: (1) Enter the service room;

(2) Get up onto the chair near the machine; (3) Activate the roller either by knocking against the knee control or the manual control, and, (4) Place her hands between the roller and the shoe. Under such circumstances it was for the jury to say whether or not Mrs. Bennett was negligent in leaving the mangle in the condition in which she did leave it.

The judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.



117 Cal.App.2d 233

WRIGHT v. BARNEY CORNETT
POTATOES, Inc.

Civ. 4618.

District Court of Appeal, Fourth District,
California.

April 8, 1953.

Action by farm landlord, who claimed interest in crops raised by tenant, against tenant, and against broker which had held mortgage against crop and sold crop to buyer in its normal course of business. The Superior Court of Kern County, R. B. Lambert, J., entered judgment dismissing action as against broker, and landlord appealed. The District Court of Appeal, Barnard, P. J., held that provisions of lease agreement between landlord and tenant did not create a cotenancy, and, therefore, broker had not converted anything belonging to landlord.

Judgment affirmed.

I. Landlord and Tenant §331(5), 332

In conversion action by farm landlord, whose rent was to consist of fraction of crop, against tenant and against purchaser of crop, where controlling question was whether landlord had money claim or was a cotenant of crop, rental agreement was properly considered notwithstanding that landlord's last amended complaint did not set forth agreement in full.

2. Landlord and Tenant ⚖️326(3)

Where relationship of farm landlord and tenant exists, parties may also be cotenants in crops to be raised where their agreement contains apt words to disclose such status.

3. Landlord and Tenant ⚖️326(3, 5)

In farm lease agreement, provisions to effect that tenant was to pay landlord one fifth part of gross of all crops until money borrowed by tenant from landlord was repaid, and that rental would be paid in money even if there were no crops produced and that payment of one fifth ratio of production would continue during lease even if loan were repaid, did not create a cotenancy; and, therefore, broker who purchased whole crop did not convert anything belonging to landlord.

4. Evidence ⚖️450(4)

Farm lease agreement under which tenant was to pay landlord fraction of gross crops raised until money borrowed by tenant from landlord was repaid, and was to pay a specified rental in cash even if no crops were produced, and was to continue paying fraction of crops as rent even after loan was repaid, contained no ambiguity which could be cured by oral evidence without changing intention of parties as expressed in written agreement.

5. Pleading ⚖️225(2)

Where farm landlord, who claimed to be cotenant of crops raised by his tenant, failed twice to state cause of action for conversion against broker which held mortgage on crop and sold crop to buyer in normal course of its business, trial court did not abuse discretion in refusing permission for further amendment when it sustained demurrer to third amended complaint.

Kendall & Howell, Bakersfield, for appellant.

Deadrich, Gill & Bates, Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiff has appealed from a judgment dismissing the action as against the corporate defendant.

The appellant entered into an agreement dated August 2, 1948, by which he agreed to lease 160 acres of land in Kern County to H. J. Hiatt for the term of five years. The agreement is in the form of a letter written by Wright to Hiatt, with an acceptance signed by Hiatt. The letter referred to a conversation in which Hiatt had told Wright that this land could be leveled and a water well developed, thereby turning it into a farm on which crops could be raised. Wright then stated that farming was not his business; that his time was fully taken up in his own line of endeavor; that he did not know whether the land could be leveled or whether water could be developed; that he was not willing to gamble money on the possibility that this could be done; and that if Hiatt was willing to gamble on these conditions he would prefer to loan Hiatt the money to carry on the work, and take Hiatt's note for all monies thus loaned. He then stated the terms under which he would lease the property. So far as material here, these terms were as follows:

1. "That you will pay undersigned the one fifth part of the gross of all crops so raised, until all the notes are paid including the interest thereon."

2. "I would require a yearly rental of the land as such, of \$2.00 per acre which you are to pay regardless of production, because you may fail to produce anything, however if you are successful in raising a crop the rental will be included in the said one fifth, thus the one fifth would first pay the lease rental, next the accumulated interest and the balance would apply on the principal."

3. "In event the earnings by crops on the land are sufficient, that the said one fifth gross will have paid all the notes for the money so loaned before the termination of the lease, you will continue to pay to undersigned the same one fifth ratio of production."

The plaintiff brought this action in conversion against Barney Cornett Potatoes, Inc., a corporation, and H. J. Hiatt. The original complaint alleged the making of the agreement, which was attached thereto and incorporated therein by reference; that Hiatt raised a crop of potatoes on this land

which was harvested in June and July, 1949; that the respondent corporation sold this crop subsequent to its harvest; that the respondent should have known of the agreement between the appellant and Hiatt; that the gross value of the crop exceeded \$30,000; that \$2,224.91 had been paid the appellant by the respondent; that the remainder of appellant's share in said crop was converted to its own use by the respondent; and that the value of this remainder is \$3,775.

An amended complaint was filed, the only change being to allege that the gross value of the crop was \$54,044; that \$6,046.74 had been paid the appellant by the respondent; and that the value of the remainder of appellant's share in said crop is \$4,762. A copy of the letter agreement was attached to, and made a part of, the amended complaint by reference. The respondent's demurrer to the amended complaint was sustained with leave to amend.

A second amended complaint was then filed, the only material change being to omit the copy of the lease agreement and in lieu thereof to allege "that one of the clauses of the said agreement provided that the plaintiff was to receive one fifth of the crops planted and harvested on said land." The respondent's demurrer to the second amended complaint was sustained without leave to amend, and this appeal followed a judgment of dismissal as to the corporate defendant.

The appellant contends that under the terms of the agreement he had a fixed interest in a specific share of the crop, and that under facts very similar to those here involved it was so held in *Woodsend v. Chatom*, 191 Cal. 72, 214 P. 965. It is further argued that, in any event, the language of the agreement is ambiguous and that the court should have permitted him to again amend and should have heard the case on its merits, taking evidence as to what was meant by the parties to the agreement.

[1, 2] The controlling question here is whether the appellant merely had a money claim or whether he and Hiatt were in the position of cotenants in the crops to be raised. Under the circumstances here ap-

pearing, the letter agreement is properly to be considered notwithstanding the fact that the last amended complaint did not set forth the agreement in full. *Uchida Inv. Co. v. Inagaki*, 108 Cal.App.2d 647, 239 P.2d 644; *Lee v. Hensley*, 103 Cal.App.2d 697, 230 P.2d 159. In *Clarke and Cain v. Cobb*, 121 Cal. 595, 54 P. 74, 75, the court pointed out that where the relationship of landlord and tenant exists the parties may also be cotenants in the crops to be raised where the agreement contains apt words to disclose such a status. The court there said:

"When it is established that a certain contract is a lease, and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy, or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid."

In *Woodsend v. Chatom*, 191 Cal. 72, 214 P. 965, 966, relied on by the appellant, the court recognized the rule followed in *Clarke and Cain v. Cobb*, supra, but held that the facts in that case were sufficient to show the existence of a cotenancy in the crops raised. The court pointed out that in the case before it the landlord "was to do more than merely receive a stipulated part of the crop as rent." In that case the agreement provided that the landlord was to furnish the seed for the first year, and half of the seed thereafter; that he was to furnish a large amount of tools and equipment; that he was to pay half the cost of maintaining the pumps; that he and the tenant were each to purchase a half interest in a number of pigs and calves; that they were to mutually agree on what crops should be planted; that they were equally interested in chickens, turkeys and fowls to be raised; and that they had agreed that the "ranch shall be run on a 50 per cent basis to each party." The facts in that case, which the court held sufficient to show a

cotenancy in the crops, were radically different from those in the case now before us, where the appellant specifically disavowed any intention of having anything to do with the actual operation of the farm, required notes for the money loaned to enable Hiett to operate the farm, provided for a cash rental until the notes were paid, and quite definitely provided that a share of the gross receipts or earnings from the crops should be applied in payment of the notes and of the rent. There was nothing in the agreement which in any way indicates any provision for a specific division of the crops to be produced, or the actual turning over to the appellant of a specified portion of such a crop.

[3] The first clause of the agreement which we have quoted provides that Hiett is to pay the appellant "the one fifth part of the gross of all crops so raised until all the notes are paid." The use of the words "pay" and "gross" clearly indicate an intention for payment in money rather than a specific division of the crops in kind. The second clause we have quoted requires the payment of a rental in money, regardless of production, and then provides that the one fifth would first pay the rental, then the interest, and the balance would apply on the principal. This also strongly indicates an intention to provide for a money payment and not for a specific division of the crops. The third clause we have quoted refers to the "earnings" from the crops and provides that after one fifth of the gross has "paid" all the notes Hiett will continue to pay to the appellant "the same one fifth ratio of production." This one fifth ratio refers to the one mentioned in the first clause we have quoted, and it cannot be held to be sufficient to constitute "appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy." *Clarke and Cain v. Cobb*, supra.

[4, 5] Not only do we think no ambiguity appears in the agreement which could be cured by oral evidence, without changing the intention of the parties as expressed in the written agreement, but the appellant had twice before amended the complaint without stating a cause of action against this

respondent, and no abuse of discretion appears in refusing a further permission to amend. At no time was it alleged that the notes had been paid, and until that time only a cash rent was due. The record also discloses that the respondent was a potato broker, that it held a mortgage on this crop of potatoes, and that it sold the potatoes to a buyer in its normal course of business.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



116 Cal.App.2d 212

PEOPLE v. HILL.

Cr. 4895.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1953.

Defendant was convicted of unlawfully driving an automobile while under influence of intoxicating liquor and thereby causing bodily injuries to other persons. The Superior Court, County of Los Angeles, Charles W. Fricke, J., following defendant's conviction, denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

Order affirmed.

1. Automobiles $\hookrightarrow$ 355(6)

Evidence was sufficient to sustain conviction for unlawfully driving automobile while under influence of intoxicating liquor and thereby causing bodily injuries to other persons. Vehicle Code, § 501.

2. Criminal Law $\hookrightarrow$ 1159(3)

In prosecution for unlawfully driving automobile while under influence of intoxicating liquor and thereby causing bodily injuries to other persons, fact that defendant introduced evidence which furnished sharp conflict with that of prosecution did not make defendant any less guilty

in view of fact that jury accepted prosecution's evidence.

3. Criminal Law ⇨1160

The District Court of Appeal is bound by factual determination made by jury on substantial evidence and approved by the trial judge.

4. Criminal Law ⇨308

In prosecution for unlawfully driving automobile while under influence of intoxicating liquor and thereby causing bodily injuries to other persons, presumption of defendant's innocence was rebutted by positive evidence. Vehicle Code, § 501.

5. Automobiles ⇨356

In prosecution for unlawfully driving automobile while under influence of intoxicating liquor and thereby causing bodily injuries to other persons, jury had prerogative of choosing evidence it preferred to rely upon. Vehicle Code, § 501.

6. Criminal Law ⇨993

Statute providing that, if evidence shows that defendant is not guilty of degree of crime of which he is convicted but of lesser degree thereof or lesser crime included therein, the court may modify judgment accordingly is merely permissive. Pen. Code, § 1181, subd. 6.

7. Criminal Law ⇨1158(1)

The District Court of Appeal is powerless to interfere with the trial court's order denying motion for new trial unless record clearly shows that, as a matter of law, evidence excludes the offense of which defendant was convicted.

8. Criminal Law ⇨1159(2)

In prosecution for felony of unlawfully driving automobile while under influence of intoxicating liquor and thereby causing bodily injuries to other persons, it was not within power of the District Court of Appeal to ignore evidence that defendant had driven on left side of highway and injured other persons and to act solely upon defendant's admissions in determining whether the trial court had erroneously refused to reduce the crime to misdemeanor of driving vehicle upon highway while under influence of intoxicating liquor. Vehicle

Code, §§ 501, 502; Pen. Code, § 1181, subd. 6.

9. Criminal Law ⇨1166½(12)

In prosecution for unlawfully driving automobile under influence of intoxicating liquor and thereby causing bodily injuries to other persons, trial judge's comments to jury on evidence did not constitute irreparable prejudice to defendant in view of fact that defendant did not object thereto, assign any of court's remarks as prejudicial, nor ask them to be stricken and jury to be admonished to disregard them. Vehicle Code, § 501; Const. art. 6, § 19.

10. Criminal Law ⇨660

When litigant deems comments of trial court to be unwarranted, litigant has duty to promptly object in order that trial court may correct its error, if any. Const. art. 6, § 19.

11. Criminal Law ⇨1035(3)

In prosecution for unlawfully driving automobile while under influence of intoxicating liquor and thereby causing bodily injuries to others, defendant, by reason of his silence during time trial court made comments on evidence to jury, waived his right to a review of the trial court's action. Vehicle Code, § 501; Const. art. 6, § 19.

12. Criminal Law ⇨1064(6)

Upon appeal from order denying new trial in prosecution for unlawfully driving automobile while under influence of intoxicating liquor and thereby causing bodily injuries to other persons, where defendant had not specified, as ground for motion for new trial, that the trial court had prejudiced him by its comments upon the evidence, defendant waived his right to have such comments considered upon appeal. Vehicle Code, § 501; Const. art. 6, § 19.

Homer H. Gooing, Huntington Park, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of violating section 501 of the Vehicle Code, a felony, in

that he unlawfully drove an automobile while under the influence of intoxicating liquor whereby he caused bodily injuries to four persons. His motion for a new trial was denied. He was placed on probation for five years, one of which he was required to spend in the county jail. He has appealed from the order denying his motion on the grounds that (1) the evidence is insufficient to warrant his conviction of violating section 501; (2) error in not reducing the offense to a violation of section 502, and (3) prejudicial error in the court's commenting on the evidence to the jury. 

About nine o'clock on the rainy evening of March 6, 1952, Edward J. Frisch drove from a church on 18th Street in the fourth block north of Whittier Boulevard in Montebello for the purpose of conveying his son and the latter's two friends, Ronnie Davis and Bobby Andrews, to their homes south of Whittier Boulevard. The latter highway connects the city of Los Angeles with Montebello, Whittier and points in Orange County. From the church they drove south on 18th Street, made a left-hand turn onto Whittier Boulevard and entered the lane nearest the south curb. After going east one block and passing Vail Street, the car driven by appellant suddenly loomed ahead of them going west in their lane of travel. In order to avoid collision, Mr. Frisch turned to the left whereupon the rear portion of the right side of his automobile was struck by appellant's car. As a result of the collision the boys sustained serious injuries—either broken limbs, contusions or laceration of face and leg—and Mr. Frisch sustained compound skull fractures and laceration of face and leg and at the time of the trial, June 17, 1952, was still hospitalized in the mental ward of the Veterans' Hospital and did not testify.

Appellant contends there was no basis for his conviction other than inferences. Such is not a fair appraisal of the proof. Ronnie Davis testified that on leaving the Boy Scout meeting at the church, they drove south to Whittier Boulevard, turned left and traveled in the southernmost lane of the boulevard until the collision. While he could not name the street on which they traveled south, he identified two establish-

ments on Whittier Boulevard which definitely proved that their travel on the boulevard commenced at 18th Street, one block west of Vail. Ronnie testified that when he saw the two headlights of an automobile approaching him in their lane of travel, he braced himself. His testimony was corroborated by that of Sergeant Mullins of the Marine Corps who was driving westward along the boulevard in the lane by the center line when he observed taillights of an automobile on his left and about 150 yards ahead of him at about Vail street. On arriving at Vail he saw the two automobiles which had crashed and the bruised bodies of Mr. Frisch and one of the boys lying on the ground. The sergeant approached appellant still seated behind his wheel. In answer to an inquiry as to whether he was all right, appellant mumbled incoherently, "How are you, buddy?" His breath had the odor of alcohol. When the police car arrived and appellant was removed from his automobile, Mullins saw that he was staggering, but observed that he had suffered no injuries in the collision. It was the opinion of Sergeant Mullins and of the police who arrested appellant that he was under the influence of liquor. In answer to an inquiry as to whether he had been drinking whiskey, beer and wine, he said, "everything." He stumbled as he left his automobile and staggered as he walked to the police car some sixty feet distant. At the trial appellant stated that he had worked a long day, stopped to visit friends and previously had had three drinks of whiskey and soda.

[1] In fact, appellant makes no serious contention with reference to his intoxication, but bases his right to a reversal on the ground that there was no definite evidence that his vehicle was on the left side of the highway when it struck that of Mr. Frisch on its right-hand side. He contends that *he* was driving easterly on Whittier Boulevard and that Mr. Frisch going west on the same highway made a sudden left turn resulting in the collision. Such contentions were rejected by the jury which apparently concluded from the testimony of Sergeant Mullins and Ronnie Davis that the collision took place just east of Vail and in the southernmost lane of the highway, and that the

Frisch car was the one going east. By the jury's adoption of the evidence of such witnesses and that of the police officers who found the Frisch car upon the sidewalk on the south side of the boulevard, the prosecution had sustained the burden of proof. Inasmuch as appellant was driving on the left-hand side of the road just before the accident, an unlawful act, *People v. Tucker*, 88 Cal.App.2d 333, 198 P.2d 941, he was properly accused and convicted of violating section 501, *supra*.

[2-5] The fact that the defense introduced evidence which furnished a sharp conflict with that presented by the prosecution does not make appellant any the less guilty so long as he was disbelieved and the testimony of the witnesses for the people was accepted. This court is bound by the factual determination made by the jury on substantial evidence, and approved by the trial judge. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. There were other facts proved from which inferences favorable to the judgment might reasonably have been drawn. The boys resided south of the boulevard. To reach their homes it was a natural and logical course for Mr. Frisch to pursue the route described by Ronnie. Also, appellant's car was in the south lane prior to the collision, and it was there afterwards. The facts that it was facing southwest, stood 25 feet from Vail and that the Frisch car came to rest on the sidewalk at the southeast corner of Vail have just such evidentiary value as the jury chose to attach to them. When two automobiles crash on a wet pavement, the distance and direction of their subsequent movements depend upon the respective speed, power and weight of the cars, the amount and nature of surface debris, and the smoothness or roughness of the street surface. But howsoever the jury might have reasoned, it is clear that their logic was too sound to accept appellant's narrative that while he was going east his radiator was broken in by striking the right side of an automobile as it turned to the left and his vehicle wound up after a 180-degree spin to the east of the one he had struck in its turning. It is far more rational to reason as the jury did: appellant was traveling west in the south lane; his

front end collided with the car of Mr. Frisch and was damaged in the radiator as Mr. Frisch attempted to avoid the impact by turning whereby he exposed the right rear of his vehicle. It is not reasonable that appellant's car would have landed 25 feet east of Vail street headed west if the Frisch car had turned in front of him at the intersection of Vail and Whittier. The physical facts indicate that appellant's automobile was heavier than that of Mr. Frisch. Appellant's contention that the legal presumptions establish his innocence is a vain effort to immunize himself by an odor of legality. Such presumptions are rebutted by positive evidence and the jury exercised its prerogative of choosing the evidence it preferred to rely upon, *People v. Tucker*, *supra*, and its choice was not unreasonable.

Refusal To Reduce The Crime Not Error

It was not error for the trial court to refuse to reduce the crime defined by section 501 of the Vehicle Code to that defined by section 502. Section 501 makes it a felony for a person under the influence of intoxicating liquor so to drive a vehicle as to violate the law or to neglect a duty imposed by law and thereby proximately cause bodily injury to another person. Section 502 makes it a misdemeanor for any person "under the influence of intoxicating liquor to drive a vehicle upon any highway." Appellant conceives that his only fault lay in driving on the highway while intoxicated and that, therefore, the court was obligated to reduce his crime to a violation of section 502. He bases such contention upon section 1181, subdivision 6, of the Penal Code which provides that "if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the judgment accordingly * * *."

[6-8] The answer to appellant's demand is two-fold: First, the evidence shows that he was guilty as charged of injuring four other persons while driving drunk and on the left side of the highway; second, the statute is merely permissive. Moreover, this court is powerless to interfere with the court's order denying the motion for a new

trial unless the record clearly shows that as a matter of law the evidence excludes the greater offense. *People v. Odle*, 37 Cal.2d 52, 58, 230 P.2d 345; *People v. Thomas*, 25 Cal.2d 880, 905, 156 P.2d 7. By reason of the substantial evidence of appellant's having driven on the left side of the highway and injured other persons, it is not within the power of this court to ignore such evidence and to act solely upon the admissions of appellant. *People v. Newland*, *supra*.

No Prejudice Suffered by Virtue of Judge's Comment on the Evidence

In the course of the trial in reply to inquiries made by a juror who had said "that the Hill car was more or less going southeast, more or less sliding," the court replied, "Well, if I understand the officer correctly, counsel—correct me if I am in error—the indication was that those marks—the they referred to as centrifugal skid marks—ran from about the curb to where the car was stopped; indicating that the car was moving in a southeasterly direction at the same time it made those marks or scrapes on the sidewalk. * * * I see what your trouble is. Anything I may say, you will regard, of course, as just an effort to help you. You as jurors will have to arrive at your final conclusion. I think we can draw a reasonable inference, since the right side of the Frisch car was hit, that in some manner the cars were in such a position that the car of Mr. Hill did hit it on the right side. One of the other possible inferences we can draw is that when two objects come into collision that one object may be compelled to stop; in other words, be stopped by coming into collision; and the light object which is struck will drive ahead. * * * All we can do is to use our best judgment and reasoning, keeping in mind cars sometimes, when they are struck, do peculiar things. In other words, we don't know at the present time a lot of things which you and I would like to know which we probably can't find out during the course of this trial as to whether the Frisch car had any motive power, whether the wheels were turning and causing it to go in some direction, whether it stopped, whether it went sideways, or forward, or how it got there; may have

caromed around in almost any position imaginable.

"The Juror: That was one of the reasons—if they were turning east off of Vail, it would clarify it to me, more of a chance to hit it on the right-hand side during the course of the turn.

"The Court: It would depend upon a number of other things. We have to consider as possibilities, we don't have any evidence of it, but when we are relying upon a case in which we are limited as to evidence, we have to rely more or less on the circumstances and those things which naturally and reasonably happen; that is, it might be possible if you or I were driving a car and you saw headlights suddenly loom ahead of us we might turn our car one direction or another, might be struck on the lefthand side—those are possibilities, as to which we have no proof at all. * * *

[9-12] Appellant contends that such comments constituted an irreparable prejudice to his cause. There is no basis for such contention. During the entire colloquy between the juror and the judge there was no objection made by appellant; neither did he assign any remarks of the court as prejudicial, nor did he ask them to be stricken and the jury to be admonished to disregard them. When a litigant deems the comments of a court to be unwarranted, it is his duty promptly to object in order that the trial court may correct its error, if any. *People v. Gosden*, 6 Cal.2d 14, 27, 56 P.2d 211; *People v. Ottey*, 5 Cal.2d 714, 721, 56 P.2d 193. By reason of his silence he waived his right to a review of the court's action on appeal. We may observe, however, that nothing was said by the judge in his answers to the inquiries of the juror that is not authorized by section 19 of Article 6 of the Constitution which provides that the court may make such comment on the evidence and the testimony and credibility of a witness as it may deem necessary for the proper determination of the case. There is no suggestion as to how appellant might have been prejudiced by the court's comments. Finally, this appeal is not from the judgment, but from the order denying the motion for a

new trial. At the time of his motion, appellant did not specify as a ground for his motion that the court had prejudiced him by comments upon the evidence. He thereby waived his right to have it considered on appeal. *People v. McCoy*, 71 Cal. 395, 398, 12 P. 272; *People v. Johnston*, 37 Cal.App. 2d 606, 609, 100 P.2d 307.

The order denying the motion for a new trial is affirmed.

McCOMB and FOX, JJ., concur.



117 Cal.App.2d 175

PEOPLE v. COLLINS.

Cr. 4918.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1953.

Rehearing Denied April 15, 1953.

Hearing Denied April 30, 1953.

Defendant was convicted in Superior Court, Los Angeles County, Harry J. Bordé, J., of two counts of assault with a deadly weapon, burglary in the first degree, and grand theft, and he appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Assault and Battery $\hookrightarrow$ 92

Evidence sustained conviction for assault with a deadly weapon.

2. Burglary $\hookrightarrow$ 41(1)

Evidence sustained conviction for burglary in first degree.

3. Larceny $\hookrightarrow$ 65

Evidence sustained conviction for grand theft.

4. Criminal Law $\hookrightarrow$ 741(1), 742(1)

Weight to be given testimony and credibility of witnesses is matter for jury.

5. Criminal Law $\hookrightarrow$ 1159(2, 4)

Jury's finding upon weight to be given testimony and credibility of witnesses cannot be set aside on appeal unless it can be

shown that there was no evidence which as a matter of law would justify the conviction.

6. Criminal Law $\hookrightarrow$ 1165(1)

Even if there were an unreasonable delay in presenting defendant before magistrate, delay was not prejudicial, where trial was without event that might have arisen from such delay. Pen.Code, § 825.

7. Criminal Law $\hookrightarrow$ 1144(9)

Delays that occurred and continuances that were granted at preliminary hearing would be presumed to have been with defendant's consent, in absence of proof to contrary.

8. Criminal Law $\hookrightarrow$ 1166(1)

Errors committed by examining magistrate, if any, cannot constitute reversible error on appeal, for reason that they could not affect the jurisdiction of the superior court, after defendant's due and prompt committal.

9. Criminal Law $\hookrightarrow$ 576(6)

Where defendant's committal was signed on March 5, and information was filed on March 20, interval did not constitute an unreasonable delay. Pen.Code, § 809.

10. Criminal Law $\hookrightarrow$ 1044

Even if filing of information against defendant was unreasonably delayed, defendant's complaint thereof would have been lost on appeal by his failure to present motion in trial court for dismissal of action. Pen.Code, § 809.

11. Burglary $\hookrightarrow$ 18, 24

Burglary information need not allege time or degree of the offense.

12. Assault and Battery $\hookrightarrow$ 78

In prosecution for assault with deadly weapon, information need not allege the type of weapon used by accused.

13. Indictment and Information $\hookrightarrow$ 133(7)

Where information for assault with deadly weapon was filed without alleging type of weapon used, defendant's remedy was to move for a dismissal, based upon evidence or lack of it before the examining magistrate.

14. Criminal Law Ⓒ1114(1)

Matters not in record cannot be considered on appeal.

15. Criminal Law Ⓒ1128(2)

Unsworn statements of defendant as to purported occurrences which were not before trial court for consideration cannot be reviewed on appeal.

16. Criminal Law Ⓒ641(4)

Court was not obliged to force defendant to accept service of other counsel after defendant's unjustifiable refusal to permit deputy public defender to conduct his trial.

17. Constitutional Law Ⓒ268

Where deputy public defender, on his own motion, was relieved from representing defendant after defendant unjustifiably refused to permit him to conduct trial, and defendant gave no indication that he desired appointment of other counsel but displayed an apparent zeal to act on his own behalf, defendant could not complain on appeal that court's failure to appoint other counsel constituted a denial of due process of law.

18. Criminal Law Ⓒ1137(8)

Where defendant requests permission to conduct his own trial, he cannot complain of court's failure to appoint counsel for him.

19. Criminal Law Ⓒ1166½(12)

Statements of court in explanation of effect of prior conviction charge included in information against defendant, made in pre-trial conference with defendant and prosecuting attorney, in chambers and outside hearing of jury, offered no basis for claim of prejudice.

20. Criminal Law Ⓒ1202(4)

Defendant was not entitled to have separate jury impaneled to try his alleged prior conviction, but prior conviction charge was determinable solely as one of issues in trial for the new offense.

21. Criminal Law Ⓒ1032(1)

Where no objection was made at trial to inclusion of prior conviction along with new offenses charged in the information, inclusion was not subject to review.

22. Criminal Law Ⓒ1169(3)

Where entire record disclosed sufficient proof of defendant's guilt without testimony

of fingerprint expert, it was immaterial whether such testimony be included.

23. Criminal Law Ⓒ1122(5)

Where no part of instructions were included in record, defendant's complaint on appeal that court failed to instruct jury on expert testimony could not be considered.

24. Criminal Law Ⓒ1169(1)

Where ownership of automobile in which defendant attempted to escape was sufficiently proved in defendant without resort to defendant's application for registration certificate, admission of certified copy of registration, without proof that document bore defendant's signature, was not prejudicial, since defendant did not testify with reference to his signature thereon.

25. Criminal Law Ⓒ1036(1), 1044

Where no objection was made to admission of exhibit, and no motion made to strike it from evidence, complaints of its admission, made upon appeal, were too late.

26. Criminal Law Ⓒ1115(1)

Statements of defendant on appeal were insufficient to indicate that he was denied process to compel attendance of witnesses.

27. Criminal Law Ⓒ1122(5)

Instructions not before court on appeal could not be considered.

28. Criminal Law Ⓒ304(2)

That three o'clock in the morning is nighttime in California's latitude, is a subject of judicial notice.

29. Criminal Law Ⓒ1030(1)

Assignments of error for which no basis was laid by appropriate and timely objections, could not be argued on appeal.

John Collins in pro. per.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by information of five felonies: (1) assault with a deadly weapon with intent to commit murder upon Joseph Burger; (2) burglary of the home

of Joseph and Lillian Burger; (3) robbery of Joseph Burger by taking a \$2,000 ring from his person; (4) grand theft by taking \$19,000 worth of jewelry and money from Joseph and Lillian Burger and (5) assault with a deadly weapon upon Lillian Burger. In addition thereto, it was charged as to each count that appellant had been convicted in a county court of New York State of robbery and had served a term of imprisonment therefor in the state prison. Being without funds, a deputy public defender was appointed to defend him, but after about one month's service was relieved of the assignment and appellant thereafter represented himself. A jury found him guilty of (1) assault with a deadly weapon, a lesser included offense, (2) burglary in the first degree, (4) grand theft, and (5) assault with a deadly weapon, but not guilty of robbery (count 3). He was found to have suffered a prior conviction of a felony and a term of imprisonment. Probation was denied and he was sentenced for the term prescribed by law on all four counts of which he stood convicted, the sentences on 1 and 2 to run consecutively, and count 4 to run consecutively to counts 1 and 2; and count 5 to run consecutively to counts 1, 2 and 4.

On this appeal reversal is demanded on the grounds of insufficiency of the evidence; irregularity in the arraignment; denial of due process of law; errors in the rulings of the court at the trial.

Evidence Sufficient

Joseph Burger is an auctioneer. He and his wife Lillian arrived at their home about 12:30 a.m. February 18, 1952. They brought two suit cases of diamonds, watches and money. Mr. Burger had been working with jewelry for more than 35 years and was familiar with values of his merchandise. They retired about one in the morning. Mrs. Burger was awakened about 3 a. m. to find her head in pain and herself on the floor, evidently caused by the strange man then beating her husband. She made her escape to the home of Mr. Buckridge, a neighbor who immediately called the police, then went to the Burger home and found it in a state of confusion and blood on the wall. One screen was propped open with a

pillow. The ambulance took the Burgers to the hospital where they were confined for two weeks. They were examined by three physicians. Mr. Burger had multiple scalp lacerations, ecchymosis and swelling on face and over his shoulders, right forearm, left wrist, left foot and right knee. His nose, his jawbone and his zygoma had all been fractured. The wounds on his head were deep and multiple and in the opinion of the physicians had been caused by the application of external force. The injuries to Mrs. Burger were similar. She had blood in the left eye and a zygomatic fracture, and suffered injuries to her neck, hip, right foot and lower spine, all of which had been caused by the application of considerable external force.

The instrumentality used by the assailant is identified by the fact that Mrs. Burger had standing on her dining room table a pair of silver candlesticks. At the time of the trial one of them bore a reddish brown stain.

No one had been given permission to enter the Burger home. About two weeks prior to the burglary, the maid in the household saw appellant near the garage about 8 o'clock in the evening and again at 10 p. m. On February 16 he called to collect papers.

As soon as the alarm reached the police, patrol officers Lacher and Randolph proceeded toward the Burger residence. Two blocks west of there they saw the parking lights of a sedan. As the officers approached it, a man came from behind, entered the front seat and drove rapidly toward the patrolmen. Officer Lacher turned on his red rights and headed straight toward the sedan, but by a sudden burst of power it drove around them. The officers made a U-turn and began the chase. Officers Giroux and Niedewski, hearing the broadcast, joined in the pursuit. The elusive sedan going at a speed of about 55 miles per hour failed in making a turn and struck a signal light standard. As Officer Lacher drove straight to the sedan he saw appellant jump out and run. He was captured about 50 yards away. He wore blue trousers, a beige knit sweater and was without shoes.

The trunk compartment of the sedan opened in the crash and a suit case had fallen to the pavement and lay open. It contained diamond rings and a canvas sack with money. The suit case which remained in the trunk compartment contained watches in boxes. These were the suit cases which had been taken from the Burger residence.

Officers Giroux and Niedewski visited the Burger residence. They found the bedroom disarranged and spattered with blood, some soil on the floor and a broken urn. Also, Giroux found the shaft of a candlestick lying opposite the living room door with a reddish brown substance which was found to be human blood by Mr. Ray Pinker, technical director of the scientific crime investigation laboratory of the Los Angeles Police Department. Also, he found the sweater and trousers of appellant had human blood on the cuff of the sweater and on the front of the left trouser leg. He found that the five waddings of cotton contained human blood. The waddings had been used with water by Officer Jones to remove the stains from defendant's hands, wrists and right foot.

Officer Jones visited the Burger residence at 1 p. m. He found stains of dried blood from the doorway into the bedroom. They seemed to terminate at the northeast corner of the bedroom next to the bed where there was dry blood, pieces of broken pottery, dirt, and glass—apparently from a mirror. He found a blue coat button under the bed similar to that found by Officer Giroux. He found a hole in the screen which was open in the den, and a bookcase pushed away from the window.

The fingerprint experts of the Los Angeles Police Department identified a photograph of a partial palm print taken from the window sill in the Burger's den as that of appellant. It was identical with the impression obtained from the defendant at the Venice jail on February 21 in twenty points. Only ten points of similarity are essential to a satisfactory identification. Fingerprint impressions of the defendant were identical with the fingerprints forwarded from a New York prison as being the prints of John William Collins.

Appellant gave rambling, fantastic and unconvincing testimony of his movements on the morning of February 18. His statement that he had been beaten and kicked in the face and stomach when arrested was refuted by the police officers to the satisfaction of the jury. Also, Dr. Miller, a licensed physician, examined appellant at 5:40 a. m. on February 18 and found that no clothing had been removed, no evidence of physical injury appeared, but appellant lay writhing, moaning and unresponsive to questions. On February 26 appellant was examined by Dr. Grover Christensen, a licensed physician and surgeon, who found no evidence of the defendant's having been beaten on the face or head or abdominal wall.

[1-5] From the foregoing facts there could be no reasonable doubt of the guilt of appellant. The weight to be given to the testimony and the credibility of witnesses are matters for the jury and their finding upon such matters cannot be set aside on appeal unless it can be shown that there was no evidence which as a matter of law would justify the conviction. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836. The asserted inconsistencies in the testimony such as Mrs. Burger's statement that the burglar wore heavy shoes with which he kicked her, the finding of a hat in the Burger bedroom of the size 7¼ whereas defendant claims to have worn size 7, are petty criticisms of the record and do not affect the general finding of the jury as to the sufficiency of the evidence generally to support the conviction.

Due Process Not Denied

[6-10] Appellant makes a number of assignments involving due process. He contends that at the time of his arrest he was beaten by the officers to force him to sign a confession and he complains that there was a delay in taking him before a magistrate for hearing. There is no proof in the record of any delay in bringing him before the committing magistrate or in the filing of an information. On February 27 his preliminary examination was continued to March 5 on which day the commitment was

signed. But conceding appellant's contention as to a delay in presenting him before the magistrate, Penal Code, sec. 825, no prejudice appears to have been suffered thereby. His trial in the superior court was without event that might have arisen from a delay in presenting him to the municipal judge. *People v. Stroble*, 36 Cal.2d 615, 626, 226 P.2d 330, affirmed, *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872. All delays that occurred and all continuances that were granted at the preliminary hearing are presumed to have been with appellant's consent in the absence of proof to the contrary. Moreover, errors committed by the examining magistrate, if any, cannot constitute reversible error on appeal for the reason that they could not affect the jurisdiction of the superior court, after appellant's due and prompt committal. *People v. Stuckrath*, 64 Cal.App. 84, 87, 220 P. 433. Neither was there any delay in the filing of the information. The commitment of appellant was signed on March 5; the information was filed on March 20. Penal Code, sec. 809. But if there were any merit in appellant's complaint on this score, it would have been lost by his failure to present a motion in the superior court for a dismissal of the action. *People v. Ganger*, 97 Cal.App.2d 11, 12, 13, 217 P.2d 41.

[11-13] Appellant contends that the information does "not aver that the alleged burglary was committed in the nighttime" which he says is an essential fact to constitute a first-degree burglary. Also, he urges that it was necessary to allege the size, type or name of the weapon used in committing the assaults with a deadly weapon. It is not necessary to allege the time or degree of the burglary. *People v. Walsh*, 75 Cal.App. 434, 435, 436, 243 P. 31. Neither is it essential to allege the type of weapon used by the accused. *People v. De La Roi*, 23 Cal.2d 692, 697, 146 P.2d 225, 151 P.2d 837. However, after the information had been filed without alleging the type of weapon used in the assaults made, appellant's remedy was to move for a dismissal of the two counts for assault with a deadly weapon, based upon the evidence or lack of it before the examining magistrate.

[14-18] Appellant complains that a deputy public defender was appointed to represent him; that in his consultation with the lawyer, the latter undertook to persuade him to plead guilty; that when the deputy declined to act unless appellant would abstain from examining the witnesses, the officer on his own motion was relieved from further representing appellant. The latter now complains that the court did not offer to appoint other counsel and that such conduct is a denial of due process of law. In support of his proposition appellant cites discussions with the deputy that are not a part of the record. They cannot therefore be considered. *People v. Ruiz*, 103 Cal. App.2d 146, 149, 150, 229 P.2d 73. Unsworn statements of appellant as to purported occurrences which were not before the trial court for consideration cannot be reviewed on appeal. *Ibidem*. But even if the record warranted an inquiry into the alleged refusal of the court to appoint a second attorney to conduct the defense, how could it be known that any other lawyer would have accepted the task? It has been judicially declared that the public defender of Los Angeles County and his staff have higher than average ability in defending criminal actions. *People v. Adamson*, 34 Cal.2d 320, 333, 210 P.2d 13. As to the "refusal" of the trial court to appoint another lawyer to represent appellant, the court was not obliged to force appellant to accept the service of other counsel after his unjustifiable refusal to permit the deputy public defender to conduct the trial. Relative to his complaint that the court refused to appoint other counsel, it is pertinent to observe that on the very first day of the trial the judge said to appellant, "You refused counsel, and I tried to talk you into having counsel and if you had counsel you would know how to go about this. * * * I was trying to do my best to have you to have counsel and you refused it * * * that is why I told you before you should have an attorney and that is why I tried my best to get you to have an attorney * * * this is a serious charge that is against you and I tried to insist on your getting an attorney. * * *" In reply thereto appellant gave no indication that he desired the appointment of counsel

but displayed an apparent zeal to act on his own behalf. From such record it is clear that appellant's complaint suggests no ground for reversal. Where a defendant requests permission to conduct his own trial, he cannot complain of the court's failure to appoint counsel for him. *People v. Acosta*, 114 Cal.App.2d 1, 249 P.2d 316.

[19] Assignment is made of the court's conduct in conferring with appellant and the prosecuting attorney in chambers before the commencement of the trial. Such conference was not a part of the "trial." On the contrary, it was a conference with a view to abbreviating the trial and of minimizing the detriment that might be suffered by appellant in the event he should insist upon his denial of a prior conviction. In that conference the court explained that if appellant denied the prior conviction, the district attorney might refer to it at any time during the trial, but if appellant admitted it, the prosecutor could question appellant about it only in the event appellant should take the witness stand and that there was no compulsion for him to testify. "If we go to trial," said the judge, "with the way the record is with a denial of the prior, he has a right to tell the jury that you suffered a prior conviction for robbery in the state of New York in 1933, so you have got to make up your mind before you go to trial." Such statement of the judge was outside the hearing of the jury. No prejudice was caused by such remarks, nor is there any basis for the claim of prejudice suffered.

[20] In this connection appellant contends that he should have had a separate jury impaneled to try his alleged prior conviction. Such is not the law. "The whole spirit and intent of these statutes appear to be that a prior conviction charge is to be determined solely as one of the issues in the trial for the new offense." *People v. Ysabel*, 28 Cal.App.2d 259, 263, 82 P.2d 476, 478.

[21] Moreover, no objection was made at the trial to the inclusion of the prior conviction along with the new offenses. Hence, it is not a subject for review. *Peo-*

ple v. Acosta, supra, 114 Cal.App.2d at page 1, 249 P.2d 316.

Rulings at the Trial

[22] Appellant assigns as error the testimony of Officer Bergman, asserting that it was vague and that it fails to prove that the palm prints as shown by the two exhibits were made by the same palm. An examination of the testimony of the officer fails to disclose any inconsistency or lack of intelligent observation on the part of the witness. The 20 points of similarity between the palm print found on the window sill and appellant's palm print are conclusive, but inasmuch as the entire record discloses sufficient proof of appellant's guilt without the testimony of Officer Bergman, it is immaterial whether such testimony be included.

[23] As to appellant's complaint that the court failed to instruct the jury on expert testimony, the answer is that no part of the instructions are included in the record.

[24, 25] Assignment is made of the admission in evidence of a "purported written application" of defendant for a registration certificate without proof that the document bore the signature of appellant. Thereby he contends the prosecution failed to prove his ownership of the car that was wrecked by appellant on the morning of the crimes. Ownership was sufficiently proved without resort to the application for a registration certificate. Officer Lacher testified that defendant was driving the automobile bearing number 1 T 20081. When the certified copy of the original registration of the car bearing such number was introduced, appellant called into question the signature on that instrument. The trial judge held the document admissible as a public record. Since appellant did not testify with reference to his signature thereon, no prejudice could have resulted from the admission of the exhibit. No objection was made to it, and no motion was made to strike it from the evidence. His complaints in this court are therefore too late.

[26] Appellant complains that he was denied process to compel attendance of witnesses. He says that he "asked the doctor

to find out the name of the nurse and give it to the court so she could be subpoenaed"; that the court promised to give the subpoena to the sheriff, but, instead, the subpoena was given to appellant for delivery to the sheriff. He asked the guards to deliver it to the sheriff and they refused to do so. Nothing is contained in the statements of appellant to indicate that he was denied process to enforce the attendance of witnesses. Matters outside the record may not be considered. *People v. Ruiz*, supra.

No Error in Instructions Shown

[27] Complaint is made of the court's not giving instructions with reference to burglary and deadly weapons. Since the instructions are not before the court, they cannot be considered.

[28] Appellant's claim that there is no proof that the burglary occurred in the nighttime and that the weapon was not introduced overlooks the facts that the testimony of the witnesses proves that the burglary and the assault occurred about three o'clock on the morning of February 18, and that a number of witnesses testified that Mr. and Mrs. Burger were struck with an instrument sufficiently heavy to cause fractures of their bones. Whether such injuries were caused by a bludgeon imported by appellant or by the silver candlesticks from the dining room table, the jury found that the Burgers were struck with deadly instruments. That three in the morning is nighttime in this latitude is a subject of judicial notice.

No Misconduct of the Court

[29] Complaint is made that the court interfered with appellant's efforts in conducting the trial. The court was occupied with requiring appellant to ask questions in an orderly fashion, in rejecting improper offers of immaterial evidence and in trying to prevent repetitions. All such conduct was the normal effort of a wise and efficient jurist in enforcing a procedure designed to develop the truth. Appellant may not now argue the demerits of the court's admission of photographs of the accident after his failure to object at the trial; nor attempt to persuade this court of the error in

allowing a witness to complete a hearsay answer before excluding it. Those rulings were made without an objection by appellant. These and other similar assignments are hopelessly futile because no basis for them was laid by appropriate and timely objections.

Judgment affirmed

McCOMB and FOX, JJ., concur.



117 Cal.App.2d 237

MASLOW v. MASLOW.

Civ. 19413.

District Court of Appeal, Second District,
Division 3, California.

April 9, 1953.

Action by wife for annulment of marriage on ground that husband fraudulently induced her to consent to marriage by representing that he desired to have children with her. The Superior Court of Los Angeles County, Allen W. Ashburn, J., following trial in default of husband, rendered judgment denying annulment, and wife appealed. The District Court of Appeal, Vallée, J., held that under circumstances revealed, whether wife had been defrauded, or had condoned any such fraud, was question for trier of fact.

Judgment affirmed.

Shinn, P. J., dissented.

1. Marriage ☞

One of the prime purposes of matrimony, by the laws of nature and society, is procreation.

2. Marriage ☞

Implicit in the marriage contract is the representation that the parties will have normal and natural marital relations and that they will not do anything which will frustrate the normal and natural result of those relations.

3. Marriage ⚭34

Where one spouse before marriage makes express or implied promise to have normal and natural marital intercourse which might result in birth of children, without any intention to keep the promise, such action is sufficient fraud to void the marriage.

4. Marriage ⚭34

When, after marriage, one spouse uses contraceptives and other spouse does not object, it may be inferred that this is what latter spouse expected, or that he or she is not the victim of misrepresentation; but the duration of the practice and the moral standards of the parties are factors to be considered in drawing such an inference.

5. Marriage ⚭34

When one spouse promptly objects to use by other of contraceptives, and shows his or her resentment by refusing further intercourse under such conditions, court may reasonably conclude that objecting spouse has been defrauded; but when spouse only mildly objects and continues restricted intercourse for period of time and then claims fraud, court is justified in concluding that he or she is not victim of fraud.

6. Marriage ⚭34

Subsequent failure of spouse to fulfill express or implied prenuptial promises does not necessarily establish that such spouse had no intention of performing marital obligations at time marriage was performed.

7. Marriage ⚭60(7)

An admission by a defendant in an annulment action should be received with particular caution in order to be sure that parties are not by collusion seeking to annul a marriage in fact valid.

8. Marriage ⚭59

When parties have voluntarily cohabited as husband and wife with full knowledge of facts constituting fraud on the part of one of them, the right to annulment is lost. Civ.Code, § 82.

9. Fraud ⚭50

The presumption is against fraud and is not overcome by shadowy evidence.

10. Fraud ⚭58(1), 64(1)

Proof of fraud must be clear, convincing, and satisfactory to the court, and whether evidence is clear and convincing is primarily a question for trier of fact.

11. Appeal and Error ⚭996

Where evidence will support different inferences, choice of inferences is for trial court, and its finding, based on inferences drawn, cannot be disturbed on appeal.

12. Appeal and Error ⚭994(3)

The trier of fact is the exclusive judge of the credibility of the witnesses, and is free to disbelieve and reject testimony of witnesses even though they are uncontradicted and unimpeached. Code Civ.Proc. § 1847.

13. Marriage ⚭60(7)

Rules relating to the proof of fraud, to the choice of inferences raised by the evidence, and to the weight to be given testimony of witnesses, apply with particular emphasis to action for annulment, since state is silent but active third party to every action to dissolve marriage, and is interested in seeing to it that no marriage is declared void as result of fraud or collusion and that statutory grounds on which annulment is sought actually do exist.

14. Marriage ⚭58(1)

Annulment of a marriage is not a relief granted promiscuously as a matter of right.

15. Marriage ⚭60(8)

In action for annulment of marriage, where plaintiff wife alleged husband fraudulently induced her to consent to marriage by representing that he desired to have children with her, but claimed not to have discovered such fraud until after more than six months of marriage during which husband consistently refused marital intercourse without use of contraceptives, whether she had in fact been defrauded, or had condoned any such fraud, was question for trier of fact.

David Silverton, Los Angeles, for appellant.

No appearance for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment denying her an annulment of her marriage to defendant. The complaint alleged that defendant, for the purpose of inducing plaintiff to consent to the marriage, falsely and fraudulently represented to plaintiff that he desired to have children with her and to raise a family; she believed the representations; if they had not been made she would not have consented to the marriage; the representations were false in that defendant did not intend to have children with her; and defendant "at no time had any intention of raising a family or having children with the plaintiff." Defendant defaulted.

The parties were married August 17, 1951, and separated March 30, 1952. The evidence consisted of the testimony of plaintiff and her mother. Plaintiff testified;

"Q. Will you please tell the court the circumstances under which you separated. A. Well, I had an argument with Walter, my husband, and that was about raising a family and having children. He didn't want a family and I did and I told him I wanted to start having one and he says that he doesn't intend to and he never intended to. I asked him whether he felt that way before we were married and he said he did. So, I asked him why he married me; why he didn't tell me that before we were married. He said, 'Well, if I told you I knew that you wouldn't marry me.' And that was it.

"Q. If you had known of his intent in that regard, would you have married him? A. No, I wouldn't.

"Q. After you learned of that intent, did you continue to live with him? A. No.

"Q. Did you feel that that was a very vital thing to your marriage? A. Yes.

"Q. A very vital part of it? A. Definitely * * *

"The Court: Well, you lived together for some five or six months, didn't you? A. Yes.

"Q. Have intercourse all that time? A. Not too often.

"Q. But, you did from time to time?

A. Yes.

"Q. By Mr. Silverton [Attorney for plaintiff]: Did he require the use of anything during those periods, on those occasions? A. Yes * * *.

"Q. On those occasions when you did engage in matrimonial intercourse did he require the use of a contraceptive? A. Yes.

"Q. Did he refuse to engage in such activities with you unless contraceptives were used? A. Yes.

"Q. This conversation concerning raising a family, did that arise on account of the use of such contraceptives? A. Yes."

Plaintiff's mother testified:

"Q. By Mr. Silverton: Now, did you have a conversation with your daughter when she separated from her husband? A. Yes, sir.

"Q. Where was the conversation you had with the plaintiff? A. In my home.

"Q. I see. Did she tell you of her conversation with her husband? A. Yes, sir.

"Q. And what did you do when she told you of that conversation? A. Well, I was upset and I got in touch—I believe I called their home. He was supposed to come over and have dinner with us and I called him and I was surprised to know that they quarreled and that they weren't happy together because of * * *.

"Q. Mrs. Wool, I just want you to tell me of your conversation with him after your daughter told you about her conversation. What did you say to him? A. I said, 'Walter, Eileen tells me that you never intended to have any children and is that true?' And he said, 'Yes.' And I said, 'Did you have those intentions before you married my daughter?' And he said 'Yes.' And I said, 'Well, you know that Eileen would not have married you if you did not want to raise a family and neither would we consent to it.'

"Q. What did he say? A. Well, he said he just wanted to marry her and he didn't want to make an issue of that at all. He thought she wouldn't marry him if he had said anything like that.

"Q. And what did he say to you particularly with reference to raising a family? A. Well, he told me of their personal experience, that she had tried * * * you will pardon me * * * and that he was very sore at her. He always told her to use contraceptives and that one time she sort of wanted to put it over him and he was very sore at her and that is what started their argument."

The court found that defendant did not falsely or fraudulently represent to plaintiff that he desired to have children with her; that plaintiff was not induced to consent to the marriage by said representation; that it was not true that defendant did not intend to have children with plaintiff; and that it was not true that defendant, "at no time had any intention of raising a family or having children with the plaintiff."

Plaintiff contends that on the evidence she was entitled to a decree of annulment as a matter of law.

[1-3] One of the prime purposes of matrimony, by the laws of nature and society, is procreation. Ordinary marriage relations between husband and wife is the foundation on which the perpetuation of society and civilization rests. Implicit in the marriage contract is the representation that the parties will have normal and natural marital relations and that they will not do anything which will frustrate the normal and natural result of those relations. *Millar v. Millar*, 175 Cal. 797, 803, 167 P. 394, L.R.A.1918B, 415. One spouse is defrauded when the other at the time of the marriage has no intention of having natural marital intercourse which might result in the birth of children. A promise by one spouse before the marriage, express or implied, to have children, without any intention to keep the promise, is a sufficient fraud to void the marriage. The fraud consists of the promise to have normal and natural relations without any intention of keeping the promise and with the intention to deceive the other spouse. *Millar v. Millar*, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415; *Aufort v. Aufort*, 9 Cal.App.2d 310, 49 P.2d 620; *Bruce v. Bruce*, 71 Cal.App.2d 641, 644, 163 P.2d 95; cases collected—4 A.L.R.2d 227.

[4-8] When after marriage one spouse uses contraceptives and the other spouse does not object, it may be inferred that this is what the latter spouse expected or that he or she is not the victim of misrepresentation. *Gerwitz v. Gerwitz*, Sup., 66 N.Y.S. 2d 327. The duration of the practice and the moral standards of the parties are factors to be considered in drawing such an inference. On the other hand when one spouse promptly objects to such practices and shows his or her resentment by refusing further intercourse under such conditions, the court may reasonably conclude that that spouse has been defrauded. When one spouse mildly objects but continues the restricted intercourse for a period of time and then claims fraud, the court is justified in concluding that he or she is not the victim of fraud. *Stegienko v. Stegienko*, 295 Mich. 530, 295 N.W. 252; *Witten v. Witten*, Sup., 109 N.Y.S.2d 254; *Richardson v. Richardson*, 200 Misc. 778, 103 N.Y.S.2d 219; *Schwind v. Schwind*, Sup., 99 N.Y.S.2d 108; *Riley v. Riley*, Sup., 89 N.Y.S.2d 347; *Hafner v. Hafner*, Sup., 66 N.Y.S.2d 442. Subsequent failure to fulfill prenuptial promises, express or implied, does not necessarily establish that a spouse had no intention of performing his marital obligations at the time the marriage was performed. *Bragg v. Bragg*, 219 Cal. 715, 720-721, 28 P.2d 1046; *Schaub v. Schaub*, 71 Cal.App.2d 467, 476, 162 P.2d 966. An admission by a defendant in an annulment action should be received with "particular caution" in order to be sure that parties, by collusion, are not thus seeking to annul a marriage in fact valid. *Maduro v. Maduro*, 62 Cal.App.2d 776, 780, 145 P.2d 683. When the parties have voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, right to annulment is lost. Civ.Code, § 82.

[9-13] The presumption is against fraud and it is not overcome by shadowy evidence. *Shapiro v. Equitable Life Assur. Soc.*, 76 Cal.App.2d 75, 91, 172 P.2d 725. Proof of fraud must be clear, convincing, and satisfactory to the court. 12 Cal.Jur. 832, § 81. And whether the evidence is clear and con-

vincing is primarily a question for the trier of fact. *Baines v. Zuieback*, 84 Cal.App.2d 483, 488, 191 P.2d 67; *Riesenberg v. Riesenberg*, 97 Cal.App.2d 714, 716, 218 P.2d 577. Where the evidence will support different inferences, the choice of inferences is for the trial court; and its finding, based on the inferences drawn, cannot be disturbed on appeal. *Bruce v. Bruce*, 77 Cal.App.2d 641, 644, 163 P.2d 95. The trier of fact is the *exclusive* judge of the credibility of the witnesses. Code Civ.Proc. § 1847, *Hicks v. Reis*, 21 Cal.2d 654, 659, 134 P.2d 788. The trial court is free to disbelieve and reject the testimony of witnesses even though they are uncontradicted and unimpeached. *Lohman v. Lohman*, 29 Cal.2d 144, 149, 173 P.2d 657; *Odenthal v. Lee*, 113 Cal.App.2d 666, 248 P.2d 937; *Manha v. Grass Valley Meat Co.*, 113 Cal.App.2d 773, 249 P.2d 45. These rules apply with particular emphasis to an action for annulment since the state is a silent but active third party to every action to dissolve a marriage. The state is interested in seeing to it that no marriage is declared void as a result of fraud or collusion, and that the statutory grounds on which the annulment is sought actually do exist. *Maduro v. Maduro*, 62 Cal.App.2d 776, 779, 145 P.2d 683.

[14] Annulment is not a relief granted promiscuously as a matter of right. The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression. Did plaintiff and her mother testify with the conviction and assurance compatible with truthfulness; or did either of them give testimony haltingly as though laboring under the handicap of apprehension and uncertainty; or did either of them give it glibly as though a tale learned by rote for the purposes of the courtroom? These are questions which can only be answered by the trier of fact. The court having seen and heard the parties may well have concluded that there was collusion;

that the plaintiff's testimony was a fabric of fancy and exaggeration woven to lift her from bonds now distasteful; and that the testimony of plaintiff's mother was a recital of rehearsed evidence.

[15] The trial judge found the evidence to be unconvincing and insufficient. Plaintiff testified she discovered the alleged fraud more than six months after the marriage. It is obvious from her testimony that she must have discovered it sooner. She continued to live, cohabit, and have restricted intercourse with defendant with full knowledge of the facts constituting the alleged fraud for a period of several months. Had plaintiff's eagerness for children been as real as she now claims, it is difficult to see why, in fact of defendant's persistent procrastination, she had to wait for him to put into words what his conduct so loudly proclaimed. A reasonable inference is that if she were really deceived she would not have tolerated the claimed situation for an instant. We cannot say, as a matter of law, that there was fraud; or if there was, that it was not condoned. See *Maduro v. Maduro*, 62 Cal.App.2d 776, 145 P.2d 683.

Affirmed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I dissent. There is no doubt as to the rule of law which plaintiff invokes. Anyone who is aware of the fact that it is the married people who have the children would know that one of the primary objects of marriage is the raising of a family. There is but one question on this appeal and a simple one at that. It is my understanding of the law that the courts belong to the people and that when a litigant makes out a complete case by clear, positive and credible evidence, untainted in any respect which would afford a reasonable ground for rejecting it, relief should be granted as of right. Plaintiff made out such a case. No woman in her situation could have proved a better one. If this judgment is to be affirmed it would mean that trial courts can nullify the law by denying annulment of marriages in any case by merely saying: "I am not convinced." I can-

not have a part in leaving plaintiff in the cruel position of being married to a would-be-actor (which defendant was shown to be), who cannot be bothered with children around the house. If the law has an interest in preserving the marriage relation, it should, and does, frown on pseudo marriages such as the present one in which plaintiff is an unfortunate prisoner.



117 Cal.App.2d 50

EICHHORN v. DE LA CANTERA.

Civ. 15200.

District Court of Appeal, First District,
Division 2, California.

March 27, 1953.

Action for damages for forcible eviction and conversion. The Superior Court City and County of San Francisco, Albert C. Wollenberg, J., entered judgment on a verdict for plaintiff, and defendant appealed. The District Court of Appeal, Goodell, J., held that owner, even though entitled to possession, could not forcibly re-enter premises occupied by others without having recourse to legal processes.

Judgment affirmed.

1. Forcible Entry and Detainer ☞34

In action against owner for forcible eviction from dwelling occupied by plaintiff and husband under agreement to carry on defendant's carpet cleaning business during her absence on vacation and make mortgage payments and pay utility bills, conflicting evidence presented a question of fact for jury as to whether such payments constituted rental and whether plaintiff and husband were tenants or licensees.

2. Landlord and Tenant ☞277(3)

Owner, even though entitled to possession, cannot forcibly re-enter without having recourse to legal processes, even though right of re-entry in case of default has been

expressly reserved in a lease, since such forcible entry tends to a breach of the peace. Code Civ.Proc. § 1159.

3. Forcible Entry and Detainer ☞5

Absence of occupant from premises at the time does not make entry by one not in possession without recourse to legal processes any the less a forcible entry and therefore unlawful. Code Civ.Proc. § 1159.

4. Forcible Entry and Detainer ☞35

In action against owner for damages for forcible eviction, instruction requested by defendant that licensee had no right without permission to change locks on structures on the land was properly refused. Code Civ.Proc. § 1159.

5. Forcible Entry and Detainer ☞35

In action against owner for damages for forcible eviction, instruction requested by defendant that if licensee occupying realty without permission changes the locks on structures so as to exclude owner, owner may break in peacefully and regain entry to the property, was properly refused, particularly where admission in answer showed that defendant did not break in peacefully. Code Civ.Proc. § 1159.

6. Appeal and Error ☞1067

In action against owner for damages for forcible eviction from dwelling, refusal to give instruction requested by defendant defining a licensee and his permissive right was not prejudicial error, where defendant admitted of record that she did break into dwelling, thereby showing a forcible entry which was just as unlawful against a licensee as against a tenant or lessee whose lease contained a provision giving landlord right of re-entry. Code Civ.Proc. § 1159.

7. Master and Servant ☞76

One occupying premises of his employer as part of his compensation has no right to continue his occupation of such premises upon termination of employment.

8. Master and Servant ☞76

An employee occupying employer's premises as part of his compensation may be evicted only by legal process and not by force, even though employment and right of occupancy have been terminated. Code Civ.Proc. § 1159.

9. Appeal and Error ⇨762

Appellate court need not consider objections to instructions raised for the first time in appellant's reply brief.

10. Trial ⇨260(6)

In action against owner for damages for forcible eviction from dwelling, plaintiff was entitled to instructions given on rights of tenant, and refusal to give instructions on licensees tendered by defendant was not prejudicial error, in view of other instructions tendered by defendant and given by court. Code Civ.Proc. § 1159.

11. Trover and Conversion ⇨1

"Conversion" consists in unwarranted interference by defendant with dominion over property of plaintiff, from which injury to plaintiff results.

See publication Words and Phrases, for other judicial constructions and definitions of "Conversion".

12. Trover and Conversion ⇨67

In action against owner for damages for forcible eviction from dwelling and conversion of plaintiff's personal property found therein, evidence that defendant, having forcibly entered premises, removed plaintiff's furniture and clothing from living quarters to basement and that such property was never returned to plaintiff entitled plaintiff to instructions defining conversion and stating the rule of damages therein. Civ.Code, § 3336.

Henry J. Kleefisch, San Francisco, for appellant.

Jerome L. Schiller, San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from a judgment in an action for damages for forcible eviction and conversion. The verdict was for \$3,300 compensatory, and \$500 punitive, damages. A new trial was denied.

Appellant owned a dwelling house at 1379 41st Avenue in San Francisco in which she conducted a carpet cleaning business. In November, 1949, she went on a vacation trip to South America and before leaving

entered into an agreement with R. H. Eichhorn, who was then respondent's husband, whereby he was to carry on the business during her absence. As part of this arrangement he was to have the occupancy of the furnished home wherein the business was to be carried on, and the use of appellant's Cadillac.

The Eichhorn family moved into the place with their furniture and personal belongings and lived there for about three months. This litigation arises out of respondent's dispossession on February 21, 1950.

As part of the arrangement the Eichhorns were to keep up the monthly payments of \$57.25 principal and interest on the mortgage and to pay the monthly gas and electric and water bills. This was done.

Appellant returned from her trip on January 21, 1950 and on February 7 received the following letter:

"Dear Mrs. Cantera:

"As per our agreement, before your departure to South America, I am relinquishing back to you, your home, 1379-41st Ave., your business, Kelly Carpet Cleaning System, located at 1379-41st Ave., and your Cadillac automobile.

"I wish to thank you sincerely for the opportunity and assistance that you have given to Mrs. Eichhorn and myself.

"Very truly yours,

"R. H. Eichhorn

"426A-24th Ave.

"San Francisco, Calif."

Eichhorn never thereafter lived at the 41st Avenue home but respondent and her 16-year-old son remained therein.

On February 8 the Eichhorns separated and 9 days later respondent sued for divorce on the grounds of desertion and extreme cruelty. At the time of the trial of this action an interlocutory judgment had been entered in the divorce case.

Although Eichhorn signed the formal relinquishment on February 7, appellant testified that he worked on through March and into April winding up unfinished business.

The evidence shows that on the afternoon on February 21 while respondent was at work and her son at school appellant re-entered the house by forcing the garage doors. Appellant's answer admits that she broke into the house. The evidence also shows that she had arranged for two men to go there that afternoon to move the Eichhorns' furniture from the upstairs living quarters to the basement, which they did, and that she removed the clothing of respondent and her son from the upstairs rooms to a closet in the basement apartment where she hung them up. It shows, further, that on that day when the son returned from school and respondent returned from work they found appellant in possession. Two police officers responded to a call by respondent and their testimony shows that although both appellant and respondent were excited, there was no physical altercation and the officers ruled that it was a civil dispute, not a police problem, and retired. Appellant testified that she told respondent that she and her son could stay that night and occupy an apartment in the basement, while respondent testified that she was told by appellant that she did not care where respondent stayed that night but that it could not be on those premises. Later the same evening respondent's son and son-in-law called and got some clothing and blankets, and respondent and her son stayed that night in her daughter's home, where respondent slept on a mattress on the floor and the son slept on a davenport, which arrangement continued for 2 or 3 weeks until respondent found an apartment.

Appellant's answer alleges that after Eichhorn "had removed from said premises and had relinquished and restored the same to defendant" the lock on the front door was changed by respondent "and because defendant was unable to enter, and was prevented from entering said premises by reason of said wrongful and unauthorized change of lock and malicious conduct on the part of plaintiff, it was necessary for her to, and she did, break into her said home and premises, as this defendant had the full right to do, and which act is the act complained of in the plaintiff's complaint." (Emphasis added.)

This plea in justification of appellant's entry without recourse to legal proceedings is based on the contention, which is appellant's principal point on appeal, that respondent's occupancy was not that of a tenant but merely that of a licensee or even a trespasser.

In this connection it appears without dispute that there was an understanding that the Eichhorns were to pay the \$57.25 monthly on the mortgage and the utility bills as well. From this the jury could have concluded that the total of these sums was intended by the parties as monthly rental. In addition to that, appellant wrote Mr. and Mrs. Eichhorn on February 5 saying: "but as you know the rent on the house at present does not even cover expenses, such as taxes and insurance, much less repairs, etc., where the house really should produce an income of not less than \$75.00 per month." In that letter she called for possession on February 22. Three days later appellant wrote respondent: "I wish to occupy that house, and unless you and Mr. Eichhorn begin to pay the sum of \$150 per month, as of February 15th, it will be necessary for me to secure the house through legal procedure." On February 13 appellant wrote respondent: "As for the house, I shall occupy it on the 22nd of February, and you may ask any attorney you desire, and he would advise you that all is required is three days, since there is back rent due from you."

Respondent testified that "we were to pay the bank loan as rent. We paid all the utilities." Appellant testified that these payments were not "rent", and gave the explanation that when she used the term "rent" she did so only as a figure of speech.

[1] This evidence pro and con, left the question as one of fact for the jury to decide, and the verdict implies the finding that the payments were rental and hence that the Eichhorns were tenants, not licensees.

[2] But wholly aside from that, it is well settled in this state that an owner cannot forcibly re-enter without having recourse to legal processes. The reason for the rule is that such forcible action tends to a breach of the peace.

As early as 1859 the Supreme Court declared in *McCauley v. Weller*, 12 Cal. 500, 524 that the object of the forcible entry law was "to prevent the disturbance of the public peace, by the forcible assertion of a private right." And the court said, also: "Questions of title or right of possession cannot arise * * *." A few years later in *Mitchell v. Davis*, 23 Cal. 381, 384-385 the court said: "One great object of the Forcible Entry Act, is to prevent even rightful owners from taking the law into their own hands and attempting to recover, by violence, what the remedial process of a Court would give them in a peaceful mode." *Voll v. Hollis*, 60 Cal. 569, 573-574 follows both the *McCauley* and *Mitchell* cases. In the early case of *Brown v. Perry*, 39 Cal. 23, 24, the court said: "The law prohibits a forcible entry, *even by the person entitled to possession*, for the reason, among others, that *it necessarily tends to a breach of the peace*." (Emphasis added.) See, also, *Knowles v. Crocker Estate Co.*, 149 Cal. 278, 285, 86 P. 715, and discussion in 12 Cal.Jur. p. 595 et seq.

Even in cases where a landlord's right of re-entry in case of default is expressly reserved in a lease, it has been held that he cannot re-enter by force. *California Products, Inc. v. Mitchell*, 52 Cal.App. 312, 314, 198 P. 646; *Calidino Hotel Co. v. Bank of America*, 31 Cal.App.2d 295, 306, 87 P.2d 923; *Igauye v. Howard*, 114 Cal. App.2d 122, 249 P.2d 558.

[3] The absence of the occupant from the premises at the time does not make the entry any the less a forcible entry. *Ely v. Yore*, 71 Cal. 130, 133, 11 P. 868.

The reason for the rule that a person cannot take the law into his own hands is just as applicable in an action such as this, for damages for forcible eviction, see *Gilbert v. Peck*, 162 Cal. 54, 59, 121 P. 315, as it is in actions for forcible entry. § 1159, Code Civ.Proc. In both instances the gist of the action is force.

[4] Appellant assigns as error the refusal of the following instruction: "A licensee on land of another has no right or authority to change locks on structures standing on the land, unless permission is granted by the owner, to so do." No au-

thority is supplied in support of such an instruction but, moreover, respondent was not being sued for changing the lock; *appellant was being sued* for forcing her entrance into the place.

[5] Error is claimed in the refusal of an instruction that "If a licensee occupying real property without permission changes the locks on the structures on the land so as to exclude the owner, the owner may break in peacefully and regain the entry to the property and in so doing commits no wrong and is not answerable in damages to the licensee." The admission in appellant's answer shows that she did not "break in peacefully". Not only is there no authority cited for this instruction, but its pronouncement that "in so doing commits no wrong" runs counter to the authorities already cited.

[6] Error is assigned in the refusal of an instruction that "A licensee is one to whom authority is granted to do an act or acts on the land of another without having an interest therein. And a licensee's right is merely permissive as long as the permission lasts." Appellant argues that the failure to give this deprived the jury of the opportunity to determine whether respondent was a tenant or merely a licensee. The failure to so instruct could not have been prejudicial error since appellant's admission of record that "she did break into her said home and premises" shows a forcible entry, and such entry, under the cases cited, would have been just as unlawful against a licensee as against a full-fledged tenant or a lessee whose lease contained a provision giving the landlord the right of re-entry.

Appellant cites *Cook v. Klenk*, 142 Cal. 416, 76 P. 57 and *Todhunter v. Armstrong*, 6 Cal.Unrep.Cas. 27, 53 P. 446. In both cases the defendant claimed a landlord and tenant relation existed which entitled him to a longer notice than the owner had given, a question not presented herein. In neither of them did the owner forcibly enter or evict the occupant but in both of them invoked the orderly processes of the law and sued for possession. They are not in point.

[7] On the theory that the Eichhorns' possession was merely incidental to the employment, several authorities are cited. In 32 Am.Jur. p. 37 the statement is found that "If a person occupies premises belonging to his employer as a part of his compensation, he has no right to continue his occupation of the premises on the termination of his employment * * *." Nobody will question that statement.

[8] The first answer is that appellant testified that Eichhorn's services did not really terminate until some time in March or April. It is true he wrote the letter of relinquishment on February 7 and never personally occupied the house after that, but it is undisputed that there was unfinished business which he had to wind up. Secondly, even under appellant's employment argument it has been held that an employee with the right to live on his employer's property cannot be evicted by force but only by legal process.

In *San Francisco and Suburban Home Building Society v. Leonard*, 17 Cal.App. 254, 262, 119 P. 405, 408, the Court said: "Indeed * * * if, under such circumstances, the plaintiff had forcibly driven Leonard from the premises and thus taken possession thereof, it would itself have been guilty of forcible entry, although it might transpire, as it has transpired, that, as a matter of legal right, it was entitled to the possession. This proposition necessarily follows from the very theory upon which or the purpose for which the forcible entry and forcible and unlawful detainer statute is enacted, viz., to secure a *judicial* adjustment of differences of that character, and thus prevent the parties themselves from redressing or attempting to redress their own wrongs which is like-

ly to lead to serious wrongs against the public or society."

Turner v. Mertz, 55 App.D.C. 177, 3 F.2d 348, 39 A.L.R. 1140, cited by appellant, is not a California case. There it was held that damages were not recoverable by the wife of one of defendant's servants, for eviction from a cottage which they were permitted to occupy. The court held that since the terms of the contract of employment were not disputed, its construction was simply a question of law for the court. Defendant contended that the servant's family were tenants by sufferance, but such a tenancy was not proved.

[9,10] In her reply brief appellant for the first time complains that the court erred in giving four instructions on the rights of a tenant, which point the respondent has had no opportunity to answer by brief because of this belated presentation. It is settled that "an appellate court is not required to consider objections to instructions raised for the first time in an appellant's reply brief" (24 Cal.Jur. p. 854). However, we are satisfied that respondent was entitled to these instructions under her theory of the case. The appellant's real grievance is that these instructions on the rights of a tenant were given, while certain instructions on licensees, tendered by appellant, were refused (as already noted) but in this connection it should be pointed out that two instructions tendered by appellant were given which, in our opinion, were more favorable to her than the law required. They are quoted in the footnote.¹

In these circumstances we repeat that there could have been no prejudicial error in failing to give the instructions on licensees.

1. "You are instructed that a person entitled to the possession of property with a right of entry to said property or lands unlawfully in the possession of another, may, during the absence of such occupant or in the presence of such occupant, peaceably and without force or violence enter said property; and having entered and obtained possession peaceably is not guilty of forcible entry or detainer for refusing to permit such occupant to enter thereafter.

"The jury is instructed that a person entitled to the immediate possession of real property has the right to enter upon his property to expel by force the intruder; and in so doing he is entitled to use all the force necessary to secure possession. Having the right to entry and exercising it, the owner would not be subject to an action for damages by one in wrongful possession, provided the owner used no more force than was necessary to dispossess him."

[11, 12] Appellant also belatedly complains of the giving of three instructions tendered by respondent defining conversion and stating the rule of damages, § 3336, Civ.Code, therein. The second count of the complaint pleaded that appellant "took into her possession and under her control the said personal property aforementioned and converted the same to her own use." This was denied, but the evidence shows that the articles of personal property which appellant admittedly moved from the upstairs living quarters (with the exception of some clothing and blankets which respondent's son and son-in-law called for) were never returned to the respondent. "Conversion consists in the unwarranted interference by defendant with the dominion over the property of plaintiff, from which injury to the latter results." *Hull v. Laugharn*, 3 Cal. App.2d 310, 315, 39 P.2d 478, 480, and cases cited; see also *Pearl v. Figoni*, 49 Cal.App. 2d 662, 122 P.2d 385. The respondent was unquestionably entitled to these instructions.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



116 Cal.App.2d 425

**MACMILLAN PETROLEUM CORP. v.
GRIFFIN et al.**

No. 15310.

District Court of Appeal, First District,
Division 1, California.

March 3, 1953.

As Modified on Denial of Rehearing

April 2, 1953.

Hearing Denied April 30, 1953.

Application by transferee of assets of corporate judgment creditor, for leave to enforce judgment. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., denied the application and transferee appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence

supported finding of transferee's lack of diligence in enforcing judgment.

Affirmed.

1. Execution ⇨73

On application by transferee of assets of corporate judgment creditor for order to enforce judgment, evidence warranted implied finding of lack of diligence of transferee to enforce judgment. Code Civ. Proc. § 685.

2. Appeal and Error ⇨533(1)

The written opinion of trial court was properly included in record on appeal and could be used as basis for implying a finding by the trial court.

3. Trial ⇨393(1)

The expression of a factual determination by the trial court in its written "opinion" did not necessarily prevent such determination from qualifying as an express finding.

4. Execution ⇨73

Where there was want of diligence by assignee of judgment creditor after assignee acquired judgment and before expiration of period during which execution would have issued as matter of right, denial of application for order enforcing judgment was not abuse of discretion. Code Civ.Proc. §§ 681, 685.

5. Execution ⇨73

Judgment creditor's assignee, who had virtually abandoned judgment and had failed to make search for assets of judgment debtor before expiration of period during which execution would have issued as matter of right, could not excuse such failure on ground that judgment debtor had no assets during such period. Code Civ. Proc. § 685.

6. Evidence ⇨220(6)

Failure of judgment debtor to testify in denial of statement in affidavit of attorney who procured judgment which judgment creditor's assignee sought to enforce, that judgment debtor, during period when execution would have issued as matter of right, had no assets or means that could have been subjected to process, did not amount to admission of such fact by judgment debtor which would excuse failure to

make search for assets before expiration of period. Code Civ.Proc. § 685.

7. Execution ⇨73

On application by assignee of judgment creditor for order to enforce judgment, wherein lack of diligence was asserted, record evidence did not establish as matter of law that judgment debtor had no assets during period when execution would have issued as a matter of right. Code Civ. Proc. § 685.

8. Judgment ⇨847

Although any diligence of judgment creditor seeking to enforce judgment would inure to its assignee, none of activities by or in behalf of judgment creditor after assignment of judgment may be used to show diligence on part of assignee. Code Civ.Proc. § 685.

9. Execution ⇨73

Under statute relating to issuance of execution more than five years after entry of judgment, creditor is entitled to execution only if, during the said five years, he proceeded with due diligence to enforcement of his judgment or in ascertaining that creditor had no property subject to levy. Code Civ.Proc. § 685.

10. Appeal and Error ⇨983(3)

Under statute relating to issuance of execution more than five years after entry of judgment, whether creditor has exercised due diligence is question for trial court and its determination will not be disturbed on appeal in absence of clear abuse of discretion. Code Civ.Proc. § 685.

Robert E. Hatch, San Francisco, Frederick W. Mahl, Jr., Los Angeles, for appellant.

Courtney L. Moore, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff has appealed from an order of May 25, 1951, denying its application under section 685 of the Code of Civil Procedure for leave to enforce a judgment of May 17, 1934, against defendant George H. Jovick.

The original plaintiff in the action was Mileage Gasoline Company, a Nevada corporation doing business in California. In 1937 Mileage Co. transferred all of its assets to Macmillan Petroleum Corporation. Mileage Co. then surrendered its license and authority to conduct business in California and voluntarily dissolved December 24, 1937.

Macmillan Petroleum Corporation did not notify Jovick, the judgment debtor, of this transfer, nor did it inform Mr. Mahl or Mr. Hatch, the attorneys who had represented Mileage Co. in this action, that the transfer had been made or that Mileage Co. had been dissolved. It did nothing whatsoever looking toward enforcement of the 1934 judgment or discovery of assets of the debtor until Mr. Mahl in the latter part of 1947 informed M. P. Macmillan, vice president of Macmillan Corporation, formerly president of the Mileage Co., that there was some possibility of collecting the judgment and asked Mr. Macmillan if he would authorize the expense that would be involved. Macmillan told Mahl he would authorize it but did not tell Mahl in what capacity he was acting.

Mr. Hatch then applied to the trial court, in the name of and on behalf of Mileage Co., for leave to enforce the judgment. An order granting such leave was made December 19, 1947. Subsequently, defendant Jovick discovered and presented proof that Mileage Co. had been dissolved. It appears that until then Mr. Hatch did not learn of the assignment to Macmillan nor of the dissolution of Mileage and that until then he acted as if no such dissolution or transfer had occurred. Hatch applied for a substitution of parties and on August 21, 1948, Macmillan Corporation was substituted for Mileage Co. as plaintiff in the action.

December 3, 1948, the trial court found and declared the orders of December 19, 1947, and August 21, 1948, void. Upon Macmillan's appeal therefrom we held the order for substitution valid and the order granting Mileage leave to enforce the judgment void. 99 Cal.App.2d 523, 222 P.2d 69. In so holding, we said: "Nothing

herein stated will prevent an application by Macmillan to the superior court for an order enforcing the judgment. On such application the assignment of the judgment by Mileage prior to dissolution, as well as any fact showing diligence on the part of Macmillan after such assignment, may be shown to the superior court." 99 Cal.App.2d at page 532, 222 P.2d at page 74. Subsequently, Macmillan did make such an application. The order denying that application is the subject of the present appeal.

[1] The facts which we have narrated, gleaned from the affidavits used upon the hearing of Macmillan's application for leave to enforce the judgment, and the inferences that reasonably may be drawn from those facts, would support a finding that the present judgment creditor exercised no diligence at all, until 1947, in enforcing the judgment. Those facts and inferences would support a finding of utter disregard and abandonment of the judgment until, ten years later, an officer of Macmillan (president of Mileage during its existence) was informed that there was some possibility of collecting.

[2] In implying this finding by the trial court, we are aided and supported by the written opinion, properly included in the record on appeal, which the Honorable Edward Molkenbuhr filed the very day that he caused the order of denial to be entered in the minutes. In this opinion, he said: "There can be no question that there was a complete failure on the part of Macmillan Corp. to show any diligence to enforce the judgment until after Mileage Co. filed its application for execution to issue in 1947, because counsel who prepared the affidavits on behalf of Mileage did not know at that time that Mileage was completely defunct since December of 1940. The affidavits did not show one iota of diligence on the part of plaintiff, Macmillan Corp. In my opinion, it was the duty of Macmillan Corp. to at least make out a prima facie showing of diligence at some time before it is entitled to an execution; it is charged with the same duty as Mileage was, namely, to make some investigation over the year concerning the col-

lectibility of the judgment. Appellant's argument that defendant did not aver whether he had leviabie assets or whether he concealed his assets is irrelevant. The statute requires that plaintiff show that it exercised due diligence. Perhaps the reason for not so doing was that Macmillan Corp. had forgotten all about the judgment and was not interested in it prior to a communication from the Los Angeles attorney in 1947."

That such use may be made of an opinion clearly appears from *Taylor v. George*, 34 Cal.2d 552, 212 P.2d 505. Having concluded that the judgment which the trial court had rendered was in itself an implied determination of a certain ultimate fact, the Supreme Court said: "The written opinion of the trial court, properly included in the record on appeal (Rule 5(a), Rules on Appeal), further supports our conclusion on that question." 34 Cal.2d at page 556, 212 P.2d at page 507.

[3] Indeed, the circumstance that the trial court's determination that Macmillan exercised no diligence prior to 1947 was expressed in a document labeled "Opinion," does not necessarily prevent it from qualifying as an express finding.

[4] This finding, whether properly deemed an express or an implied finding, is supported by the evidence. It in turn supports the order of denial, negatives any abuse of discretion by the trial judge, and compels affirmance of the order.

[5-7] Macmillan claims the record shows that Jovick had no assets during the first five-year period and, therefore, Macmillan was excused from making any search during that period upon the ground that the law does not require the doing of an idle act. This claim does not come with the best of grace from a creditor who, as the trial court found, virtually abandoned the judgment as soon as acquired in 1937 and who, after ten years of complete inattention, utter disregard and total inaction, was the recipient of unsought information that Jovick had leviabie assets. Moreover, the record is not such that a reviewing court can say as a matter of law that Jovick had no assets during any of that

first five-year period. Proof of such lack of assets, Macmillan predicates upon a statement in an affidavit by Mr. Hatch that he "is informed and believes and thereupon alleges that within all of said five year period the said Jovick was without any assets or means that could have been subjected to such process," coupled with a failure by Jovick to deny that statement. We do not see that such failure to deny amounted to an admission by Jovick. We are dealing with evidence to prove facts, not with pleadings to frame issues. Jovick's mere failure to testify on the subject added nothing to the weight of Mr. Hatch's statement, which was indeed slight, made as it was upon information and belief. That statement was predicated principally, it would appear, upon the search of San Francisco records made by Mr. Hatch in the belief he was acting for Macmillan's assignor, Mileage Gasoline Company. The record discloses that other persons discovered considerable assets belonging to Jovick in San Luis Obispo County about 1947 and in Contra Costa in 1948, in addition to the San Francisco properties brought to Mr. Hatch's attention in 1947. There is nothing in the record that would require the trial court to conclude that Jovick suddenly acquired those assets. It happens that the judgment here involved grew out of a transaction which took place in Alameda County. There is no indication that either Macmillan or its predecessor, Mileage Gasoline, conducted any search in that county. The only evidence of a search in Alameda County is in an affidavit by one Rench, another creditor of Jovick, who said that during the period 1941 to 1948 he diligently searched the records of Alameda, Contra Costa, San Francisco and San Mateo counties and was unable to locate any real property in the name of Jovick. But that is a very general statement. Rench did not specify what records he searched, nor how frequently he examined them. Looking at the whole record, we can not say as a matter of law that Jovick was without assets during the first five-year period or that the trial court committed an abuse of discretion when it denied Macmillan's ap-

plication for leave to enforce the judgment.

In so deciding, we do not undertake to pass upon the question, to which the parties have given considerable attention, whether or not the judgment creditor must show diligence beyond the five-year period immediately following rendition of the judgment. We rest our decision upon Macmillan's want of diligence after it acquired the judgment and before the five-year period expired. Its continued indifference and inaction for another eight years (until 1947) lend support to the view that its indifference, inaction, and lack of diligence were complete and absolute during the earlier period.

[8] Nor do we find it necessary to determine whether the Mileage Co. showed due diligence during the time it owned this judgment. Its diligence, if any, would inure to its successor, the Macmillan Corporation, but is of no significance in view of Macmillan's subsequent conduct. After the transfer, none of the activities of Mileage, or of Mr. Mahl or Mr. Hatch in the name and on behalf of Mileage, may be invoked as tending to show diligence upon the part of Macmillan.

[9, 10] As to the applicable provisions of law, we predicate our decision upon section 685 of the Code of Civil Procedure, interpreted in *Butcher v. Brouwer*, 21 Cal. 2d 354, 132 P.2d 205, "as authorizing the [trial] court to give a creditor an execution only if, during the five years following entry of judgment, he exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. And even though the creditor may have satisfied the court that he has proceeded with due diligence to enforce his judgment under section 681, the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now en-

titled to collect his judgment." 21 Cal.2d at page 358, 132 P.2d at page 207. "Whether or not a creditor has exercised due diligence is for the trial court to determine in its discretion, and its determination will not be disturbed in the absence of a clear abuse of discretion. [Citations.]" *Di Corpo v. Di Corpo*, 33 Cal.2d 195, 200, 200 P.2d 529, 531.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



117 Cal.App.2d 134

PEOPLE v. CLARK et al.

Cr. 935.

District Court of Appeal, Fourth District,
California.

April 1, 1953.

Hearing Denied April 30, 1953.

Defendants were convicted in Superior Court, Orange County, Raymond Thompson, J., of lewd and lascivious conduct with a 12 year old girl, and they appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Infants $\hookrightarrow$ 20

Evidence sustained conviction for lewd and lascivious conduct with a 12 year old girl. Pen.Code, § 288.

2. Criminal Law $\hookrightarrow$ 1173(2)

In prosecution for lewd and lascivious conduct with 12 year old girl, court's failure to include, in its instruction upon circumstantial evidence, statement that where circumstantial evidence is relied upon it must be irreconcilable with theory of innocence, was not prejudicial error, where there was ample direct evidence and circumstantial evidence was corroborative of the direct, and where it was improbable that a further instruction would have affected the result. Pen.Code, § 288.

3. Criminal Law $\hookrightarrow$ 781(1), 1173(2)

In prosecution for lewd and lascivious conduct with 12 year old girl, instruction that all oral admissions of defendants should be viewed with caution, should have been given, but failure to do so was not prejudicial error in view of improbability that a different result would have been reached, had instruction been given. Pen. Code, § 288.

4. Criminal Law $\hookrightarrow$ 781(1), 1173(2)

In prosecution for lewd and lascivious conduct with 12 year old girl, court should have instructed jury that proof independent of statements of defendants was necessary to prove corpus delicti, but failure to do so was not reversible error where there was ample proof irrespective of such statements. Pen.Code, § 288.

5. Criminal Law $\hookrightarrow$ 1173(2)

In prosecution for lewd and lascivious conduct with 12 year old girl, failure to instruct that while jury was to consider opinion expressed by experts, it was not bound to accept such an opinion as conclusive and might disregard such opinion if it was found to be unreasonable, was not prejudicially erroneous, where the only expert testimony played a minor part in the case, and could have had no controlling effect on verdict. Pen.Code, § 288.

6. Criminal Law $\hookrightarrow$ 824(3)

Failure to instruct on lesser included offenses could not be relied on as ground for reversal of conviction of offense charged, where defendants not only failed to request such instructions, but approved form of verdict and stated that no such instructions were desired.

7. Criminal Law $\hookrightarrow$ 1137(3)

Defendants could not complain on appeal that instruction was misleading, where defendants had asked for the same instruction, in the identical language, which was refused as covered.

8. Criminal Law $\hookrightarrow$ 1172(1)

In prosecution for lewd and lascivious conduct with 12 year old girl, instruction that from nature of such cases, "complaining" witness and defendant usually are only witnesses, and that law requires that

jury examine testimony of the "prosecuting" witness with caution, was not so misleading, in its use of "complaining" witness and "prosecuting" witness interchangeably, as to justify reversal on that ground. Pen. Code, § 288.

9. Criminal Law ☞1173(1)

The circumstances of the case must determine whether trial court's failure to instruct jury constitutes prejudicial error.

10. Criminal Law ☞1172(1)

In prosecution for lewd and lascivious conduct with 12 year old girl, instruction that defendants were presumed to be sane at time of the alleged incident, since they had not entered plea of insanity, was the usual stock instruction in connection with matter of intent, and was not prejudicial. Pen.Code, § 288.

11. Criminal Law ☞1172(1)

In prosecution for lewd and lascivious conduct with 12 year old girl, wherein court, after giving an instruction in the language of the statute referred to crime of statutory rape, read statutory definition thereof, and stated that an attempt to commit rape is a crime under code, apparently to clarify instruction, court did not thereby commit prejudicial error, where there was evidence which would have established an attempt to commit rape. Pen.Code, § 288.

12. Criminal Law ☞1172(1)

In prosecution for lewd and lascivious conduct with 12 year old girl, instruction that fact that defendant believed that victim was past age of 14 was immaterial in the case, was not prejudicial under the circumstances. Pen.Code, § 288.

13. Infants ☞13

In prosecution for lewd and lascivious conduct with 12 year old girl, want of consent on part of the girl was not an element of the offense charged and was immaterial in the case. Pen.Code, § 288.

14. Criminal Law ☞633(1)

That criminal action was being prosecuted by the People, and not in interest of any person injured, is a fundamental principle of criminal law.

15. Criminal Law ☞478(1)

In prosecution for lewd and lascivious conduct with 12 year old girl, court did not abuse its discretion in permitting an expert witness to give testimony in identifying male spermatozoa, upon a showing that witness had had 12 years experience in identification bureau of sheriff's office, that he had had experience in such identification and had had schooling in that subject, and that his experience in that line had been in course of his police work. Pen.Code, § 288.

16. Criminal Law ☞481

Matter of qualifications of expert witness rested in discretion of trial court.

17. Criminal Law ☞1165(1)

Where evidence of guilt was not only sufficient but strong, cumulative effect of various claimed errors was insufficient to establish that any miscarriage of justice occurred.

Samuel Hurwitz, Orange, for appellants.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were jointly charged with a violation of section 288 of the Penal Code, and a jury found each of them guilty. Their motion for a new trial and application for probation were denied, and judgment was entered referring them to the Youth Authority. They have appealed from the judgment and from the order denying their motion for a new trial.

The defendants were High School students, each being 18 years of age. The complaining witness was a 12-year-old orphan girl living with her grandmother in an apartment in Anaheim. On the evening of May 16, 1952, she left home to go to a picture show. In front of the theater she met four friends and decided to accompany them to a high school dance in Fullerton. She left this affair about 10:00 o'clock and was walking to the bus station, to take a bus to Anaheim, when the defendants came along in an automobile and took her in the car. She testified that one

of the defendants grabbed her and forced her into the car, but the latter part of this was struck out as a conclusion. She then testified that the defendants took her to the vicinity of Anaheim, went off on a side road and stopped in an orange grove. It would serve no useful purpose to set forth her testimony as to what there occurred. If believed, this testimony was ample to establish all elements of the offense charged, and would be sufficient to show an attempted rape. She testified that each of the defendants performed the same acts; that they then drove back and let her out near her home; that she was crying; that a preacher and his wife were there, and her grandmother came up just then; that she told the minister and her grandmother about what had occurred; and that "they took me to the hospital."

A doctor at the hospital testified that he examined her about 11:00 P. M.; that she was crying and shrieking; that her panties were wet for about a quarter of their surface and sticky; that there was an odor resembling fresh seminal fluid, defining it; that he found that the hymen was not broken; that he took fluid from the vaginal canal, and placed a drop on each of two slides; that he made a microscopic examination of these slides and observed no "moving" sperm; that he had neither time nor facilities to make other tests to see if sperm were present; that it was possible for semen and sperm to get in there even though the hymen was not ruptured; and that he turned the panties and the slides over to a police officer that same night. The police officer turned these slides over to a deputy sheriff, Captain Sharp, who was in charge of the Bureau of Identification. Sharp testified that he examined the slides under a microscope and identified five human spermatozoa. He made a photograph of one of these slides, which was received in evidence. The doctor was shown this picture on cross-examination and testified that the objects which appeared in the photograph looked like male sperm.

A police lieutenant, Taylor, testified that on the night of May 16, he went to the hospital in Anaheim in response to a call;

that this girl told him what had occurred and gave him a description of the three defendants so that he could put out a police broadcast to pick them up; that shortly after midnight he was informed that the defendants had been picked up and were at the Santa Ana police station; that he went there and had the girl and her grandmother brought there; that the girl identified these defendants as the persons in question; that in the presence of the girl, the defendant Hewlett said "She has identified me. I am the boy that she was telling you about"; and that he then interviewed each of the defendants alone. His testimony was that each of the boys told him about the same story. In substance, this was that someone at the Fullerton school suggested that they give this girl a ride to Anaheim; that they drove down the street and offered her a ride; that she got in the car voluntarily, saying she had to go home to Anaheim; that on the way to Anaheim they drove onto a side street and into an orange grove; that each in turn had attempted to have sexual intercourse with her "but it wasn't possible"; that two of them said they had excreted semen, one said that he had not; that one said that he could not have intercourse with her because she was too small or too tight; and that they also said that they had changed cars because they were afraid they might be picked up by the police, since the girl was crying when she got out of their car. Another officer testified that he was present and heard these same conversations. Taylor further testified that as he was taking the boys back to Anaheim that night they were talking among themselves and he heard them say that they did not know the girl was 12 years old; that they thought she was 16 or 18; and that if they had known she was only 12 they would not have done anything like they did.

Another officer testified that he had a conversation with the defendant Gallegly a week or two after this incident in which Gallegly, in referring to the happening on the night of May 16, told him that when the defendants found that the girl was a virgin they "quit fooling around" and took

her home. The chief of police in Anaheim testified that on the next morning, May 17, he had a conversation in his office with the defendant Clark and his mother, and that Clark told him, in his mother's presence, that he had attempted intercourse with this girl on the night before.

Each of the defendants took the stand and testified. They admitted taking the girl into their car, going to the orange orchard, and stopping there. They each denied committing any of the acts of which they were accused, and denied making any of the admissions that were testified to by Lieutenant Taylor. Their story was that they went to the school affair at Fullerton and then decided to go to one in Santa Ana; that as they were leaving some fellow asked them to give this girl a ride to Anaheim; that they went down the street and saw her walking; that they offered her a ride to Anaheim and she accepted; that as she was telling them where to go she told them to turn into the side road, and then told them to stop in the orange orchard; that they did not see any house but she told them there was one in back; that she told them she was afraid of her stepfather and did not want to go in, and wanted them to take her with them to Santa Ana; that they refused to do this and, after a little discussion, she asked them to take her to her grandmother's place in Anaheim; that they did so, and she was not crying when she got out; that they changed cars because one of the boys did not want to leave his car where it was parked; and that they were then arrested.

It is first contended that the evidence is insufficient to support the verdict. It is argued that the only direct evidence of guilt was the testimony of the girl, the rest being circumstantial; that the girl did not describe what was done in the usual manner, resulting in a "paradoxical situation" where the officers told of the defendants' admission of things which the girl herself had not described in similar language; that the girl concocted her story in order to distract her grandmother's attention from the fact that she had been to a dance and was coming home late; and

that it clearly appears that the trial judge did not believe the girl's testimony.

[1] The testimony of the girl was amply sufficient in itself to support the verdicts. Her testimony was strongly corroborated by that of her grandmother as to her condition when she arrived home and of her immediate complaint, and by that of the doctor as to the condition of a part of her clothes, and as to the result of an examination almost immediately afterward. It was further corroborated by the testimony of four officers with respect to the admissions made by the defendants, most of them very shortly after the incident occurred. It is not argued that the girl's testimony is inherently improbable or unbelievable, but it is claimed that there are inconsistencies and uncertainties in her testimony. This is only natural in view of her tender age, the fact that she had been badly frightened, and the time that had elapsed. There is nothing unusual or unnatural in the fact that she did not go into some of the details or use some of the language that might have been expected from an adult witness. The argument that the trial judge did not believe the girl's testimony is based on a remark made by him in denying the motion for a new trial. He then said: "* * * the girl's testimony is not very satisfactory in many respects, perhaps it is typical of a little girl's testimony. I do not believe the girl is too smart, and as far as that is concerned she didn't make a very good witness. Had she been the only witness, I am sure that the verdict would have been not guilty." On the same occasion he further said: "I have no doubt in my mind whatever as to the guilt of the defendants," and when counsel for the defendants asked to have the charge reduced to that of contributing to the delinquency of a minor as an included offense, he denied the request saying "I feel that they are not telling the truth, and they perjured themselves on the witness stand and committed another felony when they did that, and they are all sticking together when they do that." The admission made by one of the defendants was somewhat con-

firmed by equivocal testimony of his mother. After testifying that she was in the office of the police chief the next morning, she was asked whether she had then said to her son "Did you do what you are accused of?" She replied, "It wasn't exactly those words." When asked what she did say, she replied: "I said, 'Oh Doyle, you didn't do this'". She was then asked whether Doyle had said in reply to this "I did" and she replied: "No, he did not." On cross-examination, Mrs. Clark was asked whether anything else was said in that conversation and she replied that they had had a long conversation relating to the incident of the night before. She was then asked whether her son had then said anything at all about what he or the others had done, of a sexual nature, with this girl. She replied: "He said he didn't rape that girl." She was then asked: "Did he say whether or not he tried to?" She replied "No, he did not tell me whether he tried or not. I said 'I know you didn't do it.'" She was then asked whether her son had told her at that time what did happen in the car, and she replied: "No, I was very upset."

The evidence is not only sufficient to support the verdict but when viewed in its entirety we are unable to agree with appellants' contention that this was a close case.

[2-8] It is next contended that the court committed prejudicial error in failing to give, on its own motion, six instructions: 1. In failing to give a proper instruction on circumstantial evidence. It is argued that while the court told the jury that where evidence was susceptible to two reasonable constructions, it must adopt the one favorable to innocence rather than the one favorable to guilt, it failed to tell the jury that where circumstantial evidence is relied on it must be irreconcilable with the theory of innocence, citing *People v. Hatchett*, 63 Cal.App.2d 144, 146 P.2d 469 and *People v. Rayol*, 65 Cal. App.2d 462, 150 P.2d 812. In *People v. Koenig*, 29 Cal.2d 87, 173 P.2d 1, the court held that the failure to give such an instruction was not prejudicial under the facts of that case, as it was not in *People*

v. Bender, 27 Cal.2d 164, 163 P.2d 8. The court then pointed out the distinction in this respect between the *Hatchett* case and the *Rayol* case. In the instant case, there was ample direct evidence, and the circumstantial evidence was corroborative of the direct. It does not appear reasonable to believe that a further instruction in this connection would have affected the result. 2. In failing to instruct that oral admissions should be viewed with caution, citing *People v. Koenig*, 29 Cal.2d 87, 173 P.2d 1, 5. The court there held that such an instruction should have been given, but stated "In view of the record in this case, however, it is improbable that had this instruction been given, the jury would have discounted this testimony to such an extent that it would have returned a different verdict." That is the situation here. Moreover, there was evidence that Lieutenant Taylor, the principal witness as to the admissions, took notes of what was said and dictated these notes to a stenographer that night or the next day, so the usual possibility of a faulty memory is less persuasive here. 3. Failure to instruct the jury "that the corpus delicti must first be proved," citing *People v. Frey*, 165 Cal. 140, 131 P. 127. The court should have instructed the jury that proof independent of the statements of the appellants was necessary to prove the corpus delicti, but in this case there was ample proof irrespective of such statements and the error is not reversible. *People v. Chan Chaun*, 41 Cal.App.2d 586, 107 P.2d 455. 4. Failure to instruct that while the jury was to consider the opinion expressed by experts, it was not bound to accept such an opinion as conclusive, and that it might disregard such an opinion if it found the same to be unreasonable. The only expert testimony, that of the witness Sharp, played a minor part in the case, could have had no controlling effect on the verdict, and no miscarriage of justice appears. *People v. Brac*, 73 Cal.App.2d 629, 167 P.2d 535; *People v. Moore*, 70 Cal.App.2d 158, 160 P.2d 857; *People v. Williamson*, 134 Cal. App. 775, 26 P.2d 681. 5. Failure to give an instruction on lesser included offenses. It is argued that had such an instruction

been given the jury might have rejected the testimony "that there was any touching," and have found the appellants guilty of the lesser offense of contributing to the delinquency of a minor. Not only was there no request for such an instruction, but the record shows that just before the cause was submitted to the jury counsel for the defendants approved the form of verdict, and stated that he did not desire any instructions with respect to included offenses. This cannot now be relied on as a ground for reversal. 6. Failure to give a proper cautionary instruction to the effect that such a charge is easily made and difficult to disprove, and that the testimony of the victim should be examined with caution. Such an instruction was held to be necessary in *People v. Lucas*, 16 Cal. 2d 178, 105 P.2d 102, 130 A.L.R. 1485, although it was there held that the failure to give it was not reversible error under the circumstances of that case. Such an instruction was here given, which is in the usual form except that a portion of it read: "From the nature of a case such as this, the *complaining* witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the *prosecuting* witness with caution." (Italics ours.) It is argued that the two words we have emphasized may have misled the jury into believing that Lieutenant Taylor was the "prosecuting witness", since he had been the investigating officer and was present through the trial. The appellants asked for the same instruction, in the identical language, using the words "complaining" witness and "prosecuting" witness interchangeably, which was refused as covered. Not only are they in no position to complain, but no such misleading of the jury appears as would justify a reversal on this ground.

[9] It is well settled that the question whether such errors are prejudicial must be determined from the circumstances of each case. *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367; *People v. Lucas*, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485.

[10-14] It is next contended that the court erred in giving five instructions

which, while correct statements of the law, constitute error since they covered assumed issues which were without support in the evidence. It is argued that the following instructions placed a greater burden on the appellants than the law requires, and confused the jury by diverting its attention from the only defense interposed, which was that the appellants did not do the acts complained of. 1. That the court erred in telling the jury that the appellants were presumed to be sane at the time of the alleged incident, since they had not entered a plea of insanity. This was the usual stock instruction in connection with the matter of intent, and no possible prejudice appears. 2. That the court erred in giving an instruction on "rape" and "attempt to commit rape", since the appellants were not charged with either of those offenses. The court gave an instruction in the language of section 288 of the Penal Code, including the reference to "any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code". Following this instruction the court stated that another crime set forth in Part One of the Penal Code is that of statutory rape, reading the statutory definition thereof, and then stated that an attempt to commit rape is a crime under Part One of the Penal Code. This was apparently done to clarify the portion of section 288 read to the jury. There was evidence which would have established an attempt to commit rape, and no prejudice appears. 3. That the court erred in telling the jury that the fact that a defendant believed that the victim was past the age of 14 years was immaterial in this case. There was evidence that in a conversation that night the defendants, or some of them, had stated that they did not know that this girl was 12 years old, that they thought she was older, and that if they had known she was only 12 they would not have done anything to her. There was no prejudice under the circumstances. 4. That the court erred in giving an instruction to the effect that want of consent on the part of this girl was not an element of the offense charged, and was immaterial in this case. Again, it is argued that this

HARDY v. HARDY.

Civ. 4608.

District Court of Appeal, Fourth District,
California.

March 30, 1953.

might have misled the jury, since the matter of consent had not been raised as a defense. This was part of the law applicable to the case, and neither error nor prejudice appears. 5. That the court erred in instructing the jury that this action was being prosecuted by the People, and not in the interest of any person injured. This is a fundamental principle of criminal law and no prejudice appears.

[15, 16] Appellants' final contention is that the court abused its discretion in permitting an expert witness to testify without a sufficient foundation with reference to his qualifications. The only witness to which this refers is Mr. Sharp, who was allowed to give his opinion that the objects appearing on the picture of the slide, with the enlargement or magnification of a drop placed on the slide by the doctor, were human spermatozoa. This witness testified that he had had 12 years' experience in the identification bureau of the sheriff's office; that he had had experience in the identification of male spermatozoa; that he had had some schooling and taken a short course in that subject; and that his experience in that line had been in the course of his police work. The matter of his qualifications was one which rested in the discretion of the trial court, and no abuse of that discretion appears. Moreover, his evidence was merely cumulative and the other evidence was amply sufficient to support the verdict.

[17] It is argued that this is a close case and that the cumulative effect of these various claimed errors was to deprive the appellants of a fair trial. We are unable to agree with this contention. The evidence of guilt was not only sufficient but strong. While some of the instructions mentioned should have been given, although not asked for, it would be unreasonable to believe that the failure to give any or all of them could have affected the result, and we are far from convinced that any miscarriage of justice has occurred.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Wife sued husband for divorce. The Superior Court, Kern County, Warren Stockton, J., rendered an interlocutory decree relating to support and maintenance of minor child, attorney's fees and community property and wife appealed. The District Court of Appeal, Mussell, J., held evidence was sufficient to support finding that sum of \$2,379.12 was community property and to support award to wife of \$1300.

Judgment affirmed.

1. Divorce ⇐253

In wife's action for divorce, evidence was sufficient to support finding that community property was \$2,379.12 and to support award to wife of \$1300.

2. Divorce ⇐308

Where minor child, three years old at time of divorce action, had had a mild attack of infantile paralysis and father, who had a monthly salary of \$300 less \$50 living expenses, was under obligation to pay \$50 monthly for support of child by former marriage, award of \$75.00 monthly for support of minor child and of medical and hospital expenses for illness requiring hospitalization and one half expense of all lesser obligations plus \$223 for previously incurred medical expenses was not unreasonable.

3. Divorce ⇐308, 312.6(7)

Question as to what amount should be allowed in divorce proceedings for support of minor child was for trial court and court was entitled to consider fact that father had obligations to support child by former marriage.

4. Divorce ⇐286

Question of reasonableness of amount allowed wife's attorney in her divorce action was a question of fact for trial court.

5. Appeal and Error ⇐984(5)

In absence of clear abuse of discretion, determination of trial court as to

amount allowed as attorney's fees will not be disturbed upon appeal.

6. Divorce ⚡227(1)

Evidence sustained allowance of \$200 as attorney's fees to wife in divorce action.

7. Divorce ⚡182

Generally the granting of attorney's fees on appeal of wife from decree granting husband a divorce is in sound discretion of trial court and wife has no absolute right to prosecute appeal at expense of husband where trial court is satisfied from record before it that proposed appeal is not undertaken in good faith or with reasonable belief that appeal has merit.

8. Divorce ⚡182

Refusal to allow wife attorney's fees and costs on appeal from interlocutory decree in divorce action was not abuse of discretion.

V. P. DiGiorgio, Bakersfield, for appellant.

Frederick E. Hoar, Bakersfield, for respondent.

MUSSELL, Justice.

Plaintiff appeals from portions of an interlocutory decree in a divorce action and the provisions thereof from which the appeal is taken relate to the amounts awarded for the support and maintenance of the minor child of the parties, the amounts allowed as attorney's fees and the amount awarded as plaintiff's share of the community property. It is argued that the court's findings as to the community property are unsupported by the evidence and that the amounts allowed for the support of the child and for attorney's fees are unreasonable.

[1] Plaintiff and defendant were married in Tiajuana, Mexico, on June 16, 1948, and separated the following day. At the time of the marriage, defendant had no money or property and was in debt in the sum of \$1,000.00. After the marriage, defendant went to his parents' ranch in North Dakota, returning to California in January, 1949. In February he attended an auctioneering school in Bakersfield and his

tuition, amounting to approximately \$600.00 was paid by his sister, Edith Hardy. About April 5th defendant's sister purchased the school lease, together with some furniture, and an auction business was started which was operated by the defendant and his sister until January of 1951. In that month the partnership was dissolved at the request of defendant's sister. An auditor was employed by her to prepare a statement of accounts showing the net amount due to each of the parties on dissolution of the business. The amount due defendant, as reflected by the auditor's report, was \$2,292.90 and this sum was placed in a bank subject to the order of the court. While there is testimony in the record indicating that the net profits of this business during the year 1950 was approximately \$24,000.00, there is no evidence that the defendant at the time of trial or after the dissolution had money or property exceeding the amount shown in the auditor's report. After the dissolution of the partnership and until the trial of the instant action, defendant was employed by his sister as an auctioneer at a monthly salary of \$300.00, less \$50.00 living expenses. The trial court found that the sum of \$2379.12 constituted the community property of plaintiff and defendant and awarded plaintiff the sum of \$1,300.00. The evidence is sufficient to support the trial court's findings and award.

[2, 3] The trial court ordered defendant to pay plaintiff the sum of \$75.00 per month for the support and maintenance of the minor child of the parties, and in addition, ordered defendant to pay any and all future obligations that plaintiff may necessarily incur for medical and hospital treatment rendered to said minor for any illness of the minor requiring hospitalization and one-half of any and all future lesser obligations, if any, incurred by plaintiff on account of office calls for medical treatment or consultation in respect to said minor child. Defendant was further ordered to pay physician's charges previously incurred in the sum of \$223.00.

Plaintiff contends that the allowance made for the child was unreasonable. This contention is without merit. The record

shows that the minor was three years old at the time of trial; that she had had a mild attack of infantile paralysis from which she had not entirely recovered and that she required a special diet and medical care. However, the defendant, at the time of trial, was under obligation to pay the sum of \$50.00 per month for the support of a child by a former marriage and the court was entitled to consider this fact as well as the circumstances of the parties in determining the amount to be allowed for the support of the child. This was a question of fact for the trial court's determination. *Dickens v. Dickens*, 82 Cal.App. 2d 717, 722, 187 P.2d 91.

[4-6] It is next argued that the award of \$200.00 as attorney's fees for appellant's attorney is wholly inadequate and unreasonable. The clerk's transcript shows that plaintiff was granted an allowance of \$140.00 for attorney's fees at a hearing on an order to show cause and that she was awarded the additional sum of \$200.00 in the judgment. The question of the reasonableness of the amount to be allowed to plaintiff's attorney is likewise a question of fact for the trial court and in the absence of a clear abuse of discretion, its determination will not be disturbed on appeal. *Smith v. Smith*, 85 Cal.App.2d 428, 434, 193 P.2d 56. Under the circumstances shown, we cannot hold as a matter of law that the allowance made for attorney's fees was unreasonable.

[7,8] Finally, it is suggested that the trial court's failure to allow attorney's fees and costs on appeal constitutes an abuse of discretion. We cannot agree with this contention. The clerk's transcript shows in this connection that plaintiff filed an affidavit in which she stated that she was without funds to employ counsel and had been advised and believed that she had a meritorious appeal from the decree. An opposing affidavit was filed by the defendant in which he stated that the appeal was not taken in good faith and was taken for the purpose of harassing and annoying the affiant; that the proposed appeal was without merit; and that the appellant had often stated that she would "break" affiant financially. The trial court appar-

ently concluded under the circumstances shown by the record that the appeal was not taken in good faith. As this court said in *Perry v. Perry*, 93 Cal.App.2d 720, 728, 209 P.2d 847, 851:

"The general rule is that the granting of attorney's fees on appeal is clearly in the sound discretion of the trial court and there is no absolute right in the defeated wife to prosecute an appeal at the expense of the husband where the trial court is satisfied, from the record before it, that the proposed appeal is not undertaken in good faith, or with reasonable belief that it has merit. The trial court was justified in denying the application. *Gay v. Gay*, 146 Cal. 237, 79 P. 885; *Kellett v. Kellett*, 2 Cal.2d 45, 39 P.2d 203."

No abuse of discretion appears in the court's failure to make an allowance for plaintiff's attorney's fees and costs on appeal herein.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



117 Cal.App.2d 156

In re MAXWELL.

CLICK et al. v. BRUNNING.

Civ. 15406.

District Court of Appeal, First District,
Division 1, California.

April 3, 1953.

Proceedings were instituted to have child declared free from the custody and control of her mother, on ground that she had been abandoned by mother. The Superior Court, County of Alameda, A. T. Shine, J., entered judgment adverse to mother, and mother appealed. The District Court of Appeal, Peters, P. J., held that under circumstances there had been an abandonment of child by mother and that child was properly declared

free from custody and control of mother, so that she could be adopted by third persons.

Judgment affirmed.

1. Parent and Child ◌2(4)

In proceeding under Welfare and Institutions Code to have child declared free from custody and control of her mother so that she could be adopted by others, introduction into evidence by mother's counsel of report and recommendation of probation officer was a waiver by mother of right to object to any evidence contained in report. Welfare and Institutions Code, § 701.

2. Adoption ◌7

Where court declares child free from custody and control of parents under the Welfare and Institutions Code, consent of parents is no longer necessary to adoption of child by third persons. Welfare and Institutions Code, § 701; Civ.Code, § 224.

3. Parent and Child ◌2(3.7)

When a child is taken from parent by judicial wardship proceeding, child is not abandoned within meaning of section of Welfare and Institutions Code authorizing child to be declared free from custody and control of parent when there has been an "abandonment" of child for one year. Welfare and Institutions Code, § 701.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

4. Parent and Child ◌2(3.7)

To constitute "abandonment" of child by parent within meaning of the Welfare and Institutions Code, so that child may be declared free from the custody and control of parent, there must be intention to do so, expressed or implied, from conduct of parent respecting child. Welfare and Institutions Code, § 701.

5. Parent and Child ◌2(3.7)

Section of Welfare and Institutions Code authorizing declaration that abandoned child is free from custody and control of parent should be strictly construed. Welfare and Institutions Code, § 701.

6. Parent and Child ◌2(3.7)

Where child is taken from parent by wardship proceeding, and there is no at-

tempt by parent to support or to communicate with child for over three years, there has been an "abandonment" of child by parent by such nonaction within meaning of section of Welfare and Institutions Code authorizing declaration that abandoned child is free from custody and control of parent. Welfare and Institutions Code, § 701.

7. Parent and Child ◌2(3.7)

Where wardship proceeding to take child from mother was had in April of 1947, and from middle of 1948 until January of 1951 mother made no effort to support child or to communicate with child and did not seem concerned with whereabouts of child, there was an "abandonment" of child by mother so that child could be declared free from custody and control of mother under Welfare and Institutions Code, and so that child could be adopted by third persons. Welfare and Institutions Code, § 701; Civ.Code, § 224.

Suren Toomajian, Stanley E. Sparrowe and Stark & Champlin, Oakland, for appellant.

Norris & Broun, Centerville, for respondents.

PETERS, Presiding Justice.

The mother of Linda Maxwell appeals from a judgment entered in 1951 pursuant to section 701 of the Welfare and Institutions Code declaring that the child is free from the custody and control of her mother. In 1947, when Linda was 5 years old, she had been declared a ward of the Juvenile Court, and the mother deprived of her custody because of the mother's then excessive drinking. Since then the child has been placed in several foster homes. Since 1948 she has been in the home of the Clicks. In January of 1951 the Clicks filed the instant proceeding as the preparatory step to the adoption of Linda. The hearing on the petition was had in December of 1951. The basic contention of appellant is that the evidence is insufficient to support findings removing the child from the custody and control of the mother under any of the

subdivisions of section 701 of the Welfare and Institutions Code.

At the hearing the following facts were developed: Linda was born, out of wedlock, in Arkansas on August 19, 1942. The father of the child has never contributed to her support. Early in 1943 appellant and Linda came to California where appellant worked at various jobs and finally took up her residence in Oakland. Sometime in 1946 appellant quit work and lived thereafter on her unemployment insurance. During this time, and until 1950, appellant admitted that she was an alcoholic. In April of 1947 Linda was declared a ward of the Juvenile Court and committed to the custody of the probation officer for placement in a foster home.

For a short time Linda was placed in several local foster homes, and then was placed with appellant's sister who took the child to Oregon. In 1948 Linda was returned to the court by appellant's sister, she being unable to care for the child any longer. On September 2, 1948, the child was then placed with the Clicks as foster parents, where she has remained since. The Clicks, as foster parents, have received \$50 per month from the county for the child's care. They have furnished the child with loving care and a fine home. The child's health and mental attitude have improved since residing with the Clicks, and she has made a good adjustment to her new environment. In January of 1951 the Clicks filed a petition to adopt Linda, after discovering the whereabouts of appellant, but appellant refused her consent. Whereupon, the present proceeding was instituted.

From September of 1948 to January of 1951 appellant made no effort to see or to contact her daughter through any official agency. She testified that she called once (apparently in 1949) at the court and asked for a particular social worker. When told that the named employee was no longer there, no other inquiry was made. Appellant did (apparently in the summer of 1949) make some inquiry of a Mrs. Emro, a friend who had taken care of Linda for a short time before she was declared a ward of the court and who had made the

initial complaint to the juvenile authorities. Mrs. Emro, who had no connection with the Juvenile Court or probation office, told appellant that the child was being well cared for and was out of town, but refused to give appellant the child's address.

No other effort to locate or to communicate with Linda was made until February of 1951. Appellant testified that respondent's lawyer had located her in December of 1950 trying to secure her consent to the adoption, and that in February of 1951 she made inquiry of a social worker at the probation office. The social worker refused to give appellant the child's address on the ground that the present proceeding was then pending, and that the issues involved would have to be resolved by the judge. Appellant did discover the child's whereabouts shortly thereafter. Between then and December of 1951 (the date of the trial) she visited the child twice, and the Clicks brought the child to see her several times. Appellant sent the child a birthday gift in August of 1951, but at no time did she furnish any clothes for the child or offer to contribute to her support. The Clicks made no demand for any such contribution.

The Clicks started to look for appellant in 1950. Their lawyer discovered her general whereabouts in December of 1950, but did not definitely locate her until January of 1951. At that time appellant was living in Oakland with her husband and new child.

Appellant admitted that she continued to drink to excess after Linda was declared a ward of the court in April of 1947, until 1950. In December of 1949 she married Benjamin Brunning, a boilermaker who averages better than \$400 a month income. She sought medical treatment for alcoholism in January of 1950, and from November of 1950 to the time of trial in December of 1951 had not had a drink. At the time of trial she was still taking medicine under doctor's orders to help her conquer the drinking habit. Her doctor is hopeful of a complete cure.

The marriage of the Brunnings is happy and harmonious. The couple live in a comfortable rented house in Oakland that has a bedroom for Linda should she return

to her mother. They have a child born to them in July of 1950. Mr. Brunning testified that he was willing to accept Linda into their home and to support her. Appellant testified that at no time did she intend to abandon Linda.

[1] There was introduced into evidence the report and recommendation of the probation officer dated November 5, 1951. This report was introduced by appellant's own counsel so that if it contains any evidence otherwise objectionable, such objection was waived. It summarizes most of the facts to which reference has been made. It states that Linda was declared to be a ward of the court in 1947 "when her mother's home was found to be unfit by reason of her drinking and associations with various men"; that from 1947 to January of 1951 "she never contacted the Probation Office regarding Linda's whereabouts although she knew that this office would tell her where the child was placed"; that she attributed this apparent lack of interest to the fact that "such a contact would cause her more heartache and it would therefore be more difficult for her to see Linda"; that while she sent Linda a birthday present in 1951, she did not send her a Christmas or other present or contact the Probation Office because she "did not feel like it." The probation officer recommends that if the court finds that appellant violated subsections (a) or (b) of section 701 of the Welfare and Institutions Code that the child be declared free from the mother's custody and control.

Something more should be said about the 1947 wardship proceedings. The entire Juvenile Court file in that proceeding has been sent up to this court as an exhibit. It was never formally introduced into evidence. Counsel for respondents offered the file, and then the following occurred:

"Mr. Toomajian [counsel for appellants]: They are records of the Court any way.

"Mr. Broun [counsel for respondents]: That is so, but I want to be sure they are in the record.

"The Court: The Court has already reviewed the record."

This file is not indispensable to the determination of the present appeal, inasmuch as it simply presents, in great detail, the case history disclosed by the testimony and probation report in the instant proceeding. It is obvious that the parties and the court treated the 1947 file as being before the court, and that the court considered it. In view of the facts already discussed, and the fact that the probation office is an official part of the Juvenile Court, and the fact that its records are official records, the file, for what it is worth, will be considered as having been before the trial court.

The petition initiating the wardship proceedings alleges that the then home of Linda "by reason of neglect and depravity on the part of the mother of said person is an unsatisfactory place for said person, to wit: That the parents of said person are living apart; that said person is in the care of the mother of said person; that your petitioner [a social worker in the probation office] is informed and believes and therefore alleges that said mother repeatedly drinks intoxicating liquor to excess; that said mother repeatedly leaves said person alone in said home; that said mother is now confined in the Oakland City Jail." The reports, recommendations and investigations contained in the file disclose, in minute detail, the neglect of the mother that led to the institution of the 1947 proceedings.

The commitment recites that the mother of Linda was served with a citation for the hearing, but did not appear, and that evidence was taken. The court finds that Linda "comes within the provisions of subdivision D of Section 700 of said Juvenile Court Law and that the home of said person is unfit and that the welfare of said person requires that the said person be hereby declared a ward of the Juvenile Court, and that said person be hereby committed to the care and custody of the Probation Officer for placement in a foster home." It was so ordered.

On this record the trial court, in the instant case, after setting forth the jurisdictional facts, finds that in 1947 the mother "was deprived of the custody of said minor child because of the cruel treatment and

neglect of the said child by said mother and of habitual intemperance"; that the child has been a ward of the court ever since; that Linda "is a person abandoned by said Naomi Brunning, who was formerly Naomi Maxwell the parent entitled to her sole custody; and that said parent left said child in the care and custody of another without any provision for support and without any communication from said parent for the period of more than one year with the intent of said parent to abandon said child.

"That it is for the best interest of the said Linda Ruth Maxwell that she be declared free from the custody and control of the said Naomi Brunning."

Based on these findings, the court concluded and adjudged that Linda should be and is free from the custody and control of her mother.

It is the main contention of appellant that the evidence does not support the findings, nor the findings the judgment, under any of the subdivisions of section 701 of the Welfare and Institutions Code. All that need be considered is the first part of the section and subdivision (a) thereof. They reads as follows:

"The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions:

"(a) Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person

abandoned by the parent or parents abandoning him."

[2] When those naturally entitled to custody of a child fall within subdivision (a) of the section, or any of the other subdivisions, and the court declares the child free from the custody and control of such parents, then, under section 224 of the Civil Code, the consent of such parent or parents is no longer necessary to the adoption of such child.

The appellant points out that under subdivision (a), before a child can be abandoned it must have been "left" in the care and custody of another, and contends that a child is not so "left" when, as here, the child is taken from the parent by judicial order. Based on this premise, appellant then urges that when a child is taken from a parent by judicial sanction, the parent's failure thereafter to support or care for the child is immaterial because there was no original abandonment within the meaning of subdivision (a).

The first part of this argument is sound; the second is not.

[3] The cases do, as contended by appellant, establish the rule to be that when a child is taken from a parent by a judicial wardship proceeding, such child has not been abandoned under subdivision (a) of section 701. This rule was first declared in *Matter of Cozza*, 163 Cal. 514, 126 P. 161. In that case a stepfather, by way of grudge, instituted proceedings against his stepchild to have her declared a ward of the court on the ground of her claimed disobedience. Such proceedings were successful and the child was judicially removed from the custody of the mother against her wishes, the court directing that such custody be in another for one year. The Supreme Court carefully noted, however, 163 Cal. at page 529, 126 P. at page 167, unlike the present case, that the mother began and continued efforts to have the child returned to her, and that during the child's entire absence the mother made unsuccessful efforts to see and converse with her. The mother misunderstood the one-year custody order and so postponed legal proceedings to regain the child's custody until the end of the year.

At the end of the year the parties to whom custody had been awarded filed a petition to adopt the child on the ground that the child had been abandoned by her mother for one year. The Supreme Court held that an "abandonment" for such purposes must be a voluntary intentional act, and that no such abandonment occurs when the child is removed from the custody of the parent by judicial decree against the wishes of the parent. The court first laid down the proper rule of construction in the following words, 163 Cal. at page 524, 126 P. at page 165: "The power of the court in adoption proceedings to deprive a parent of his child being in derogation of his natural right to it, and being a special power conferred by the statute, such statute must be strictly construed, and in order to warrant the exercise of the special power and sustain an order for adoption, made in opposition to the wishes and against the consent of the natural parent, on the ground that conditions prescribed by statute exist which make that consent unnecessary, the existence of such conditions must be clearly proven, and the evidence bring them within the terms and intent of the statute. The law is solicitous towards maintaining the integrity of the natural relation of parent and child, and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation."

[4] The court then stated, 163 Cal. at page 528, 126 P. at page 167: "To constitute abandonment, there must be an intention to do so, express or implied, from the conduct of the parent respecting the child. This is the character of abandonment contemplated by the very terms of section 224, as far as they are applicable or are relied on in this proceeding. It contemplates a case where a child has been voluntarily surrendered or left for a year in the care and custody of another, without any agreement or provision for its support. This is not the situation here. The care and custody of this child was not so left by the mother with either Mrs. Merri-

man or the petitioners for adoption. It was taken away from her and placed in the custody of the former by order of the juvenile court (whether valid or not is immaterial to this inquiry), without the consent of the mother and against her wishes and desire."

In *re Cattalini*, 72 Cal.App.2d 662, 165 P.2d 250, applied the same rule to a factual situation where a father, deprived of custody by a court order, continued to communicate with his children after the wardship decree, and whose failure to furnish support was held excused by an inability to pay, and by the unwillingness of the mother and stepfather to accept payment. Under such facts, the court stated that the judicial removal from custody is not the voluntary relinquishment of control contemplated by the statute. At page 665 of 72 Cal.App.2d, at page 253 of 165 P.2d, the court stated:

"We turn then to the first question to be resolved; Were the children 'left' by appellant in the custody and care of the mother, within the meaning of said section, when they were placed in her custody by a court order? According to Webster's International Dictionary, 'leave' means 'to put, deposit, deliver, or the like, so as to allow to remain;—with a sense of withdrawing oneself from; as *leave* your hat in the hall; we *left* our cards.' Thus the term appears to connote voluntary action. Therefore, it may not be said that appellant left his children in the care and custody of the respondent when, by an order of the court, they were taken from the joint control of their parents and placed in the sole care and custody of the mother. * * *

"Here, as in the *Cozza* case, the children were not voluntarily surrendered or left by appellant; they were taken away from him and placed in the custody of the mother by order of the court. There would appear to be no reason why this rule is not applicable to the facts disclosed herein."

[5,6] While these cases establish the rule to be that an involuntary removing from custody by a wardship order does not,

under section 701, constitute an abandonment so as to start the one year running, they do not foreclose the possibility that by action or nonaction subsequent to the wardship proceeding the parent can be guilty of an abandonment. In both of the above cases the courts carefully rebutted any presumption of an abandonment by subsequent action by emphasizing that after the wardship proceedings the parents went to great lengths to see and to communicate with their children. Construing the section strictly, as should be done, it seems obvious that where, after a wardship proceeding, there is no attempt to support or to communicate with the child for a period of over three years, there has been an "abandonment" by such nonaction within the meaning of section 701, subdivision (a) of the Welfare and Institutions Code. Regardless of how the child has been taken from her parent, by such nonaction that has continued for at least a year, pursuant to the presumption contained in the subdivision in question, the parent may be deemed by the trial court to have abandoned the child. In such a case the child has been "left * * * in the care and custody of another without any provision for his support, or without communication from * * * his parents, for the period of one year" within the meaning of the section.

There have been several cases discussing the essentials of an abandonment by a parent of a child. See, generally, *In re Creely*, 70 Cal.App.2d 186, 160 P.2d 870; *In re Green*, 192 Cal. 714, 221 P. 903; *Matter of Forrester*, 162 Cal. 493, 123 P. 283; *In re Guardianship of Kerns*, 74 Cal.App.2d 862, 169 P.2d 975. None of these cases involved or discussed the precise problem here involved. The case closest in point is *In re Peterson*, 56 Cal.App.2d 791, 133 P.2d 831. There a father, by consent, placed the child in the custody of strangers. There, as in the instant case, the original leaving of the child was not an abandonment of the child within the meaning of section 701(a). It was held, however, that a finding of abandonment resulting in a judgment freeing the child from the custody and control of the father was supported by evidence that the father had

failed to communicate with the child for thirteen months, and failed to make any effort to support the child. Thus, what was not initially an abandonment was converted into such by the latter conduct of the parent.

[7] In the instant case the facts are more aggravated than they were in the Peterson case. Here the wardship proceeding was in April of 1947. From then until the middle of 1948 the child was placed in foster homes, including the home of appellant's sister in Oregon. From the middle of 1948 to January of 1951 appellant made no effort to support the child, made no effort to communicate with her, and did not seem concerned about her whereabouts. The record shows that appellant knew that by an inquiry of the Juvenile Court she could have, at any time, ascertained the child's whereabouts. She went once to the probation office and asked for a certain social worker, and when told that such person was no longer employed there, left without making further inquiry or stating her business. The inquiry made of Mrs. Emro was not sufficient. It was simply a request of a friend with no official connection with the court or probation office. The only explanation of this apparent lack of interest, given to the social worker in 1951, was that it would cause her heartache to see Linda, and because she did not "feel" like seeing her. On the trial she attempted to excuse her lack of interest by her alcoholism up to 1950, her financial inability to support the child, and her weakened health following the birth of her second child. The sufficiency of these explanations was for the trial court. It chose to find an abandonment and its finding is amply supported.

The parties ably discuss the possibility of other subdivisions of section 701 being applicable. In view of the determination that subdivision (a) is applicable, it is not necessary to discuss whether the judgment could be sustained or was entered under any of the other subdivisions of the section. The parties also discuss the validity or invalidity of the 1947 wardship order. We think that order was valid. But whether it was valid or not is a false factor in this

case. That order resulted in the child being removed from appellant's custody. By her subsequent actions appellant has abandoned the child. That is so whether the 1947 order was valid or invalid.

We realize that the record shows that appellant has made a praiseworthy and apparently successful effort to rehabilitate herself. We have no doubt of her present sincere desire to care for Linda. It is a most serious responsibility to deprive a parent of her child. But the Legislature has provided that if the child is abandoned, as defined in the section, the trial court may enter such an order. The weight to be given to the rehabilitation of appellant and her excuses for her past conduct was for the trial court. It has found the facts required by law. Those findings are supported. Therefore, this court must affirm.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



117 Cal.App.2d 190

GLOBE DAIRY LUNCH CO. v. JOINT EXECUTIVE BOARD OF CULINARY WORKERS et al.

Civ. 18651.

District Court of Appeal, Second District,
Division 3, California.

April 3, 1953.

Hearing Denied May 28, 1953.

Proceeding by employer seeking to enjoin unions from picketing employer's places of business. The Superior Court, Los Angeles County, Frank G. Swain, J., entered preliminary injunction and unions appealed. The District Court of Appeal, Vallée, J., held where one union joined other unions in commission of illegal acts against employer to force him to breach collective bargaining agreement with employees' association and union maintained pickets who prevented deliveries to employer, union was member of conspiracy and was responsible as joint tort-

feasor, whether or not union was direct actor and regardless of degree of its activity.

Order affirmed.

1. Labor Relations ⇐284

The Jurisdictional Strike Law is constitutional. Labor Code, § 1115 et seq.

2. Labor Relations ⇐975

Where employer entered into collective bargaining agreement with employees' association, and labor unions picketed employer, representing that employer was unfair to labor, that its employees were unorganized, and that its products were made by unorganized labor, preliminary injunction enjoining such picketing did not prohibit acts not subject to prior restraint.

3. Labor Relations ⇐352

Where employer entered into collective bargaining agreement with employees' association, and labor unions picketed employer, and representing that its employees were unorganized, that its products were made by unorganized labor, and that it was unfair to organized labor, such picketing arose out of a controversy defined by Jurisdictional Strike Law. Labor Code, § 1115 et seq.

4. Labor Relations ⇐844

Where employer entered into collective bargaining agreement with employees' association, and labor unions picketed employer, representing that employer was unfair to organized labor, that its products were made by unorganized labor and that its employees were unorganized, such picketing did not involve a legal and illegal objective and court properly prohibited all such picketing. Labor Code, § 1115 et seq.

5. Appeal and Error ⇐996

When an issue is tried on affidavits, rule on appeal is that affidavits favoring contention of prevailing party establish facts stated therein and all facts which can reasonably be inferred therefrom.

6. Appeal and Error ⇐1011(2)

When an issue is tried on affidavits, and there is conflict in facts stated therein, trial court's determination of controverted facts will not be disturbed.

7. Conspiracy ⚖️14

Where affidavits in support of verified complaint contained allegations that one union joined with other unions in commission of illegal acts to force employer to breach collective bargaining agreement with employees' association and that pickets maintained by the union prevented deliveries to employer, affidavits showed a conspiracy and union was responsible as joint tortfeasor, whether or not it was direct actor and regardless of degree of its activity.

8. Conspiracy ⚖️19

A conspiracy may be inferred from nature of acts done, relations of parties, interests of alleged conspirators, and other circumstances.

9. Conspiracy ⚖️14

A conspiracy renders each participant in wrongful acts responsible as a joint tortfeasor for all damages ensuing from wrong, irrespective of whether or not he was a direct actor, and regardless of degree of his activity.

10. Labor Relations ⚖️966

Where one union joined other unions in commission of illegal acts against employer to force him to breach collective bargaining agreement with employees' association and union maintained pickets who prevented deliveries to employer, granting preliminary injunction was not abuse of discretion.

John C. Stevenson, Lionel Richman, George E. Bodle and Louis R. Stein, Los Angeles, for appellants.

Hyman Smith and Howard R. Harris, Los Angeles, for respondent.

VALLÉE, Justice.

Appeals by certain defendants from an order granting a preliminary injunction. Defendants, other than Globe Independent Employees' Association, will be referred to as defendant unions. Globe Independent Employees' Association will be referred to as the association.

From the verified complaint and the affidavits, viewed most favorably to plaintiff,

it appears that plaintiff is engaged in the business of operating a commissary and bakery and two restaurants with cocktail bars. The commissary and bakery are operated exclusively for the purpose of supplying food and bakery products to the two restaurants. Defendant unions had for several years sought to obtain a collective bargaining agreement with plaintiff's predecessor. In February, 1950, they picketed the restaurants. In April, 1950, while the restaurants were owned by plaintiff's predecessor, the picketing was terminated. In June, 1950, plaintiff had 93 persons in its employ, excluding office managers. On June 23, 1950, defendant Globe Independent Employees' Association, consisting of nonsupervisory employees of plaintiff, was organized. The association was formed with the assistance of one Steese, an independent expert in labor organization, who was not employed by or in any way connected with plaintiff. Eighty-six of the 93 nonsupervisory employees of plaintiff freely designated the association as their representative to negotiate the terms and conditions of their employment with plaintiff. The association is not financed in whole or in part, dominated or controlled in any respect by plaintiff.

On July 1, 1950, the association, in writing, demanded the exclusive bargaining rights for all nonsupervisory employees of plaintiff, and demanded that plaintiff negotiate a collective bargaining agreement with it, covering all matters pertaining to wages, hours, and working conditions of those employees. The demand stated that failure by plaintiff to comply with the demands immediately and completely would leave the association no alternative but to exert economic pressure. On January 15, 1951, plaintiff and the association entered into a collective bargaining agreement by which plaintiff recognized the association as the exclusive bargaining agent for all of its nonsupervisory employees.

About January 18, 1951, defendants, other than the association, agreed among themselves that they, and each of them, would and did commence a course of aggressive activities to compel plaintiff to breach the

agreement of January 15, 1951, with the association, and to compel plaintiff to make exclusive collective bargaining agreements with defendant unions, and to require plaintiff to compel its nonsupervisory employees to join an appropriate union other than the association or to discharge the employees who refused. On January 22, 1951, defendant unions picketed plaintiff's places of business. The pickets carried placards stating the plaintiff was unfair to organized labor. The picket in charge of the others told the president of plaintiff that the picketing would continue unless and until plaintiff signed collective bargaining agreements with defendant unions, that defendant unions would not recognize the association, and that they demanded the exclusive right to bargain collectively with plaintiff. Members of other unions refused to make deliveries to plaintiff because of the pickets. Defendant unions placed plaintiff on the "unfair" or "we do not patronize list," and circulated the same among the members of the unions affiliated with the American Federation of Labor in the Los Angeles area for the purpose of having such members refuse to patronize plaintiff. Defendant unions were concertedly interfering with plaintiff's operations and business and threaten to continue to do so. Their acts were done with knowledge of the existence of the agreement of January 15, 1951, between plaintiff and the association. The association threatened to call a strike if plaintiff dealt with defendant unions or if it repudiated the collective bargaining agreement of January 15, 1951. Plaintiff has suffered a substantial loss of business and good will.

The preliminary injunction restrained defendants from picketing at, near, or in front of any of plaintiff's places of business, from representing that plaintiff's employees are unorganized or that its products are made by unorganized labor or that it is unfair to organized labor, and from placing plaintiff on the "unfair" or "we do not patronize list".

Defendants' points for reversal are: 1) The Jurisdictional Strike Law of California, Labor Code, § 1115 et seq., is unconstitutional. 2) The preliminary injunc-

tion should be modified since it seeks to prohibit acts not subject to prior restraint. 3) The picketing did not arise out of a controversy defined by the Jurisdictional Strike Law. 4) Where the picketing has both a legal and an illegal objective the court will not prohibit all picketing but will enjoin the picketing for the illegal objective only.

[1-4] In a series of recent cases the Supreme Court has decided all of the points made by defendants adversely to their contentions. The Jurisdictional Strike Law is constitutional. *Seven Up Bottling Co. v. Grocery etc. Union*, 40 Cal.2d 368, 254 P.2d 544. The court decided that a preliminary injunction, issued on substantially similar facts, does not prohibit acts not subject to prior restraint, that the picketing did arise out of a controversy defined by the Jurisdictional Strike Law, and that the picketing did not have both a legal and an illegal objective. *Voeltz v. Bakery and Confectionery Union*, 40 Cal.2d 382, 254 P.2d 553; *Sommer v. Metal Trades Council*, 40 Cal.2d 392, 254 P.2d 559; *Ex parte Kelleher*, 40 Cal.2d 424, 254 P.2d 572; *Isthmian S. S. Co. v. National Marine Engineers Beneficial Ass'n*, 40 Cal.2d 433, 254 P.2d 578.

[5-10] The defendants Service and Maintenance Employees Union Local 399, George Hardy, its president, Bakery Drivers Local Union No. 276, Charles A. Bolton, its secretary, Jack Allis, and Jack De Po, Jr., also contend that the trial court abused its discretion in granting the preliminary injunction against them. They argue that there was no evidence connecting them with the illegal acts. The issue was tried on the verified complaint and affidavits. When an issue is tried on affidavits, the rule is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and when there is a substantial conflict in the facts stated, the determination of the controverted facts by the trial court will not be disturbed. *Hayutin v. Rudnick*, 115 Cal.App.2d 138, 251 P.2d 707. It appears that these defendants agreed to and did join with the other de-

fendants in the commission of the acts, and that they acted in concert with the other defendants. It also appears that pickets maintained by these defendants prevented deliveries to plaintiff. The facts show a conspiracy. A conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances. *California Auto Court Ass'n v. Cohn*, 98 Cal.App.2d 145, 149, 219 P.2d 511. A conspiracy renders each participant in the wrongful acts responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor, and regardless of the degree of his activity. *Mox Incorporated v. Woods*, 202 Cal. 675, 677-678, 262 P. 302. It cannot be said that the court abused its discretionary power in ordering a preliminary injunction against these defendants pending a hearing on the merits.

Order affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



117 Cal.App.2d 203

In re ERWIN'S ESTATE.

NESSIER v. NOACK.

Civ. 15600.

District Court of Appeal, First District,
Division 2, California.

April 6, 1953.

Probate proceeding. The Superior Court, San Mateo County, Edmund Scott, J., entered order settling final account of administratrix, and claimant appealed from that portion of order which refused to approve his claim against decedent's estate for expenses of decedent's last illness. The District Court of Appeal, Dooling, J., held that where claimant failed to present his claim within time provided therefor, such claim was, by terms of

statute, barred forever, and administratrix could not waive failure to present claim in time and manner provided, even though she believed the claim to be justly due.

Order affirmed.

1. Executors and Administrators ⇨228(5)

Where claimant failed to present claim against decedent's estate within time provided therefor, such claim was, by terms of statute, barred forever, and administratrix could not waive failure to present the claim in the time and manner provided, even though she felt that the claim was justly due. Probate Code, § 707.

2. Executors and Administrators ⇨75

An administratrix owes a fiduciary duty to the heirs to protect their legal rights in the estate.

3. Courts ⇨193

The probate court is the guardian of the estates of deceased persons.

4. Executors and Administrators ⇨231

Both the administratrix and the probate judge had plain duty to protect estate against collection of a debt which the statutory law expressly declares to be barred forever. Probate Code, § 707.

5. Executors and Administrators ⇨233

Probate court could not relieve claimant of consequences of his own neglect by directing administratrix to pay a demand which became barred by his failure to pursue the plain requirements of the statute.

Fahey, Castagnetto & Gallen, Daly City, for appellant.

Halsey & Leo, San Francisco, for respondent.

DOOLING, Justice.

Appellant attacks that portion of the order settling the final account of the administratrix which refused to approve appellant's claim against the decedent's estate for \$552.64 alleged to have been paid by appellant for the expenses of decedent's last illness. Appellant did not file or present a claim within the time provided after publication of notice to creditors. However the administratrix represented to the

court that she believed the amount to be justly due and requested the court to authorize her to pay it. She filed no respondent's brief on appeal her counsel stating in a letter to the court that appellant "should, in fairness and equity, receive payment if that could be legally done without the Administratrix incurring any personal liability."

[1-4] We agree with the probate judge that it cannot be legally done. Section 707 Probate Code states in unequivocal terms that "any claim not so filed or presented is barred forever". It is appellant's position that despite this clear language the administratrix may waive the failure to present the claim in the time and manner provided by the Probate Code and the probate judge must concur in her waiver. This argument overlooks the facts that the administratrix occupies a fiduciary duty to the heirs to protect their legal rights in the estate, *Larrabee v. Tracy*, 21 Cal.2d 645, 650, 134 P.2d 265; 11a Cal.Jur., Executors and Administrators, sec. 23, p. 75, and that the probate court is the guardian of the estates of deceased persons, *County of Los Angeles v. Morrison*, 15 Cal.2d 368, 371, 101 P.2d 470, 129 A.L.R. 443; 11 Cal.Jur. Executors and Administrators, sec. 6, p. 214. It is the plain duty of both the administratrix and the probate judge to protect the estate against the collection of a debt which the statutory law expressly declares to be "barred forever".

The supreme court said in *Re Estate of Hinchon*, 159 Cal. 755, 760, 116 P. 47, 49, 36 L.R.A., N.S., 303: "The court cannot relieve him [the creditor] of the consequences of his own neglect by directing the executors to pay a demand which became barred by his failure to pursue the plain requirements of the statute."

There is nothing in *Whitmore v. San Francisco Savings Union*, 50 Cal. 145 nor in *Re Estate of Houston*, 205 Cal. 276, 270 P. 939, 60 A.L.R. 730, which authorizes the administratrix or the probate court to allow a claim not filed in time. The *Whitmore* case only holds that a secured creditor can still look to his security for the payment of the debt although he has not presented a claim against the decedent's es-

tate and the *Houston* case deals with the payment of a debt of the decedent, presumably before the time for presenting claims has expired, without requiring the presentation of a claim, as authorized by what is now section 929, Probate Code.

The wisdom of not permitting the probate court and the administratrix to compromise the plain rights of the heirs in the fashion suggested here is well illustrated by the situation existing in this case. One-eighth of the estate goes to the administratrix and seven-eighths is distributed to heirs residing in Western Germany. If the estate is to be diminished by the payment of a claim which is declared by law to be "barred forever" what protection is afforded the foreign heirs who have not consented thereto?

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.



117 Cal.App.2d 206

PEOPLE v. DEACON.

Cr. 2832.

District Court of Appeal, First District,
Division 2, California.

April 6, 1953.

Defendant was convicted in the Superior Court, City and County of San Francisco, Twain Michelsen, J., of second degree murder, and he appealed from judgment of conviction and order denying motion for new trial. The District Court of Appeal, Dooling, J., held that record disclosed no prejudicial misconduct by either judge or prosecutor.

Judgment and order affirmed.

I. Criminal Law ⚖️660

The exception to general rule, that an objection is not necessary where it would be fruitless, applies to those situations where the conduct is so flagrantly obnoxious that

a verbal objection or admonition would not erase it from the minds of the jurors.

2. Criminal Law Ⓒ1166½(12)

In prosecution for murder, record disclosed that trial judge had not been guilty of prejudicial misconduct in volunteering objection to question of defense counsel which assumed something not in evidence, and in interrupting in cases of nonresponsive answers, immaterial questions and poorly taken objections, and in volunteering an objection to hearsay evidence of witness.

3. Criminal Law Ⓒ698(2)

A judge may properly exclude inadmissible testimony even though no objection is made.

4. Criminal Law Ⓒ656(2)

The trial judge may properly ask questions in a criminal prosecution as long as questions do not cast aspersion or ridicule or indicate the judge's convictions, and especially so when no objection is made.

5. Criminal Law Ⓒ1171(1)

In prosecution for murder, wherein it was contended that prosecutor had been guilty of misconduct, record disclosed that facetious exchange among counsel and judge concerning water and alcohol, and statement of prosecutor which may have hinted that victim was at defendant's mercy, although latter may have been improper, did not constitute prejudicial error.

6. Homicide Ⓒ340(2)

In prosecution for murder, wherein court instructed jury on first-degree murder and penalty therefor, and also instructed jury that although there are two degrees of murder, evidence was such that either defendant was innocent of charge of murder or he was guilty of murder in second degree, instructions as to degree became immaterial and impropriety in connection with them could not be urged as prejudicial.

7. Criminal Law Ⓒ448(12)

In prosecution for murder which had allegedly taken place in defendant's room, admission of testimony of resident in room directly below as to spirit or tenor of voices heard directly above him, and that voices

denoted anger, was not error, since anger must be described as a conclusion and amounts to a fact.

8. Criminal Law Ⓒ695(2)

Fact that general objection by prosecutor was sustained to question asking for conclusion of witness did not amount to error, since rule relative to specific objection requirement pertains to review by appellate courts in cases where objection has been overruled.

9. Criminal Law Ⓒ1170½(2)

In prosecution for murder, argumentative question asked of defendant on cross-examination, indicating that defendant had not, at morning of killing in his apartment, had an opportunity to get together the story now being told by him, to which negative answer was given, did not constitute prejudicial error.



Albert E. Polonsky, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Charles E. McClung, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appeal from a judgment of conviction of second-degree murder and from the order denying a motion for new trial. The principal complaint is the alleged misconduct of both the trial judge and the prosecutor. Also cited are an instruction on first-degree murder and the admission of certain evidence.

Dana Clark died of knife wounds on August 12, 1951 in appellant's San Francisco apartment. Deacon and Clark had been friends for a number of years. Clark was an excessive drinker. They were together on the day in question and, with three other people, had some drinks in a bar. About 9:45 p. m. on the night in question Deacon went to one Vaughn's apartment, which was in the same building as his own, to get some ice. The ice was for Clark who had been beaten by Deacon in Deacon's apartment. Deacon said he had "blown his top". Vaughn went back to his own apartment

and Clark remained in Deacon's. At about 11:50 p. m. Vaughn saw Deacon again when Deacon rang Vaughn's doorbell and said "Call an ambulance" and "Dana is dying" and "I think I have killed Dana." Vaughn then went to Deacon's apartment and found Clark dead, lying on his back on the bed with a wound near his heart. Vaughn identified a knife that he had used in cracking the ice earlier in the evening and said he had left it on the sink where he had used it. Deacon never told Vaughn that Clark had killed himself. Clark had expressed a sullen wish to kill himself after he had been beaten. Vaughn did not see any knife when he went into Deacon's apartment after Clark had been stabbed. The knife was found in the kitchen and was clean. The autopsy showed that, although there was only one surface wound, there were three internal wounds indicating that the knife was thrust three times through the same opening. It was the expert's opinion that it was "very unlikely" that the wounds were self inflicted. Deacon testified that Clark was drunk and despondent and that finally he, Deacon, threw the knife to Clark and told him to use it or stop talking about it. Deacon further testified that Clark did use it himself, which Deacon saw and Deacon then grabbed the knife, withdrew it and threw it into the kitchen. He had felt he was morally responsible for the death, but he did not kill Clark. The cause of the previous beating given Clark by Deacon does not appear other than that he "blew his top", nor is there further motive shown for a killing. The evidence however is very convincing of a killing rather than a suicide especially in light of the expert's testimony and Deacon's admission to Vaughn, immediately after Clark's death: "I think I have killed Dana."

[1] There were no objections made to the cited conduct which is characterized as misconduct. Appellant would make use of an exception to the usual rule, that in cases where the objection would be fruitless it is not necessary. But, appellant also points out that no particular acts or statements by the judge or prosecutor may be harmful in itself. What he complains of is the sum of the particular incidents. The exception

mentioned above applies to those situations where the conduct is so flagrantly obnoxious that a verbal objection or admonition would not erase it from the minds of the jurors. In *People v. Mahoney*, 201 Cal. 618, 258 P. 607, it was pointed out that any admonition would have been disregarded by the jury in a case where the remarks of the judge were particularly distasteful. The problem really is whether a judicious admonition would have cured any prejudicial effect conveyed to the jury. *People v. Weeks*, 104 Cal.App. 708, 286 P. 514. Appellant likens his case to *People v. Burns*, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9. But in that case there were a number of errors of law as well as improper remarks made in a close case.

[2, 3] The first assignment of error is directed to the court's volunteering an objection that a question by defense counsel assumed something not in evidence. It hardly seems prejudicial, but rather quite proper. Next are listed a series of citations which are hardly necessary of quotation. All they amount to is interruption by the court in cases of nonresponsive answers, immaterial questions and poorly taken objections. The interruptions appear entirely proper and indicate no prejudice whatsoever. The next citation is the court's volunteered objection to testimony of a witness about something he had not directly witnessed. The entire colloquy is nothing more than an argument over different interpretations of the evidence. The court would not let certain evidence in because it was hearsay. It further told defense counsel that night sessions would be held if the trial did not get along. This does not appear prejudicial either. Further, the court interrupted defense counsel's opening statement on its own motion to point out that what was being said would not be material to the case. These appear to be proper remarks in the interest of confining the case to its issues. There certainly could be no prejudice from them. A judge may properly exclude inadmissible testimony even though no objection is made. *People v. Yuen*, 32 Cal.App.2d 151, 160, 89 P.2d 438, 90 P.2d 291; *People v. Parry*, 105 Cal.App.2d 319, 322, 232 P.2d 899.

[4] In two instances the court sought by itself to elicit testimony from defendant concerning what liquor was bought and drunk by him and decedent. The questions were all proper, material and directly in point. Appellant complains that the court should not have taken it upon itself to ask these questions. It is not argued that the questions were aimed at discrediting appellant, and the trial court may properly ask questions as long as they do not cast aspersion or ridicule or indicate the judge's convictions. This is especially so where no objection is made. *People v. Ottey*, 5 Cal.2d 714, 720-721, 56 P.2d 193; *People v. Carlson*, 73 Cal.App.2d 933, 942, 167 P.2d 812; *People v. Williams*, 17 Cal.App.2d 122, 125, 61 P.2d 813.

[5] The next point is alleged misconduct of the prosecutor. The principal citation concerns a rather lightly taken colloquy amongst counsel and judge concerning water and alcohol. A reading of it would suggest that defense counsel brought on the levity himself. At any rate it is at most facetious and not harmful. There is no hint at harm in a statement by the prosecutor that the defense counsel might like a drink of water. The question by the prosecutor of whether defense counsel was speaking of the case at trial or not was trivial and shows no harm. At one point the prosecutor hinted that Clark was at defendant's mercy. This may have been improper but not prejudicial. This case is not at all like *People v. Duvernay*, 43 Cal.App.2d 823, 111 P.2d 659, where the prosecution had asked extremely improper questions concerning defendant's former arrests and his characteristics as a narcotic user where he was not charged with use but with selling. Besides, the statement was not objected to.

[6] The next assignment of error refers to the court's instructions to the jury on first-degree murder and the penalty therefor. But the court also instructed the jury that "Although there are two degrees of murder, the evidence in this case is such that either the defendant is innocent of the charge of murder or he is guilty of murder in the second degree." Hence the first-degree instructions became immaterial. Respondent contends that the first-degree

instructions tended to clarify to the jurors what second-degree murder was. Second-degree murder is all murder which is not first-degree murder. If it was surplusage (and admittedly the instruction on the penalty for first-degree murder is such) it cannot be complained of as prejudicial, for appellant was, after all, convicted of second-degree murder, not first.

[7] The next assignment of error concerns the allowing a witness to testify to the spirit or tenor of voices that he heard in the room directly above his own. He stated that the voices denoted "anger". It was allowed under the exception to the opinion rule that laymen can give their opinion on matters of common knowledge that are not susceptible of analysis and detailed description. Anger, like speed or sobriety, must be described as a conclusion. *Holland v. Zollner*, 102 Cal. 633, 638-639, 36 P. 930, 37 P. 231; 20 Am.Jur., Evidence, sec. 823, p. 692; 32 C.J.S., Evidence, §§ 490, 510b, pages 148-149, 188. How "anger" could be evidenced other than by characterizing it as such is difficult to see. Anger is the fact, not the voices that evidence the anger. Every attempt at analyzing the voices heard would reproduce the same objection here made, if it were a good one.

[8] The next error claimed occurred where the witness was asked for a conclusion, a general objection by the prosecutor was made and the court thereupon sustained the objection on the specific ground that the question called for the conclusion of the witness. Appellant conceives that this was error since only a general objection was made. But what he refers to is a rule applied by an appellate court in cases where the objection is overruled. Appellant cannot make a specific objection for the first time on appeal. At the trial the court may rule out improper evidence on its own motion and appellant does not argue that the evidence was admissible.

[9] The last-cited error consisted of allowing the prosecutor to ask an argumentative question of appellant. The question was: "Mr. Deacon, isn't it a fact that at this time, when they were at your apartment that morning you hadn't had an opportunity

to get together the story that you have now told from the witness stand in this trial?" The witness gave a negative answer before the objection was made and overruled. No doubt the question is argumentative, but it was made on cross-examination and hardly is prejudicial especially since a negative answer was given.

A reading of the record satisfies us that the case was fairly tried and that no prejudicial error of any kind occurred.

Judgment and order affirmed.

NOURSE, P. J., and GOODELL, J., concur.



117 Cal.App.2d 194

Ex parte CONROY.

Cr. 4846.

District Court of Appeal, Second District,
Division 3, California.

April 3, 1953.

Rehearing Denied April 14, 1953.

Hearing Denied April 30, 1953.

Habeas corpus proceeding. The matter was referred to Superior Court judge to take evidence and make findings, and petitioner filed exceptions to the report of the referee. The District Court of Appeal, Shinn, P. J., held that evidence sustained findings of referee that habeas corpus petitioner serving life imprisonment sentence had been released from custody under special service parole to enter Army, that petitioner knew facts and conditions of the parole, and that after honorable discharge, terms of the parole had been violated by petitioner.

Writ discharged, and petitioner remanded.

1. Habeas Corpus ☞85(1)

Evidence sustained findings of referee that habeas corpus petitioner serving life imprisonment sentence had been released from custody under a special service parole to enter Army, that petitioner knew facts and conditions of parole, and that after honorable discharge petitioner had violated terms of parole. Pen.Code, §§ 3100 et seq., 3105, 3106.

2. Habeas Corpus ☞85(1)

Pardon ☞14.20

Where order of revocation of habeas corpus petitioner's parole incorporated grounds of revocation set forth in charges of Chief State Parole Officer in report which was on file in his office by reference, there was a substantial compliance with requirement that order of revocation state cause therefor, and referee taking evidence and finding facts in habeas corpus proceeding was entitled to presume that such report was based upon, and incorporated, the report of Supervising State Parole Officer of Interstate Matters, which report was before Adult Authority at time of parole revocation. Pen.Code, § 3063.

Jack E. Grisham, Long Beach, for petitioner.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

A writ of habeas corpus was issued upon petition of Joseph F. Conroy, who was and now is confined as a prisoner in the Medical Facility at Terminal Island, by direction of the Adult Authority of the Department of Corrections. He was convicted in Los Angeles County of the crime of murder, in 1937, and was sentenced to life imprisonment.

It was alleged in the petition that on or about June 3, 1944, petitioner was released from the California Institute for Men at Chino, to enter the United States Army; his induction was refused until he could be completely free of all restraint from the California Adult Authority; he was by the Authority released from all restraint, and on June 11, 1944, enlisted in the United States Army; four months later he received an honorable discharge and remained at liberty until on or about April 28, 1950, when he was taken into custody and incarcerated in the institution for men as a parole violator. It was alleged that petitioner was never released on parole, was under no restraint by the Adult Authority, he always understood that he was not on parole and was under no duty to comply

with any of the usual terms of parole, and that he never at any time violated any duty as a parolee. Respondent Marion R. King, superintendent of the Medical Facility at Terminal Island, San Pedro, made return to the writ, alleging that petitioner was given a special service parole pursuant to the provisions of § 3100 et seq. of the Penal Code, on or about June 9, 1944, and that petitioner, after his discharge from the Army, did not make this fact known to the California Bureau of Paroles, nor come within the jurisdiction thereof until May 4, 1950, and that he did not receive a pardon from the Governor and was not granted a full discharge from parole; that on June 22, 1945, petitioner's special service parole was revoked and his return to prison ordered. The return listed eight alleged acts and omissions of petitioner as violations of the terms of his parole, and alleged that by reason thereof petitioner's parole was duly revoked and petitioner was ordered returned and was returned to prison. A traverse to the return was filed by petitioner denying that he had received a special service parole and setting forth at length the details of his conduct and actions after his release, alleging that none of them constituted a violation of parole or the conditions under which he was released from custody.

The matter was referred to Honorable Jesse J. Frampton, Judge of the Superior Court, to take evidence and make findings: (a) As to whether Conroy was given a special service parole; (b) as to the nature of his release from confinement and his knowledge of the nature thereof; (c) as to any proceedings had as to revocation of parole; (d) as to whether Conroy was guilty of violation of parole; (e) as to the truth of the allegations of the traverse to the return. Hearings were had before the referee, oral and documentary evidence was taken and the referee has reported to this court a summary of the evidence and his findings thereon.

The referee found: (1) That petitioner was granted a special service parole; (2) that attached to the parole were certain conditions which are set forth at length in the findings; (3) that the conditions

upon which petitioner might ultimately be released from parole on his honorable discharge from the armed forces were explained to him by members of the staff of the State Institution for Men at Chino, and also by a representative of the armed forces prior to petitioner's release, and that petitioner signed an original ticket of parole and at all times knew that he was, and remained, under the jurisdiction of the parole authority, except that actual supervision was suspended during the time he was in the armed forces and except as to all directives and requirements of the armed forces inconsistent with the terms and conditions of his parole; (4) parole was revoked on June 22, 1945, by the Adult Authority; (5) petitioner violated the terms and conditions of his parole in that he married in 1944 without the right to marry being restored to him after his discharge from the armed forces; he changed his places of employment and residence numerous times without having obtained permission; he failed to report to the State Parole Officer after his discharge from the armed forces; he violated the penal statutes of the State of Nevada or of the county or municipality thereof, and he again married in the year 1950 without such right being restored to him. Further findings were made with reference to the allegations of the traverse to the return. These were as to evidentiary matters relied upon by petitioner in substantiation of his claim that he was not at any time subject to the conditions of a parole and that the only condition of his release was that he be inducted into or enlist in the armed forces. These findings in material respects are covered by the ultimate findings above mentioned.

[1,2] Petitioner filed exceptions to the report of the referee and these were answered by the respondent, Dr. King. The exceptions question the sufficiency of the evidence to support the findings of the referee with respect to petitioner having been released under a special service parole, and his knowledge of that fact and of the conditions of parole. The point was made that the order revoking parole did not state the cause or causes for the same, as required

by § 3063 of the Penal Code. A review of the evidence taken at the hearings before the referee satisfies us that there was ample evidence to support the findings of the referee. The exceptions are therefore overruled.

On June 21, 1945, the supervising "State Parole Officer Interstate Parole Matters" reported to the Adult Authority for the Bureau of Paroles, that Conroy had never reported to or informed the Bureau of Paroles that he had been separated from military service; that a report had been received from the Federal Bureau of Investigation dated April 9, 1945, advising that Conroy had been arrested at Mineral Wells, Texas, for threatening to kill his wife, and was released from custody, and further that the Chief of Police at Mineral Wells, Texas, had advised the Bureau of Paroles that Conroy had been arrested on said charge and released, and that he was then working as a civilian driving a cab. Upon the following day, at a meeting of the Adult Authority at San Francisco, action was taken to revoke certain paroles, including the special service parole of Conroy. The minutes of the meeting recited that the Chief State Parole Officer presented reports in writing in certain cases listed below, including the case of Conroy, and that: "These reports are now on file in the office of the executive secretary at the San Francisco office, charging violations of the terms and conditions of their paroles and recommending that the parole in each case be cancelled, suspended, and/or revoked." The minutes stated: "Due cause being shown by the Chief State Parole Officer, it is hereby ordered that the parole heretofore granted the above named and numbered prisoners be suspended, and/or revoked, upon the ground that the above named parolees have violated the terms and conditions of their paroles, and more particularly set forth in the Chief State Parole Officer's charges, which are made a part of this order of revocation, as though fully set forth herein." On June 22, 1945, there was endorsed on the report of the supervising State Parole Officer, in the case of Conroy, the following: "Special Service Parole revoked, return or-

dered. Approved, Allen Moore, Chief State Parole Officer." On May 29, 1950, the State Parole Officer reported to the Adult Authority eight separate alleged violations of parole "supplementary to Adult Authority action June 22, 1945, suspending parole." Petitioner was presented with a copy of these charges. It does not appear in the record that the Adult Authority took additional action upon the supplementary report. A number of the charged violations were committed subsequent to the action taken by the Authority June 22, 1945.

We are of the opinion that there was substantial compliance with the requirement that the order of revocation state the cause therefor, as required by § 3063 of the Penal Code. One of the conditions of the parole was that Conroy should report at once to the State Parole Officer upon being discharged from the military service. Another was that he should not marry without restoration of civil rights by the Adult Authority. It is not questioned that he married after his discharge from the service. Another was that he should not drive or operate an automobile except with the written permission of the Bureau of Paroles. It appears from the report of the "State Parole Officer Interstate Parole Matters" that the terms of parole had been violated in each of these particulars. Although the minutes of the meeting of June 22, 1945, incorporate the grounds for revocation, set forth particularly in the report of the Chief State Parole Officer on file in his office and made them a part of the order of revocation, the referee could properly presume that such report was based upon and incorporated the report of the Supervising State Parole Officer, of Interstate Matters, which was before the Adult Authority at the June 22nd meeting. Furthermore, the Chief State Parole Officer, on August 20, 1945, applied for a requisition for the arrest and detention of Conroy, and therein alleged the failure of Conroy to report to the Bureau of Paroles the fact that he had been discharged from the Army. A warrant was issued but was not executed

for the reason that Conroy had left the State of Texas.

Section 3105 of the Penal Code provides: "Special Service paroles shall be conditional in nature and shall continue in force, unless sooner revoked, for a period of time equal to the maximum term of imprisonment theretofore fixed for the parolee." Under § 3106, a person holding a special service parole who receives an honorable discharge is eligible for a full pardon from the Governor, or may petition the Authority granting the parole for full discharge, which the Authority may grant. No pardon or discharge was granted. Petitioner had no right to be at large except under his special service parole. His arguments based on the assumption that he was not paroled but was in some manner finally discharged from custody, are of no avail for the reason that it was established that he was released from custody under a special service parole. The lapse of almost five years time between the date of the revocation of the parole and the reimprisonment of petitioner did not entitle him to be released from custody. See *People v. Dixon*, 387 Ill. 420, 56 N.E.2d 816.

The writ is discharged and petitioner is remanded.

PARKER WOOD and VALLÉE, JJ., concur.



117 Cal.App.2d 101

PEOPLE v. FRYE.

Cr. No. 2864.

District Court of Appeal, First District,
Division 1, California.

March 31, 1953.

Prosecution for rape and assault with intent to commit rape. The Superior Court, County of Alameda, Donald K. Quayle, J., rendered judgment of conviction and denied defendant's new trial motion and defendant

appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law ⇐1081

Where defendant who was in state prison requested permission to forward his notice of appeal in ample time so that letter should have reached clerk within time limited for filing notice of appeal, but due to necessary delay in prison mailing procedure, notice was received after expiration of such time, defendant made a constructive filing within prescribed time and satisfied jurisdictional requirements as contemplated by law, and hence would be released from default. Rules on Appeal, rule 31.

2. Rape ⇐54(1)

Corroboration of prosecutrix' testimony is not necessary in a rape case. Pen.Code, §§ 1108, 1111.

3. Criminal Law ⇐507(7)

Victim in a rape case is not an "accomplice" within statute making person who is liable to prosecution for the identical offense charged against defendant on trial an accomplice. Pen.Code, §§ 1108, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

4. Criminal Law ⇐1160

Court of Appeal must accredit to decision of trial judge a familiarity with the witnesses and their testimony and that in denying a new trial, trial judge acted with understanding and with a regard for function of jury.

5. Criminal Law ⇐1159(4)

To reverse judgment on verdict of conviction on ground that prosecuting witnesses' testimony was inherently improbable, it should clearly appear that verdict was result of passion and prejudice.

6. Rape ⇐51(4)

In prosecution for rape, evidence sustained implied finding of jury that victim's resistance was overcome by force or violence or that victim was prevented from resisting by threats of great and immediate bodily harm. Pen.Code, § 261, subds. 3, 4.

7. Rape ☞6

If female resists, but her resistance is overcome by force or violence, rape is committed under conditions prescribed in statute. Pen.Code, § 261, subsds. 3, 4.

8. Rape ☞6

Gravamen of offense of forcible rape is use of force or violence sufficient to overcome resistance of female, and bodily injury is not essence of offense. Pen.Code, § 261, subsds. 3, 4.

9. Rape ☞6

To warrant conviction for forcible rape, kind of physical force exerted by defendant in commission of act is immaterial. Pen.Code, § 261, subsds. 3, 4.

10. Rape ☞11

If female is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, rape is committed. Pen.Code, § 261, subsds. 3, 4.

11. Rape ☞51(4)

Evidence sustained defendant's conviction of forcible rape. Pen.Code, § 261, subsds. 3, 4.

12. Rape ☞51(7)

In prosecution for rape, evidence sustained implied finding of jury that defendant was man who attacked victim. Pen. Code, § 261, subsds. 3, 4.

13. Rape ☞57(5)

In prosecution for assault with intent to commit rape, evidence raised question for jury as to whether defendant assaulted prosecutrix with intent to have sexual intercourse with her and used force to overcome her resistance.

14. Rape ☞16(1)

If defendant intends to have sexual intercourse with his victim, and to use force to overcome her resistance, assault with intent to commit rape is committed.

15. Criminal Law ☞507(7)

Victim of assault with intent to commit rape was not an "accomplice" of defendant, and it was unnecessary for her testimony to be corroborated. Pen.Code, §§ 1108, 1111.

16. Criminal Law ☞1144(14)

Instructions, not incorporated in record, will be presumed correct and will not be reviewed.

17. Criminal Law ☞1134(3)

Defendant's request for reversal of judgment of conviction for assault to commit rape on all statutory grounds set forth in statutes defining rape and prescribing punishment therefor, defining an accomplice, and requiring an accomplice's testimony to be corroborated, and statute relating to form of verdict in certain type of cases, not involved in instant case, was too general and would not be reviewed. Pen. Code, §§ 261, 264, 1111, 1158a.

Robert Frye, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Charles E. McClung, Deputy Atty. Gen., J. F. Coakley, Dist. Atty. of Alameda County, and Richard C. Lynch, Deputy Dist. Atty., Oakland, for respondent.

FRED B. WOOD, Justice.

The defendant appeals from the judgment entered upon his conviction on two counts: Count 1, rape; Count 2, assault with intent to commit rape. He also appeals from the order denying his motion for a new trial.

[1] His notice of appeal, dated June 7, was received by the clerk of the trial court June 10, 1952, but under Rule 31 should have been received June 6. It appears from a letter of the warden of the state prison where defendant was incarcerated, that the defendant requested permission to forward his notice on June 5, 1952, "but due to the necessary delay in procedure here, we were unable to arrange for his signing and mailing the Notice until today [June 9] * * * We assume that this Notice is timely within the rule of *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868, and *People v. Arensen*, 91 Cal.App.2d 26, 204 P.2d 389, 957." For those reasons we hold that the defendant made a constructive filing within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law.

(1) *Defendant claims that his conviction of the crime of rape (Count 1) is not supported by the evidence.*

In that behalf, he contends that the complaining witness' testimony was self-contradictory and that she related facts inherently improbable; that there was no evidence that she resisted him; that because of darkness, it is apparent she could not have identified him as the person who attacked her; and her testimony is not corroborated.

[2,3] Our examination of the record convinces us that these points are not well taken. Corroboration of the prosecutrix' testimony is not necessary in such a case. Section 1108 of the Penal Code is inapplicable because rape is not one of the crimes therein mentioned. Section 1111 of that code is also inapplicable because the victim in a rape case is not an "accomplice," not a person "who is liable to prosecution for the identical offense charged against the defendant on trial." See *People v. Gidney*, 73 P.2d 1186, 10 Cal.2d 138, and 22 Cal.Jur. 399.

[4,5] As a reviewing court, we "must accredit to the decision of the trial judge a familiarity with the witnesses and their testimony and that in denying a new trial he acted with understanding and with a regard for the function of the jury. Those instances in which the appellate court have overridden the conclusions of the jury and the trial court are where the testimony of the complaining witness is uncorroborated and it is so obviously and so inherently false and unbelievable that reasonable minds may not differ with respect to its character. *People v. Jefferson*, 31 Cal.App. 2d 562, 566, 88 P.2d 238, 240. For testimony which has effected a conviction by a jury with the approval of the trial court 'to justify a reversal * * * on that ground it should clearly appear that the verdict is the result of passion and prejudice.' *Ibid.* *People v. Lewis*, 18 Cal.App. 359, 123 P. 232." *People v. Holquin*, 48 Cal.App.2d 551, 555, 120 P.2d 71, 73. See also *People v. Brown*, 100 Cal.App.2d 207, 223 P.2d 60.

The prosecutrix' testimony as to the first count was not inherently improbable; was believed by the jury; and, therefore, can

not be rejected by us. A summary of the salient features of her testimony will suffice.

The victim lives with her family in Oakland, across the street from Raimondi Park. On the evening of October 28, 1951, at about 8 p. m., she left her home alone to attend a movie. When she reached a certain street intersection alongside the park (it was dark and there was poor artificial light at the corner) a man approached her walking in the opposite direction. He grabbed her, put both arms around her and threw her to the ground. At first she screamed but he put his hands on her throat, choked her and told her not to scream any more. He had a knife in his hand; she did not see it but she felt it, managed to grab the knife and threw it away. He then pulled her to her feet and marched her towards the rest room in the park. He had something pressed against her back, and told her to walk or he would shoot her. She did not see this object but assumed it was a gun. She asked him if he wanted her money but he refused it and said when he grabbed women like that he wanted intercourse. She did not scream after he had thrown her to the ground and told her not to scream because she was afraid. There were no lights in or around the rest room building. He took her into the ladies rest room and told her to lie down. She did not do so fast enough so he threw her down. He took her coat off and threw it over the rest room door. She told him she was pregnant, that he might hurt her and that she wanted to go home to her five children. He disregarded her statements, and told her she should have stayed home with her children. He then accomplished the act. It was without her consent. She was afraid he would injure her because she was pregnant and she thought he had a gun. He performed more than this act of intercourse. They were in the ladies room until 11:00 or 11:30. The man held her during most of this time and when not holding her stood where she could not get around him to get out. He smoked cigarets off and on. She was afraid to look at him but glanced at him every time he lighted a cigaret. About 11:00 he forced her to go into the men's room in the same building. He told her he usually killed women he caught like that, and that he

would go just as far for rape as he would for murder. She was again pushed to the floor and he again had intercourse more than once. They stayed in the men's room about an hour and a half or two hours. During this time she heard someone enter the adjoining room but did not scream because, as stated by her, "I was pregnant and I could not wrestle with nobody." He took her outside, had another act of intercourse outside the building and later, about 3:00 a. m., told her he would let her go. She went towards her home and on the way met two policemen in a patrol car. They took her to the inspector's office and then to Highland Hospital where she was examined. The doctor who examined her testified that the examination showed injuries and abrasions about the external genitalia, live sperm in the vagina and a pregnant condition about four months along. It was the doctor's opinion it would take a very forceful act of intercourse to cause the abrasions. The police showed the witness some pictures of various men, prior to March 1952. She told them that one man "favored" the man who raped her. She found out that this man was six feet two or more inches tall and on that basis decided he wasn't the man that raped her, because the latter man was not as tall as her husband who was six feet two inches tall. In March, 1952, she identified a picture of defendant from a group of pictures shown to her by the police, as the man that raped her. She identified defendant in court as the same man that raped her on the 28th of October, 1951.

[6-11] Concerning resistance by the victim, the statute defines rape as an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances, among others: "3. Where she resists, but her resistance is overcome by force or violence" and "4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution". Pen.Code, § 261. The force which defendant exerted and the threats he uttered, particularly in view of the victim's pregnant condition, amply support an implied finding that her resistance was over-

come by the methods defined in each of clauses 3 and 4 of section 261. The following observations of the reviewing court in *People v. Tollack*, 105 Cal.App.2d 169 at pages 171-172, 233 P.2d 121, at page 122, are peculiarly apt in our case: "If the female resists, but her resistance is overcome by force or violence, rape is committed under the conditions prescribed by subdivision 3 of section 261. The gravamen of the offense is the use of force or violence sufficient to overcome the resistance of the female. Bodily injury is not the essence of the offense. The word 'force' implies physical power exerted upon a person or thing. *People v. McIlvain*, 55 Cal.App.2d 322, 328, 331, 130 P.2d 131. In *People v. Bradbury*, 151 Cal. 675, at page 677, 91 P. 497, quoting from *Bishop on Criminal Law*, it was said: "The kind of physical force is immaterial; * * * it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will." The prosecutrix testified that while on the sidewalk defendant took her arm and turned her around; that he edged her from the sidewalk to the place where the act was committed; put his hands underneath her clothes and fondled her; put his hand inside her blouse; and that he raised and pushed her clothing aside. The evidence was sufficient to bring the offense within subdivision 3 of section 261. If the female is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, rape is committed under the conditions prescribed by subdivision 4. Threats to do bodily harm were made and the consent of the prosecutrix was obtained as a result of those threats. *People v. Peterman*, 103 Cal.App.2d 322, 324, 229 P.2d 444. The threats were accompanied by apparent power of execution. 'A submission induced by fear is not acquiescence.' *People v. Blankenship*, 103 Cal.App. 2d 60, 67, 228 P.2d 835, 839. The evidence was also sufficient to bring the offense within subdivision 4." See also *People v. Casandras*, 83 Cal.App.2d 272, 277-279, 188 P. 2d 546; *People v. Blankenship*, 103 Cal. App.2d 60, 64-66, 228 P.2d 835; *People v. Peterman*, 103 Cal.App.2d 322, 324-325, 229 P.2d 444; *People v. Harris*, 108 Cal.App.2d 84, 89-90, 238 P.2d 158; *People v. Flores*,

62 Cal.App.2d 700, 703-705, 145 P.2d 318; *People v. Lay*, 66 Cal.App.2d 889, 892-893, 153 P.2d 379.

[12] The victim's identification of the defendant was positive. We cannot substitute our judgment for that of the jury on the question whether or not she had a sufficient opportunity to observe his features to enable her to identify him. Although the rest room in the park was unlighted defendant smoked cigarets with some frequency while there and the prosecutrix glanced at him every time he lighted a cigaret. The evidence supports the implied finding that defendant was the man who attacked her.

(2) *As to the second count, defendant claims the evidence is not sufficient to support an implied finding of intent to commit rape.*

This point, also, is not well founded.

According to her testimony, the victim was returning home from church about 9 in the evening of March 16, 1952, on Campbell Street, next to Raimondi Park, Oakland. As she approached a street intersection she met a man coming toward her. When he got to her he stuck a knife up to her neck but did not grab hold of her. He told her to start walking and that if she screamed he would cut her throat. She dropped some song books she was carrying and screamed until he started choking her so she could not scream. She offered him money but he told her to do as he said. He forced her into the park and then into the rest room building. She screamed twice before she arrived at the rest room. After he got her into the rest room he got her down on the floor, tried to get her coat off and her dress up, and she bit his thumb and started screaming again. During this time she heard her son and his friends outside the rest room. This man had kept the knife at her throat while he and she approached the rest room and still had it in the rest room. He knicked her with the knife but not enough for it to bleed. She identified the defendant in court as the same man. While the struggle was going on her son and two of his friends came into the rest room. The man said "wait and let me explain to you, I was only playing," and then

he ran across the park. The boys ran after him and caught him after he fell in the park.

Her son testified that he heard some one scream, thought it was his mother, ran outside their home (which was nearby, opposite the park), met two of his friends on the street, who with him went toward the rest room. A few seconds later he heard her scream again. He called out "May, is that you?" and a man's voice replied, "No, this isn't May." The son and one of his friends ran in. His mother was scuffling on the floor and the man was over her and had her dress up. The man said he wanted to explain, and that he was just playing. The boys stepped from the door and the man ran out with the boys after him. They caught him, threw him down, and proceeded to beat him. His mother came up, told him not to kill the man and then they took the man out on the street. The police arrived thereafter.

[13, 14] The jury was amply justified in inferring from this evidence that the defendant assaulted this prosecutrix with intent to have sexual intercourse with her and to use force to overcome her resistance; i. e., assault with intent to commit rape. "The crime of assault with intent to commit rape was committed, if defendant intended to have sexual intercourse with his victim and to use force to overcome her resistance." *People v. Nye*, 38 Cal.2d 34, 37, 237 P.2d 1, 3.

[15] The testimony of the victim's son corroborated her testimony, but there was no legal requirement for such corroboration because this victim, like the victim of the offense charged in Count 1, was not an accomplice of the defendant.

[16] (3) Defendant suggests that some of the court's instructions may have been erroneous, but as the transcript upon this appeal does not contain the instructions given, we are unable to consider this point. "Instructions not incorporated in the record will be presumed correct and will not be reviewed." (4 Cal.Jur.2d 441, Appeal and Error, § 569, note 12, and cases cited.)

(4) Defendant complains that he was not properly represented at the trial, suggesting that his counsel should have cross-examined

the prosecutrix more vigorously at the trial. This point is without merit. The record indicates that his counsel conducted an extensive cross-examination of the prosecutrix, covering substantially all of her testimony, with emphasis upon her identification testimony. This is not to suggest that the state would be responsible for the negligence, if any, of defendant's counsel, had defendant's counsel been negligent, which he was not.

[17] (5) Finally, defendant requests reversal "on all statutory grounds set forth in sections 261, 264, 1111, 1158a of the Penal Code." This is too general a statement to be meaningful. Sections 261 and 264 merely define rape and prescribe the punishment therefor. Section 1111 defines "an accomplice" and requires his testimony to be corroborated. Section 1158a relates to the form of verdict in certain types of cases not involved here.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.



117 Cal.App.2d 247

LANE v. LANE.

Civ. 19246.

District Court of Appeal, Second District,
Division 2, California.

April 10, 1953.

A wife brought an action against her husband and obtained interlocutory decree of divorce. The Superior Court of Los Angeles County entered an order requiring defendant to pay a specified amount of money monthly for support of the wife and he appealed. The District Court of Appeal, Fox, J., held that property settlement agreement entered into by the parties was not an agreement providing for wife's support in nature of alimony, and that court lacked jurisdic-

tion to modify decree approving such agreement.

Order in accordance with opinion.

1. Husband and Wife ⇨30

Where husband and wife have agreed upon settlement of their property rights courts are loath to disturb agreement except for equitable consideration.

2. Husband and Wife ⇨278(1)

A property settlement agreement entered into by estranged husband and wife, not tainted by fraud or compulsion and not in violation of confidential relationship of parties, is valid and binding.

3. Divorce ⇨254

Where intention of parties was to definitely, fully and permanently adjust and settle property rights and obligations, and a provision for monthly payments is a part of such plan and constitutes an integral and important element in amicable adjustment of property rights, court may not thereafter modify decree approving settlement.

4. Divorce ⇨286

Where there is no extrinsic evidence relative to property settlement agreement entered into by estranged husband and wife and approved by court, reviewing court is not bound by construction thereof by trial court but must make final determination in accordance with applicable principles of law.

5. Husband and Wife ⇨279(1)

In construing property settlement agreement entered into by estranged husband and wife, agreement must be considered in its entirety.

6. Divorce ⇨169

An interlocutory decree of divorce is, so far as it determines rights of parties, a contract between them, and interpretation of such a decree is a question of law.

7. Divorce ⇨254

Agreement entered into by husband and wife, approved by court in wife's divorce action, and dividing community property and providing for support of wife for specified number of years, and not containing expressed provision for wife's support, and

obligating husband's estate to complete performance of agreement if husband died, and providing for payment of attorney's fees if suit was brought upon agreement, and not providing for submission of agreement to court for approval, constituted a property settlement agreement and was not agreement providing for wife's support in nature of alimony, and court lacked jurisdiction to modify decree approving such agreement.

G. L. Berrey, Los Angeles, for appellant.

J. Q. Gilchrist, Los Angeles, for respondent.

FOX, Justice.

Upon a hearing of an order to show cause re modification of an interlocutory decree of divorce, defendant was required to pay plaintiff \$200 per month for her support until the further order of the court. Defendant appeals.

Plaintiff filed suit for divorce on January 3, 1949, charging defendant with extreme cruelty. They were married in July, 1932, and separated in December, 1945. There were no children. Plaintiff attached to her complaint as an exhibit, and by reference made it a part thereof, a copy of "a property settlement agreement * * * dividing their community property and providing for the support of plaintiff," according to her allegation. She prayed (1) for a decree of divorce; (2) that "the said property settlement agreement and agreement for the support of said plaintiff be confirmed, ratified and approved;" and (3) for general relief. The agreement was dated January 3, 1949; it recited that the parties desired "to settle all questions as to their respective property rights between themselves, and have been fully and independently advised by their respective counsel in regard thereto." It provided for the sale of the home and furniture and the equal division of the net proceeds. The husband kept the 1940 Chrysler sedan and 69 shares of the capital stock of Bank of America, and agreed to pay the wife \$1,750, with interest at five percent, out of his share of the proceeds of the sale of the house and furniture,

but in any event within six months, whether said property was sold or not. He also bound himself, "his estate, his heirs, executors and administrators" to pay the wife the sum of \$150 on the third day of each month thereafter, commencing with the date of the agreement, for a period of three years from date, or until she remarried. There was no characterization of these payments.

The wife agreed "to accept the said several sums of \$150.00 per month * * * for the next three years, or until her remarriage, together with the other real and personal property as herein set forth as and for and in full of her right and claim in and to any interest in the community property of herself and the First Party, as well as in full of her right and claim to alimony, support and maintenance from the First Party; * * *." The agreement further provided that in case the wife filed suit to collect any of the monthly or other payments due her the husband would pay a reasonable attorney's fee. There was no provision in the agreement that it be submitted for court approval in the event of a suit for divorce.

Defendant appeared in the action but did not file an answer. He did, however stipulate that "his default might be taken" and the matter be heard "as a default." An interlocutory decree of divorce was granted plaintiff in due course. It approved the agreement of the parties, designating it as a "property settlement," and by reference incorporated all of its terms and provisions in the judgment. It did not, however, contain any order requiring defendant to perform said agreement, nor did it contain any order directing him to make any payments whatever to plaintiff. The final decree made no change in these particulars.

Defendant has made each of the \$150 monthly payments provided for in the agreement, the last being made on December 3, 1951. On December 28, 1951, less than a week prior to the expiration of the three-year period from the date of the agreement, plaintiff caused the issuance of an order to show cause, the hearing on which resulted in the order here on appeal.

Defendant attacks the order on the ground that the trial court lacked jurisdic-

tion to modify the interlocutory decree. His contention is that the agreement he made with the plaintiff constituted a settlement of their property rights, and that the payments therein specified were not in the nature of alimony. His position must be sustained.

[1-3] Property settlement agreements are sanctioned by the Civil Code, §§ 158, 159, and occupy a favored position in the law. Such agreements are usually made, as in this case, with the advice of counsel after careful negotiations. The courts prefer agreement in such matters rather than litigation. *Hill v. Hill*, 23 Cal.2d 82, 89, 142 P.2d 417. When the parties have agreed upon the settlement of their property rights the courts are loath to disturb their agreement except for equitable consideration. A property settlement agreement, therefore, not tainted by fraud or compulsion and not in violation of the confidential relationship of the parties, is valid and binding. *Adams v. Adams*, 29 Cal.2d 621, 624, 177 P.2d 265. When it appears that it was the intention of the parties to definitely, fully and permanently adjust and settle their property rights and obligations and a provision for monthly payments is a part of such plan and constitutes an integral and important element in the amicable adjustment of the property rights of the parties which has judicial approval, the court is without power thereafter to modify the decree. *Hamilton v. Hamilton*, 94 Cal.App.2d 293, 295, 210 P.2d 750; *Puckett v. Puckett*, 21 Cal.2d 833, 840, 136 P.2d 1; *Ettlinger v. Ettlinger*, 3 Cal.2d 172, 178, 44 P.2d 540.

[4-6] Where, as here, there was no extrinsic evidence relative to the agreement or its execution its construction is purely a question of law. Under such circumstances a reviewing court is not bound by the construction thereof by the trial court but must make final determination in accordance with the applicable principles of law. *Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825; *Western Coal & Min. Co. v. Jones*, 27 Cal.2d 819, 827, 167 P.2d 719, 164 A.L.R. 685; *LaLumia v. Northern Calif. Packing Co.*, 75 Cal.App.2d 917, 922, 172 P.

2d 94; *Clark v. Tide Water Associated Oil Co.*, 98 Cal.App.2d 488, 490, 220 P.2d 628. In interpreting an agreement, of course, it must be considered in its entirety. *Street v. Streeter*, 67 Cal.App.2d 138, 143, 153 P.2d 441; *Puckett v. Puckett*, *supra*. An interlocutory decree of divorce is, so far as it determines the rights of the parties, a contract between them, *London Guarantee & Accident Co. v. Industrial Acc. Comm.*, 181 Cal. 460, 465, 184 P. 864; *Taylor v. George*, 34 Cal.2d 552, 557-558, 212 P.2d 505; and "[t]he interpretation of such a decree is a question of law." *Becker v. Becker*, 36 Cal.2d 324, 326, 223 P.2d 479, 481.

[7] We are satisfied from an examination of the agreement that it was the intention of the parties to completely settle all of their property rights and obligations to each other. The agreement stated at the outset that the parties desired to settle all questions as to their respective property rights. They then provided for the disposition of their home and furniture, the automobile, and the bank stock. Thus all the community property is disposed of. Then follows the provision whereby defendant agreed to pay to plaintiff \$150 a month for a period of three years, or until she remarried, and binds his legal representatives to carry out this agreement. It is to be noted that these payments are not stated to be for a particular purpose. It is significant that there is no reference to support or maintenance or alimony in connection therewith. If these payments had been intended for such purpose it is both natural and reasonable that some mention thereof would have been made. Such is the usual practice. In the acceptance of these payments they are not described as being for support or maintenance. They are accepted "together with" the other property in full settlement of her community interest and claim to alimony, support and maintenance. The completeness of the agreement is indicated by the provision that if plaintiff brings suit to collect any of the monthly or other payments provided for therein defendant agrees to pay a reasonable attorney's fee. It will also be recalled that there is no provision for sub-

mission of the agreement for court approval in the event an action for divorce is filed.

The fact that there are no express provisions in the agreement for plaintiff's support; that the monthly payments are not designated for that purpose; that defendant's estate is obligated to complete performance of the agreement in the event of defendant's death; that provision is made for payment of attorney's fees if suit is brought upon the agreement; that there is no provision for submitting the agreement to the court for approval; that plaintiff accepted the monthly payments and the other property in full for both her community interest and claim to alimony as a package settlement; and that the parties desired to settle all questions relative to their property rights, point unerringly to the conclusion that it was the intention of the parties to completely adjust and settle their property rights and that the provision for the monthly payments constituted an integral and important element in the amicable adjustment of the property rights of the parties. *Puckett v. Puckett*, supra; *Ettlinger v. Ettlinger*, supra; *Hamilton v. Hamilton*, supra; *Holloway v. Holloway*, 79 Cal.App.2d 44, 46, 179 P.2d 22; *Kohl v. Kohl*, 66 Cal.App.2d 535, 541, 152 P.2d 494; *Rich v. Rich*, 44 Cal.App.2d 526, 529, 112 P.2d 780; *Hodgson v. Hodgson*, 6 Cal.App.2d 496, 498, 44 P.2d 544; *Wallace v. Wallace*, 136 Cal.App. 488, 492, 29 P.2d 314. The fact that the monthly payments ceased upon the remarriage of plaintiff is not persuasively significant since they are made a charge upon defendant's estate. This is particularly true when the contract is considered in its entirety. A like provision terminating payments upon the remarriage of the wife was contained in the *Kohl*, *Puckett*, *Hamilton* and *Ettlinger* cases, supra, yet the agreement in each of those cases was held to be a settlement of property rights and not one for support or alimony.

Although plaintiff referred to the agreement in her complaint as a property settlement agreement and described it as divid-

ing their community property and providing for her support, she did not pray for alimony but only requested approval of the agreement. The court, in the interlocutory decree, however, designated the agreement as a property settlement agreement, but did not order the defendant to perform any obligations thereunder. The fact that here, as in *Wallace v. Wallace*, supra, and *Hamilton v. Hamilton*, supra, the prayer of the complaint did not ask for alimony but merely that the property settlement agreement be approved, and that the decree did not undertake to make any award for alimony, but only approved the agreement without ordering the defendant to carry out his commitments therein, see *Howarth v. Howarth*, 81 Cal.App.2d 266, 271, 183 P.2d 670, indicates that the trial court considered the agreement as a property settlement agreement and therefore designated it as such in the decree and did not consider it as providing for the plaintiff's support in the nature of alimony.

It should be noted that defendant has fully performed the agreement and has made the final payment when due and prior to the issuance of the order to show cause. To permit the agreement which the parties made for the purpose of completely and finally settling their financial obligations, and which has been fully performed, to become the foundation for alimony payments of an indeterminate duration would be to make a different contract from that which the parties intended and actually made and would result in defendant's being trapped by the agreement and default judgment. See *Burnett v. King*, 33 Cal.2d 805, 811, 205 P.2d 657, 12 A.L.R.2d 333. If property settlement agreements are to continue to occupy a favored place in the law their integrity must be preserved.

The order of January 23, 1952, ordering defendant to pay \$200 per month for plaintiff's support is reversed. The purported appeals from the other orders are dismissed.

MOORE, P. J., and McCOMB, J., concur.

117 Cal.App.2d 121

PEOPLE v. OWENS.**Cr. 4872.**

District Court of Appeal, Second District,
Division 2, California.

March 31, 1953.

Defendant was convicted in Superior Court, Los Angeles County, Charles W. Fricke, J., of grand theft, and of receiving money to be wagered on horse races, and he appealed. The District Court of Appeal, Fox, J., held that evidence that defendant received from his victims various amounts to be placed on horse races which defendant represented to be fixed, but which were in fact not fixed, to defendant's knowledge, sustained conviction for grand theft upon theory either of false pretenses or by trick and device, and also held that such offense differed in its elements from that of receiving money to be wagered on horse races, permitting convictions for both.

Affirmed.

1. False Pretenses $\S$ 49(1)
Larceny $\S$ 65

Evidence that defendant received from his victims various amounts to be placed on horse races which defendant represented to be fixed, but which were in fact not fixed, to defendant's knowledge, sustained conviction for grand theft upon theory either of false pretenses or by trick and device. Pen.Code, $\S$ 484.

2. Gaming $\S$ 73

That defendant placed most of his bets at one of the race tracks through pari mutuel machine as provided by law was no defense to prosecution for receiving money to be wagered on horse races, since to sustain it would be to permit commercialized gambling conducted away from track, in contravention of state's public policy. Pen. Code, $\S$ 337a, subd. 3.

3. Criminal Law $\S$ 29

A defendant may be convicted of separate offenses arising out of same transaction when each charge is separately stated and offenses differ in their elements and one is not included in the other.

4. Criminal Law $\S$ 29

Where defendant was charged with grand theft and with receiving money to be wagered on horse races, arising out of his obtaining money from victims to be placed on horse races which he alleged to be fixed, but which were in fact not fixed, to defendant's knowledge, such offenses differed in their elements and one was not included in the other, and convictions could be had for both. Pen.Code, $\S\S$ 337a, subd. 3, 484.

5. Criminal Law $\S$ 863(2)

Court's statement to jurors, in answer to question arising during deliberations, that where otherwise a theft would exist, fact that property obtained was a check, upon which payment was subsequently stopped, would not alter situation, but that obtaining of property unlawfully "in any one of the manners described", constituted the theft, was not erroneous because of omission of element of intent, in view of presumption that previous instructions, not part of record, fully instructed jury on what constituted theft and the element of intent in relation thereto. Pen. Code, $\S$ 484.

6. Criminal Law $\S$ 863(2)

Court's statement to jurors, in answer to question arising during deliberations, to effect that where otherwise a theft would exist, fact that property obtained was a check, upon which payment was subsequently stopped, would not alter situation, but that obtaining of property unlawfully in any one of manners described constituted the theft, was proper, as against contention that it implied defendant's guilt of grand theft and that use of word "stolen" therein was an ambiguous reference to crime with which defendant was charged. Pen.Code, $\S$ 484.

7. Criminal Law $\S$ 825(1)

Where defendant desires court to make a more specific statement to jury, he must request it.

8. Criminal Law $\S$ 1023(10)

Appeal from verdict of conviction would be dismissed as unauthorized.

John Owens, in pro. per.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOX, Justice.

Plaintiff was convicted of 14 counts of grand theft and 17 counts of violation of Penal Code section 337a, subdivision 3. He appeals from the verdict and judgment and the order denying his motion for a new trial.

Defendant represented to a number of business men that he was an ex-jockey and belonged to a jockeys' association; that at least once in every meet there was a jockey race, or a fixed race, so that unemployed jockeys could themselves place bets on this particular race and have a select clientele for whom they could also place bets. Defendant explained that his clients gave him various amounts of money to be bet on these particular races and that his fee for handling the transaction was one third of the winnings. There were no such races. Defendant, however, received from his victims various amounts, ranging from \$250 to \$1,000, to be placed on such races. None of these amounts were or could be so wagered for there was no fixed race. After receiving the money for the so-called wager, defendant then disclosed to his victim the horse on which the money would be placed.

As to fourteen of these transactions, there are two counts in the information growing out of each. One count charges grand theft, Pen.Code, § 484, and the other charges defendant with receiving money to be wagered on horse races, Pen.Code, § 337a, subd. 3.

[1] Defendant claims that the convictions of grand theft must be reversed because "the evidence is insufficient to establish the required specific intent to permanently deprive the owners of their property at the time they issued their checks" to him. This proposition is not well founded. There was no fixed race, which fact defendant knew when he made the contrary representation to his several victims. However, they parted with their money in

reliance on his statements from which the inference readily arises that he intended to permanently deprive them of their property at the time he acquired possession thereof. The evidence is ample to support the grand theft convictions upon either the theory of false pretenses or by trick and device. *People v. Chamberlain*, 96 Cal.App.2d 178, 181-183, 214 P.2d 600; *People v. Rial*, 23 Cal.App. 713, 717, 139 P. 661; *People v. Caldwell*, 55 Cal.App.2d 238, 247-250, 130 P.2d 495. The victims were not betting on a particular horse. The later identification of the horse and the race was merely an incident in defendant's fraudulent scheme by which he procured money to be placed on a particular kind of race, viz., a fixed race, which he knew did not exist.

[2] Defendant attempts to escape conviction under section 337a, subd. 3, on the ground that the evidence indicates he "placed most of his bets at one of the race tracks through the pari mutual machine as provided by law." This defense was considered and rejected in *People v. Tompkins*, 109 Cal.App.2d 215, 240 P.2d 356. The court stated, 109 Cal.App.2d at page 221, 240 P.2d at page 359, that to "sustain it would be to permit commercialized gambling conducted away from the race track to flourish" and pointed out that this was contrary to the public policy of the state as expressed through its legislative enactments. Defendant's contention here is wholly without merit.

[3,4] Defendant argues that the same transaction cannot constitute two offenses, and therefore he could not be guilty of violating both section 337a, subd. 3, Penal Code, and grand theft as a result of his dealings with any one of his victims upon any particular occasion. He fails to conceive, however, the implications of each of these transactions, and the facets of public policy which each transgresses. The rule is that " * * * A defendant may be convicted of separate offenses arising out of the same transaction when each charge is separately stated and the offenses differ in their elements and one is not included in the other." *Rodriguez v. Superior*

Court, 27 Cal.2d 500, 501, 165 P.2d 1, 2. It is clear that these offenses differ in their elements and one is not included in the other. By the terms of section 337a, subd. 3, Penal Code, it is a public offense to receive "in any manner whatsoever" money for the purpose of being bet upon the result of a horse race. The purpose of this act is to protect the public against commercial gambling, generally, on horse races. The essence of this offense is the receipt of money to be used for that prohibited purpose. This is very different from a public policy which makes it a crime for a person to knowingly and designedly defraud another of his property by false pretenses or by some trick and device and thus commit grand theft. Penal Code, § 484. In *People v. McCabe*, 60 Cal.App.2d 492, 141 P.2d 54, conviction on 19 counts of grand theft and 19 counts of violation of the Corporate Securities Act (there being two counts based on each transaction) was affirmed. As to the latter violations, the court pointed out, 60 Cal.App.2d at page 494, 141 P.2d at page 56, that each "was concomitant with and constituted a part of the device designed whereby to gain possession of the sums of money taken from the several prosecution witnesses * * *." Here the counts arising out of violations of section 337a, subd. 3, Penal Code, are based upon acts that were concomitant with offenses against the grand theft statute and are parts of the device by which defendant fleeced his victims. Different offenses are thus alleged and the convictions thereon must be sustained.

During the course of defendant's dealings with Mr. Miller the latter gave him a check for \$500 to be wagered on Federalist in the ninth at Tanforan on the representation that "this one was definitely in." Miller determined from the Sunday paper that Federalist did not win. On Monday morning he stopped payment on the check. This is count 14, which charges grand theft. Soon after the jury was originally charged and retired to deliberate it returned to the court room requesting an answer to a question that had arisen. The judge announced, in the presence of counsel and defendant, that: "I have a question which the jurors would

like to have answered. The question reads, 'Mr. Miller stopped payment on the check, and the money was not deducted from his account. Does this constitute a theft?' If I understand the question, * * * what you want to know is [s], where otherwise a theft would exist, but the property obtained was a check, does the check have to be cashed? It is the obtaining of property unlawfully in any one of the manners described, either embezzlement, false pretenses, or larceny by trick and device, which constitutes the theft. The fact that a person whose property has been stolen, if it has been stolen, doesn't lose anything by it, doesn't alter the situation. The test is whether there was a stage in the proceedings when a person was unlawfully deprived of his property by any of the means. Let me put it another way, so we don't get too close to the case—If I were walking down the street and a pickpocket picked my pocket and took a \$100.00 check out of my pocket and I found out the check was gone and stopped payment on the check, the fact of the pickpocket stealing my check is not altered, he still stole my check." The essence of this statement finds support in *People v. Rial*, supra, 23 Cal.App. at page 719, 139 P. at page 663, and *People v. Frankfort*, 114 Cal.App.2d 680, 251 P.2d 401.

[5] Defendant contends that the court's statement "ignores one of the essential elements of theft, namely, the intent *at the time of the taking* to permanently deprive the owner of his property." As the judge stated, however, he assumed the jury was concerned with the situation "where otherwise a theft would exist." The court referred to the obtaining of property unlawfully "in any one of the manners described" as constituting theft. It must be presumed that in the previous instructions, which are not part of the record, the jury was correctly and fully instructed on what constituted theft and the element of intent in relation thereto. *People v. Hidalgo*, 78 Cal. App.2d 926, 936, 179 P.2d 102.

[6, 7] Defendant also contends that the court's statement implied he was guilty of

grand theft and that the use of the word "stolen" is an "ambiguous reference" to the crime with which he was charged. There is no merit in these contentions. Furthermore, if defendant desired some more specific statement, it was his duty to request the same. *People v. Carothers*, 77 Cal.App. 2d 252, 255, 175 P.2d 30.

[8] The purported appeal from the verdict is dismissed since such an appeal is unauthorized. *People v. Brock*, 21 Cal.App. 2d 601, 604, 70 P.2d 210.

The judgment and the order denying the motion for a new trial are, and each is, affirmed.

MOORE, P. J., and McCOMB, J., concur.

TREU v. KIRKWOOD, State Controller et al.*

Sac. 6282.

Supreme Court of California, in Bank.

April 3, 1953.

Rehearing Granted May 1, 1953.

Former secretary of the lieutenant governor brought mandamus proceedings against the State Controller and the State Treasurer to compel approval and payment of former secretary's claim for compensation for overtime worked. The Superior Court of Sacramento County entered judgment in favor of former secretary, and State Controller and State Treasurer appealed. The Supreme Court, Edmonds, J., held that as alleged contract for payment of overtime compensation had not been approved by the Department of Finance, no recovery could be had thereon.

Judgment reversed.

Carter and Schauer, JJ., dissented.

Prior opinion 240 P.2d 32.

1. Pleading ⇨388

It is not every variance between pleading and proof that will necessitate overthrow of a judgment. Code Civ.Proc. §§ 452, 469, 471, 475; Const. art. 6, § 4½.

2. Pleading ⇨34(1)

Petition was required to be construed liberally. Code Civ.Proc. § 452.

3. Mandamus ⇨187(9)

In mandamus proceeding by former secretary of Lieutenant Governor against State Controller and State Treasurer to compel approval and payment of claim of former secretary for overtime worked, variance between petition alleging promise by Lieutenant Governor to give former secretary compensating time off for overtime hours worked and proof that Lieutenant Governor did not promise compensating time off for overtime but promised additional compensation, was not so material as to require reversal, where Controller and Treasurer were not misled to their prejudice and anticipated proof of contract for payment for overtime work. Code Civ. Proc. § 452.

4. States ⇨59

Words "salary" and "compensation" as used in statute providing that unless

255 P.2d—26½

Legislature specifically provides that approval of Department of Finance is not required, whenever a state agency fixes "salary" or "compensation" of an employee, which "salary" is payable in whole or in part out of state funds, "salary" is subject to approval of Department of Finance before it becomes effective and payable, are synonymous. Government Code, § 18004.

See publication Words and Phrases, for other judicial constructions and definitions of "Salary" and "Compensation".

5. States ⇨121

Purpose of statute providing that Department of Finance has general powers of supervision over all matters concerning financial and business policies of the state is to conserve financial interests of the state, to prevent improvidence, and to control expenditure of state money by any of the several departments of the state. Government Code, § 13070.

6. States ⇨53

Where contract fixing matters relating to pay and working conditions of a state employee has not been approved by Department of Finance in accordance with statute it is invalid. Government Code, § 18004.

7. States ⇨63

Where contract between lieutenant governor and his secretary that secretary would be paid additional compensation for overtime work was never approved by Department of Finance, secretary could not recover thereon. Government Code, § 18004.

8. Appeal and Error ⇨1122(2)

Normally, an appellate court will exercise its power to make findings only for purpose of affirming judgment and should not do so when judgment must be reversed. Code Civ.Proc. § 956a.

Edmund G. Brown, Atty. Gen., Wilmer W. Morse and Marcus Vanderlaan, Deputies Atty. Gen., for appellants.

James H. Phillips, Sacramento, for respondent.

* Subsequent opinion 268 P.2d 482.

EDMONDS, Justice.

From 1947 to 1949, Florenz Treu was a non-civil service employee in the office of the lieutenant governor. By writ of mandate, the state controller and the treasurer have been ordered to approve and pay her claim "for overtime worked * * * for which petitioner was not compensated and was not given compensating time off". The appeal is from that judgment.

In her petition for a writ of mandate, Miss Treu alleged that, prior to the time the work was performed, the lieutenant governor had established normal office hours and promised her compensating time off for work beyond those hours. All overtime work was authorized by the lieutenant governor, she said, and she did not receive time off or any other compensation for such work, nor was any offered to or refused by her. According to the petitioner, a payroll claim for the cash equivalent of the accumulated overtime hours at the time of her separation was filed by the lieutenant governor and approved for payment by the State Personnel Board, but the controller refused to issue a warrant.

By their answer, the controller and treasurer denied that any amount was due for overtime. They alleged that Miss Treu was exempt from, and never held a position in, the state civil service. Her salary, they said, was fixed by the lieutenant governor with the approval of the department of finance at a monthly rate which was paid in full and no salary or compensation on any other basis or in any form other than cash was authorized by the department.

There is no dispute as to the facts. Miss Treu was appointed secretary to the lieutenant governor on March 1, 1947, in which capacity she served for one year. She then became executive secretary. Her employment was terminated by resignation on August 1, 1949. In both positions she was exempt from civil service. During her employment, her salary, fixed on a monthly basis with the approval of the department of finance, progressively increased from \$275 to \$436 per month.

When Miss Treu commenced her work for the lieutenant governor, he fixed office

hours from 9:00 a. m. to 5:30 p. m. on weekdays and from 9:00 a. m. to noon on Saturdays. At the beginning of her employment, he told her, she testified, "that there was a terrific amount of work in the office and he knew I was going to work a lot of overtime, and that I was going to be paid for the overtime that I worked". She was informed "that she would be paid for the overtime as it would be impossible for her to take any time off because of the increased amount of work."

Thereafter, the lieutenant governor wrote to the department of finance requesting a salary increase for his staff upon the basis that two employees "have taken over and are doing the work that a staff of three people performed previous to my administration. Because of their willingness to assume this additional responsibility, I feel they should be compensated accordingly". He suggested that the appropriation for his office was sufficient to increase their salaries and stated: "I do not intend to further add to my staff as long as Mr. Mydland and Miss Treu continue doing the work that has required three people". In response to this request, the director of finance approved a salary increase for Miss Treu. All of her salary was paid in full.

The department of finance at no time fixed or approved salary or compensation for Miss Treu on other than a monthly basis, or in amounts different than her agreed monthly salary, nor did it approve compensation in any form other than cash or fix normal working hours for her. An official record was maintained in the lieutenant governor's office showing hours which she worked in addition to normal office hours. All such work was authorized by the lieutenant governor, and she was at no time granted compensating time off for these hours.

Upon her separation from service, a claim for payment for overtime was approved by the State Personnel Board. While the claim was pending in the controller's office, a letter from the attorney general was forwarded to the controller by the director of finance. The attorney general's letter set forth seven facts upon

which it said the validity of the claim would depend. Among these were that the lieutenant governor had established normal hours of work for Miss Treu and that he promised her compensating time off for extra hours worked. The covering letter from the director of finance stated that: "The seven items * * * already have been substantiated, and there is available in our files the required letters and affidavits making the required substantiation." Thereafter, the claim was rejected by the controller and this proceeding was commenced.

Upon this evidence, the trial court found the allegations of the petition to be true. Judgment was entered directing that a peremptory writ of mandate issue commanding the respondents to approve and pay her claim. The appeal is from that judgment.

In support of their appeal, the respondents contend that the finding that Miss Treu was promised compensating time off for overtime work is not supported by the evidence. In addition, they say, the judgment may not be sustained upon the theory of a contract to pay cash compensation for overtime work because no such contract was approved by the department of finance as required by statute. They argue that, in the absence of either a valid contract or a statutory provision, Miss Treu's monthly salary was payment in full for all of her services during each month, regardless of the number of hours worked. Other objections made by the respondents are that the trial court failed to find upon certain material issues and that other findings are not supported by the evidence. This court is requested to make findings of fact to conform to the proof. A final contention is that, even if Miss Treu is entitled to a cash payment for overtime work, it should be computed upon the basis of her salary at the time the work was performed, rather than her salary at the time of separation.

Miss Treu relies upon *Howard v. Lampton*, 87 Cal.App.2d 449, 197 P.2d 69, and *Clark v. State Personnel Board*, 56 Cal.App.2d 499, 133 P.2d 11, holding that a state employee is entitled, in the absence of

statute, to payment upon separation from service for properly authorized overtime work. She also contends that a promise of compensating time off is not a prerequisite to payment for overtime. Even if it is, she says, the promise by the lieutenant governor to pay her for overtime work may be construed as a promise to give her compensating time off. In addition, she disputes each of the other contentions of the respondents.

In *Martin v. Henderson* (*Redwine v. Henderson*), Cal.Sup., 255 P.2d 416, the Howard and Clark decisions were disapproved insofar as they determine that a state employee, in the absence of specific statutory authority, is entitled to payment for accrued overtime upon separation from service. Therefore, the question here is whether there was contractual or statutory authority for payment to Miss Treu for overtime services.

The petition specifically alleges a promise by the lieutenant governor to give Miss Treu "compensating time off for overtime hours worked in addition to her normal hours of work". The court found that the promise was made. However, the proof, in the form of a letter from the lieutenant governor to the department of finance and Miss Treu's own testimony, shows conclusively that she was not promised time off. She was told that "it would be impossible for her to take any time off because of the increased amount of work". The promise made to her was "that she would be paid for the overtime".

The respondents contend that this amounted to a failure of proof within the meaning of section 471 of the Code of Civil Procedure, rather than a mere variance. They rely upon *Gillin v. Hopkins*, 28 Cal.App. 579, 580-582, 153 P. 724, which held that evidence of a contract to accept payment in stock constituted failure of proof of a cause of action upon an agreement to pay a designated sum of money. The situation is analogous to that here. Obviously, a promise to grant compensating time off is far different from a promise to pay cash for overtime work. However, "(n)o variance between the allegation in a

pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits". Code Civ.Proc. § 469.

[1] "The code also provides that the court must, in every stage of an action (and that means on appeal, as well as in the trial of the cause), disregard any error, improper ruling, or defect in the pleadings or proceedings, which, in the opinion of the court, does not affect the substantial rights of the parties. It must appear from the record that the error, improper ruling, or defect was prejudicial and caused substantial injury before the judgment rendered may be reversed or be held to be affected by it; and it must further appear that a different result would have been probable if such error, ruling, or defect had not occurred or existed. Code Civ.Proc. § 475. Not only do these code sections require this court, under such circumstance, to determine from an examination of the entire record, whether or not there has been a miscarriage of justice before reversing a judgment, but the state Constitution is equally mandatory and imperative. Const. § 4½ of art. 6. It therefore indubitably follows that it is not every variance that will necessitate the overthrow of a judgment." *Murnane v. Le Mesnage*, 207 Cal. 485, 495, 279 P. 800, 804.

[2, 3] It is obvious from a review of the record in this case that the respondents were not misled to their prejudice. They anticipated proof of a contract for payment for overtime work and introduced evidence to show that no such contract had been approved. In addition, the pleading adequately apprised the respondents of the claim which they would be called upon to meet. It alleged that "at the time of said separation from said State employment petitioner herein had accumulated and was entitled to be paid in cash by the State of California for overtime worked while an employee of the said Lieutenant Governor in the total sum of \$3,076.53". Construed liberally, as must be done, Code Civ.Proc. § 452, the petition demanded payment for overtime work for which compensation in some form had been promised. Under the circumstances,

it cannot be said that the variance is so material as to require a reversal of the judgment. *Hayes v. Richfield Oil Corp.*, 38 Cal. 2d 375, 382, 240 P.2d 580.

Although there is no evidence to support the finding that Miss Treu was promised compensating time off for overtime work, the evidence would be sufficient to support a finding that she was promised compensation in cash for work beyond normal office hours. However, the respondents argue that the judgment cannot be sustained upon this theory because no such contract was approved by the department of finance as required by statute.

Miss Treu was appointed under the authority of section 12101 of the Government Code which provides: "The Lieutenant Governor may appoint and, subject to the approval of the Director of Finance, fix the salaries of one secretary and such clerical assistants as the Lieutenant Governor deems necessary for his office." It is not disputed that the only salary basis fixed by the lieutenant governor for Miss Treu which was approved by the director of finance was one for monthly compensation without mention of additional payment for overtime. She concedes that the department never approved payment of compensation for overtime, but argues that no such approval was required.

However, Miss Treu's position is directly contrary to the express provisions of section 18004 of the Government Code. At the time she commenced her employment, that section read: "Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any state agency * * * fix the salary or compensation of an employee * * * which salary is payable in whole or in part out of state funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable." The office of lieutenant governor is included within the term "State agency". Govt.Code § 11000.

The words "salary" and "compensation" are, in general usage, interchangeable and are synonymous in most definitions. "Compensation" is "(t)he remuneration or wages

given to an employee or, especially, to an officer. Salary, pay, or emolument." Black's Law Dictionary, 4th ed., p. 354. Likewise, "salary" is defined as "a stated compensation, amounting to so much by the year, month, or other fixed period, to be paid to public officers and persons in some private employments, for the performance of official duties or the rendering of services of a particular kind". Black's Law Dictionary, 4th ed., p. 1503. "While the term 'salary' in its original and strict sense signifies a fixed compensation, it is frequently used in our constitution and laws as the equivalent of 'compensation.'" *Martin v. Santa Barbara*, 105 Cal. 208, 212, 38 P. 687, 689.

[4-6] Reading section 18004 with reference to related statutory provisions, it becomes obvious that the words "salary" and "compensation" are there used as being synonymous. Section 13070 of the Government Code provides that the department of finance "has general powers of supervision over all matters concerning the financial and business policies of the State". The purpose of the latter section "is to conserve the financial interests of the state, to prevent improvidence, and to control the expenditure of state money by any of the several departments of the state. *Ireland v. Riley*, 11 Cal.App.2d 70, 72, 52 P.2d 1021." *State of California v. Brotherhood of R. R. Trainmen*, 37 Cal.2d 412, 422, 232 P.2d 857, 863. Therefore, a contract fixing matters relating to pay and working conditions which has not been approved by the department in accordance with section 18004 is invalid. *State of California v. Brotherhood of R. R. Trainmen*, supra.

Any doubt concerning the necessity for approval by the department of contracts for "compensation" and "salary" is dispelled by reference to section 13370 of the Government Code which, at the time Miss Treu was hired, provided: "All contracts entered into by any state agency for * * * services * * * are of no effect unless and until approved by the Department of Finance." Under this section, the contract to pay Miss Treu for her services beyond normal working hours, regardless of wheth-

er payment be considered "compensation" or "salary", or both, was invalid for lack of approval by the department.

Although Miss Treu pleaded and tried her case entirely upon a theory of contract, she now contends that no promise of time off was necessary to entitle her to recover. She concedes that section 18005 of the Government Code, authorizing payment upon separation for accumulated overtime, was inapplicable to employees exempt from civil service during the period in question. However, she refers to Government Code sections 18023 and 18024 and Rule 133 of the Personnel Board which provide for the adoption of rules governing hours of work and the granting of time off in lieu of cash compensation for overtime. But she does not claim, nor does the record indicate, that she was within those statutory or regulatory provisions or that any statute entitled her to payment for overtime. Instead, she argues that no statutory authority is essential to permit her recovery. This point has been decided adversely to her position in *Martin v. Henderson*, supra.

[7] In the absence of either a valid contract or statute, there is no basis for a recovery by Miss Treu. Her monthly salary was payment in full for all of her services, without regard to the number of hours which she worked. *Martin v. Henderson*, supra; *Jarvis v. Henderson*, Cal.Sup., 255 P.2d 426; *Robinson v. Dunn*, 77 Cal. 473, 19 P. 878.

[8] This determination makes it unnecessary to consider the other questions raised by the parties. The request by the respondents for this court to make additional findings of fact is not appropriate under the circumstances. Normally, the appellate court will exercise its power to make findings, Code Civ.Proc. § 956a, only for the purpose of affirming the judgment and should not do so when the judgment must be reversed. *Tupman v. Haberkern*, 208 Cal. 256, 266, 269-270, 280 P. 970.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

In this case Florenz Treu was a non-civil service employee in the office of the Lieutenant Governor. The Lieutenant Governor had established regular working hours for the employees in his office. Miss Treu's position was that of secretary to the Lieutenant Governor and she served for a year. At the time she was employed by the Lieutenant Governor, he told her there was a "terrific" amount of work in the office and she would have to work overtime for which she would be paid. She worked overtime and a record thereof was kept. She was never given time off in lieu of the overtime or paid therefor. Not only did the Lieutenant Governor agree to pay for the overtime worked but upon her separation from service she filed a claim therefor with the state personnel board which was approved. Moreover, high state officials were in accord. The attorney general advised that if the facts were as heretofore outlined, she was entitled to payment and the Department of Finance found that all of such facts were substantiated.

With all those circumstances the application of the doctrine of estoppel is completely compelling. See discussion and authorities in dissent in *Martin v. Henderson* (Redwine v. Henderson) *supra*. In face of these circumstances the majority holds that Miss Treu cannot recover because the Department of Finance never approved payment for overtime. It is clear that estoppel would obviate the requirement for such approval.

In addition there is statutory authority for payment of the overtime, contrary to the majority opinion, as pointed out in my dissent in *Martin v. Henderson* (Redwine v. Henderson) *supra*.

In addition to estoppel, a factor eliminating the necessity of the approval of the employee's claim by the Department of Finance, there are factors which negate the lack of approval as a defense. The Department of Finance gave tacit approval to the claim. After it was approved by the personnel board, it was sent to the controller, and while pending there, the Department of

Finance wrote to the controller asking him to withhold approval until the claim could be audited. The department later wrote the controller and stated that all the facts needed to substantiate the claim as outlined in a letter from the attorney general had been substantiated and whether the claim should be paid was up to him (the controller). The thought was never suggested that the claim was defective for lack of approval by the department, and its conduct clearly evinced at least an implied approval. The department, in effect, said it approved the claim, that is, on the issue as to whether it was fair and just but passed the question as to whether there was statutory authority for it to the controller. Moreover, this conduct further fortifies the existence of an estoppel against the state.

It should be noted that the Lieutenant Governor is authorized by statute to fix the salary of members of his staff. Gov.Code, § 12101. The provision requiring the approval of the Department of Finance cannot embrace more than the rate of pay—the amount thereof. Certainly, under its right to withhold approval, the department could not properly say we will not approve any compensation which exceeds \$1 per month. Where the power to fix compensation of an officer is conferred upon a board or officer, the latter may not provide that there shall be no compensation or the office could be destroyed by fixing the amount at so low a figure that no one will discharge the duties. *De Merritt v. Weldon*, 154 Cal. 545, 98 P. 537, 671. Thus the approval of the department goes only to the rate or amount of compensation and it must approve a reasonable rate or amount. It does not appear that the rate or amount of compensation fixed for the overtime was unreasonable. On the contrary, the showing is otherwise because the rate for overtime was the same as the rate for regular time. Thus when the department approved the rate of pay for regular time it also approved the rate for overtime or at least there is no basis for complaint because it could not have approved less than a reasonable amount. It is not to be supposed that the staff of every officer in the state, where the officer is empowered to fix their compensation, is sub-

ject to the arbitrary whim or caprice of the department—that it may destroy the functioning of all such officers by arbitrarily or capriciously withholding its approval of their staff's compensation. I cannot believe the Legislature had any such intent when it required approval by the department.

Finally I believe the District Court of Appeal, Third District, adequately answered this proposition in quoting from the memorandum opinion of the trial court: "Respondent further argues that even though petitioner was promised that she would be paid for the overtime; that, (A) She was paid by a salary increase of \$50.00 a month, and (B) that if there was anything further than the increase in salary expected, there was no approval of the Department of Finance, and accordingly, this being additional "compensation", would be ineffective without such approval.

"Section 18,004 of the Government Code provides in part: "Unless the Legislature specifically provides that approval of the Department of Finance is not required whenever any state agency or court *fixes the salary or compensation* of an employee or officer, which *salary* is payable in whole or in part out of state funds, the *salary* is subject to the approval of the Department of Finance before it becomes effective and payable."

"It will be noted that respondent includes a lump sum compensation in lieu of compensating time off in this requirement. It is true that the statute states "salary or compensation" but later each one of the clauses refers only to the word "salary". This court does not feel that that statute is subject to the broad interpretation which respondent puts upon it. We are of the opinion that the words "salary or compensation" are used as interchangeable terms, but that a lump sum to be paid in lieu of compensating time off is not such "compensation" as is meant there. It is admitted that in the ordinary case where an employee is promised compensating time off for overtime and fails to receive the full amount of this, that a lump sum payment may be given upon separation from the service without regard to any action by the Department of Finance. Section 12,101 of the Govern-

ment Code refers specifically to the fixing of the *salaries* of one secretary and such clerical assistance as the Lieutenant Governor deems necessary by the appointing power with the Director of Finance. This Court feels that there was no evidence in the case that the question of overtime was in any way a factor in granting the pay raise to petitioner in this matter. * * *"

Treu v. Kuchel, Cal.App., 240 P.2d 32, 35.

The judgment should be affirmed.

SCHAUER, Justice (dissenting) to opinion by EDMONDS, Justice.

I would affirm the judgment of the trial court.

No case is likely to come before us in which the presumptions favoring an affirmance of the judgment will be stronger. Upon what is inherently a claim for labor the trial court has heard the evidence and has made findings of fact and entered its judgment in favor of the claimant. No suggestion of fraud is made. Admittedly the services were rendered. The controlling question is a cold technical one as to the construction of statutes governing the *right* of the state to pay for services it has requested and received. In my view the findings of fact are supported by the evidence and the material conclusions of law, as drawn by the trial court, are tenable.

Although the relationship between public employes and the state employer is basically one of law rather than of contract this does not preclude either party from incurring obligations which within the law are regarded as contractual. Rights once established are regarded as vested and will be enforced by judicial process. Good faith and fair dealing by the state will not only be presumed but will be enforced. Thus, in *England v. City of Long Beach* (1945), 27 Cal.2d 343, 348, 163 P.2d 865, this court in requiring the payment of a pension despite the failure of a municipality to have adopted measures to provide funds for such payment, said: "We must, of course, reject any theory that the provisions of the charter were designed to create an appearance of granting pensions while at the same time withholding the benefits by providing inadequate funds * * *".

The injustice that would prevail if the provisions relating to the fund were construed to be a limitation on the obligation to pay pensions is apparent. The existence of a pension plan is, of course, a strong factor inducing persons to enter into or remain in a particular employment. Moreover, the employee involved here was required to contribute a portion of his salary to the pension fund * * *. It obviously would be unjust to make the payment of pensions dependent upon the solvency of a particular fund, thereby depriving employees of the benefits of the system, unless we were compelled to do so by a clear, positive command in the charter."

How much more forcefully it may be observed here that we should reject any theory that the provisions of applicable law and regulations were designed to create an appearance of expressly authorizing the fixing of a definite number of hours for a regular working day and likewise, either expressly or impliedly, authorizing the promise of payment for overtime services expressly requested and dutifully rendered, while at the same time withholding the compensation by failing to allow either compensating time off or cash payment. Surely, the expectation of receiving pay, as promised, is "a strong factor in inducing persons to enter into or remain in a particular employment," and, after the employee has contributed the requested services, we must not deny compensation unless we are "compelled to do so by a clear, positive command." The appellant has failed to point out any such "clear, positive command."

That no such "clear, positive command" exists is emphasized by the fact that the majority here in reversing the judgment find it necessary to disapprove *Clark v. State Personnel Board* (1943), 56 Cal.App.2d 499, 133 P.2d 11, and *Howard v. Lampton* (1948), 87 Cal.App.2d 449, 197 P.2d 69. *Clark v. State Personnel Board* was the law of this state during all of the time that Miss Treu served it and *Howard v. Lampton*, following the *Clark* case, and construing the decision of this court in *Pohle v. Christian* (1942), 21 Cal.2d 83, 130 P.2d 417, was the law of this state at the

time of her separation from the state service. This court, with two justices dissenting (and I was one of them), denied a hearing in the *Howard* case. Regardless of whether we should now approve or disapprove the holdings in the *Clark* and *Howard* cases I think that we should not disapprove them and in the same opinion hold, in effect, that our newly announced view of the law is compelled by "clear, positive command," a command so clear and positive that we must now enforce such new view retroactively upon Miss Treu and thereby deprive her of compensation for the services which she rendered in all good faith in presumptive reliance upon the old view.

For adequate treatment of points not here discussed in detail reference is made to the opinion prepared for the District Court of Appeal by Justice Schottky, reported in *Treu v. Kuchel*, 240 P.2d 32.

Upon the record here I think that the judgment should be affirmed.



40 Cal.2d 583

MARTIN v. HENDERSON et al.

REDWINE v. HENDERSON et al.

Sac. 6280.

Supreme Court of California, In Bank.

April 3, 1953.

Rehearing Denied April 30, 1953.

Former traffic sergeant and former traffic officer of the State Highway Patrol brought proceedings against the Director of the Department of Motor Vehicles and others to compel respondents to approve their claims for overtime worked. The Superior Court of Sacramento County entered judgment adverse to respondents, and they appealed. The Supreme Court, Edmonds, J., held that former traffic sergeant and former traffic officer were not entitled to recover for services rendered prior to February 6, 1943.

Judgment affirmed in part and reversed in part.

Carter and Schauer, JJ., dissented.

Prior opinion 240 P.2d 21.

1. Officers ⇨99

A person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary, and he cannot legally claim additional compensation, even though salary may be very inadequate remuneration for services. Government Code, § 18000.

2. Officers ⇨100(1)

Fact that after a person accepts public office his duties are increased by subsequent statute or ordinances without his salary being increased does not entitle him to additional compensation. Government Code, § 18000.

3. States ⇨59

When an employee of the state is paid by time, as by the day, week, or month, rather than by amount of work which he does, he is bound, in absence of statute, to render services without regard to the number of hours worked. Government Code, § 18000.

4. States ⇨59

In absence of a statutory provision therefor, time off granted for work done in excess of those hours fixed for an employee of the state is not granted as of right, but is allowed in accordance with necessities of duties to be performed. Government Code, §§ 11152, 18705.

5. States ⇨59

Fact that normal hours of work are established for state employees and compensating time off is provided for work beyond those hours does not, of itself, give employee right to payment for overtime. Government Code, §§ 11152, 18705.

6. States ⇨63

Statutes providing a comprehensive system of overtime computation and compensation for state employees did not create a right to payment for overtime previously worked by former traffic sergeant and former traffic officer of the State Highway Patrol before effective dates of statutes. Government Code, §§ 18020-18024; Const. art. 4, § 32.

7. States ⇨63

Former traffic sergeant and former traffic officer of the State Highway Patrol

who were required to work a number of hours in addition to their regular hours, and who retired from service without having taken compensating time off, were not entitled to recover compensation for the extra hours worked prior to February 6, 1943. Government Code, §§ 11152, 18000, 18005, 18020-18024, 18705, 18850.

8. States ⇨64

Statute providing that no action shall be brought by any person having or claiming cause of action for wrongs or grievances based on or related to any civil service law in the State or administration thereof unless action is commenced and served within one year, is applicable to salary claims of state employees and controls time for bringing any action on a claim for overtime services. Government Code, § 19630.

Fred N. Howser and Edmund G. Brown, Attys. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for appellants.

James H. Phillips, Sacramento, for respondents.

EDMONDS, Justice.

For a number of years, Andrew W. Martin was a traffic sergeant and George H. Redwine a traffic officer of the State Highway Patrol. They worked in excess of regular hours of duty without receiving equivalent time off. After the termination of their employment, Martin and Redwine each filed a petition to compel the respondents, the appropriate state officials, to approve his claim for overtime. The appeal is from a judgment requiring approval and payment of the claims.

The facts are undisputed. During the entire period of service, the monthly salary of each petitioner was fully paid. Martin worked about 500 hours in excess of his regular hours of duty, 100 of them being worked between February 6 and September 29, 1943. Redwine's excess hours of duty totaled 332, all but 33 of them being served before February 6, 1943. Martin retired on April 30, 1947. Redwine's separation from service was on March 16, 1947.

Headquarters General Order No. 295, issued by the chief of the highway patrol, effective October 1, 1939, provided: "Employees ordered to work beyond the hours ordinarily required or hours overtime in addition to what is considered their regular full day's work, may be allowed time off on the day following or at some other convenient time in lieu of the overtime hours worked. Overtime hours shall be adjusted by the immediate superior of the employee affected and shall not become a part of the Headquarters' record."

Order No. 295 was canceled by Headquarters General Order No. 394 effective August 5, 1942. The new order read: "Employees ordered to work beyond the hours ordinarily required and considered as a full days work may be allowed compensating time off in lieu of such overtime worked. Such overtime hours may be granted and adjusted by the immediate superior of the employee affected and shall not become a part of the Headquarters record."

On June 5, 1945, the chief of the highway patrol issued Information Bulletin No. 323, requiring that any claim for overtime hours accumulated prior to September 29, 1943, must be reported to the department in writing, accompanied by evidence in affidavit form supporting the claim. Failure to present a claim in the form outlined by June 30 would constitute a waiver of any claim for such overtime hours. Each of the petitioners complied with the requirements of this bulletin by timely filing a claim in the specified form.

Thereafter, on August 21, 1945, Headquarters Information Bulletin No. 329 was issued rejecting each and all of the claims presented pursuant to Bulletin No. 323. Following a list of reasons for the rejection of the claims, Bulletin No. 329 stated that "it is not believed that the State is privileged at this time either to grant compensating time off for overtime hours * * * worked prior to September 29, 1943, or to pay an employee the cash equivalent thereof on separation or otherwise. Accordingly, liability therefor is hereby denied and no such overtime credit will be recognized * * * and any and all overtime hours * * * accumulated or claimed

to have been accumulated prior to September 29, 1943, are hereby cancelled."

Rule 12 of the State Personnel Board, adopted June 17, 1938, with reference to the pay plan for the state civil service provided for pay schedules. Section 2(c) of the rule stated that: "The rates of pay set forth in the pay schedules, unless otherwise indicated in such schedules, represent the total compensation in every form." It was also provided in section 2(h) that: "When the rate of pay is in terms of dollars a month no additional payment for overtime shall be made to any employee for services rendered by him in the same department, whether in the discharge of his ordinary duties or for any other duties which may be imposed upon him or which he may undertake or volunteer to discharge or perform." On October 18, 1940, section 2(h) of Rule 12 was amended to read: "When the rate of pay is in terms of dollars a month no additional payment for overtime shall be made to any employee for services rendered by him in the same classification in the same department."

Effective February 6, 1943, section 150.5 was added to the State Civil Service Act, Stats.1937, ch. 753, providing: "Upon a separation from service, without fault on his part, a person shall be entitled to a lump sum payment as of the time of separation * * * for any time off to which the person is entitled by reason of previous overtime work where compensating time off for overtime work is provided for by the appointing power or by the rules of the board. Such sums shall be computed by projecting the accumulated time on a calendar basis so that the lump sum will equal the amount to which the employee would have been paid had he taken the time off but not separated from the service." Stats. 1943, ch. 20, § 2, p. 136; now Govt.Code § 18005.

The petition of Redwine, filed March 11, 1948, asked that the respondent state officers be required to approve and pay his claim for overtime on the basis of the amount of salary he was receiving at the time he left the state service. By petition filed on April 21, 1948, Martin sought the same relief. The answer of the respond-

ents denied that any amount was due for overtime. They alleged that any accumulated overtime hours had been canceled by departmental action and that the causes of action are barred by various statutory provisions.

Upon trial the superior court, by writ of mandate, directed that the respondents approve Martin's claim in the amount of \$872.95 and Redwine's for \$512.44, the respective cash values of the claimed overtime. The appeal is from that judgment.

In support of their appeal, the respondents contend that, insofar as hours worked prior to February 6, 1943, are concerned, Martin and Redwine were paid monthly salaries which, by statute, constituted compensation in full for all services which might be rendered by them. Prior to that date, they say, there was no statutory provision for overtime compensation and none could be allowed in the absence of statute. The respondents also argue that the claims are barred by the statute of limitations, regardless of whether the hours were worked prior or subsequent to February 6, 1943. Even if Martin and Redwine are entitled to a cash payment for overtime worked prior to February 6, 1943, the respondents say, the amount should be computed upon the basis of each officer's salary as of the time the hours were worked, rather than as of the time of separation.

Martin and Redwine rely upon *Howard v. Lampton*, 87 Cal.App.2d 449, 197 P.2d 69, and *Clark v. State Personnel Board*, 56 Cal.App.2d 499, 133 P.2d 11. These decisions were based, by analogy, upon *Pohle v. Christian*, 21 Cal.2d 83, 130 P.2d 417, in which it was held that a civil service employee, upon separation from service without fault on his part, is entitled to a cash payment for accumulated vacation time. The basis for the conclusion in the *Pohle* case was the statutory provision giving each officer and employee of the state a right to a vacation of specified duration. Former Pol.Code § 359c; cf. Govt.Code § 18050. In accordance with former section 359d of the Political Code (now Govt.Code § 18052), the State Personnel Board had provided for payment upon separation for unused portions of va-

cation time. State Personnel Board Rule 13, § 4. The court held that, because the applicable sections of the Political Code "do not expressly or otherwise provide that an employee having the right to a vacation loses his right to compensation for that time upon being separated from the service" he is entitled to payment for unused vacation time. 21 Cal.2d at page 90, 130 P.2d at page 421.

The Clark case followed the *Pohle* decision insofar as payment for accumulated vacation time was concerned. The court then held that, despite the absence of any statutory provision granting time off for overtime work and a rule of the Personnel Board specifically prohibiting payment for overtime, a state employee may be paid upon separation from service for accumulated overtime hours. It said [56 Cal. App.2d 499, 133 P.2d 12]: "We see no difference in principle between allowing an employee a cash payment for accrued vacation time upon his separation from the service, and allowing him, upon such separation, a cash payment in lieu of the compensatory time off to which he may have become entitled because of overtime worked." The rule regarding payment for overtime hours expressed in the Clark case was applied to retired officers of the highway patrol in the *Howard* case, which involved a factual situation substantially similar to that here presented.

The basic fallacy in the *Howard* and *Clark* cases was the court's assumption that, in the absence of any statutory provision, a civil service employee had a right to compensatory time off for overtime work. Those decisions are clearly distinguishable from the *Pohle* case, where the employee had a right granted by statute to a specified amount of vacation time.

Prior to February 6, 1943, the effective date of section 150.5 of the State Civil Service Act, *supra*, there was no statutory provision for overtime compensation. Section 1033 of the Political Code (now Govt. Code § 18000) provided: "The salaries fixed by law for all state officers, elective or appointive, shall be compensation in full for all services rendered in any official capacity or employment whatsoever, during

their terms of office, and no such officer shall receive for his own use any fee or perquisite for the performance of any official duty." The same limitation was applied to civil service employees by the State Personnel Board, State Personnel Board Rule 12, § 2(c), *supra*, acting under its power to "establish and adjust salary ranges". Stats.1937, ch. 753, § 70, p. 2094; now Govt.Code § 18850. Implementing this limitation, the board also specifically prohibited additional payment to any employee for overtime. State Personnel Board Rule 12, § 2(h), *supra*. Officers of the highway patrol are included within civil service, Const. art. XXIV, § 4(a), and come within the definition of the word "employee" for the purposes of the State Civil Service Act. Stats.1937, ch. 753, § 8, p. 2086; now Govt.Code § 18526.

[1, 2] The statutory and regulatory limitations upon compensation for services are but a codification and application to civil servants of the oft-repeated rule "that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services, nor does it alter the case that by subsequent statutes or ordinances his duties are increased, and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office, for the compensation stipulated, whether these duties are diminished or increased; and whenever he considers the compensation inadequate he is at liberty to resign." *Dougherty v. Austin*, 94 Cal. 601, 629, 28 P. 834, 835, 29 P. 1092, 16 L.R.A. 161; *Buck v. City of Eureka*, 109 Cal. 504, 517, 42 P. 243, 30 L.R.A. 409; *McAuliffe v. Kane*, 54 Cal.App.2d 288, 296, 128 P.2d 932; *Vogel v. White*, 134 Cal. App. 252, 254, 25 P.2d 233; *Kilroy v. Whitmore*, 115 Cal.App. 43, 49, 300 P. 851.

[3] The rule applies not only to the duties themselves, as in the cases cited, but also to the hours of work. When the employee is paid by time, as by the day, week,

or month, rather than by the amount of work which he does, he is bound, in the absence of statute, to render services without regard to the number of hours worked. *Robinson v. Dunn*, 77 Cal. 473, 19 P. 878. Thus, in this case, Martin and Redwine, being paid by the month, could be required to work whatever number of hours each month was necessary for the performance of their duties. The situation is in no way analogous to that in the Pohle case where the vacation was a matter of statutory right. The vacation was a period of time when no services could be required although compensation continued to be payable.

[4, 5] Obviously, efficient management and satisfactory employment relations require the state to fix reasonable work hours. In the absence of a statutory provision therefor, time off granted for work done in excess of those hours is not granted as of right, but is allowed in accordance with the necessities of the duties to be performed. Former Pol.Code § 350; now Govt.Code § 11152; cf. Stats.1937, ch. 753, § 154, p. 2103; now Govt.Code § 18705. The fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give the employee a right to payment for overtime.

"The terms and conditions of civil service employment are fixed by statute and not by contract. (Citations.) 'When an employee of the state, under civil service, accepts a position, he does so with knowledge of the fact that his salary, and, indeed, his conduct, are both subject to the law governing such matters, as set forth in the statute and the rules and regulations of the commission.' (Citations.) The statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith." *Boren v. State Personnel Board*, 37 Cal.2d 634, 641, 234 P.2d 981, 985.

[6, 7] The enactment of section 150.5 of the State Civil Service Act and the addition of sections 73 to 73.5 to the act, effec-

tive June 7, 1943, Stats.1943, ch. 1041, §§ 1-2, pp. 2976-2977; now Govt.Code §§ 18020-18024, providing a comprehensive system of overtime computation and compensation, did not create a right to payment for overtime previously worked. The statutes were not, and could not be, retroactive. "The Legislature shall have no power to grant, * * * any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, * * * in whole or in part, nor to pay, or to authorize the payment of, any claim hereafter created against the State, * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." Const., art. IV, § 32. The services performed by Martin and Redwine prior to February 6, 1943, were such as they were bound to render for their fixed monthly salaries. Under the prohibition of the Constitution, they could be granted no extra compensation for such services. *Robinson v. Dunn*, supra, 77 Cal. at page 475, 19 P. 878.

Insofar as *Howard v. Lampton*, supra, and *Clark v. State Personnel Board*, supra, determine that a state officer or employee, in the absence of specific statutory authority, is entitled to a cash payment for accrued overtime upon separation from service, they are disapproved. Also disapproved is language in *Howard v. Lampton*, supra, 87 Cal.App.2d at pages 457, 459, 197 P.2d 69, implying that section 18005 of the Government Code may be applied retroactively.

The respondents do not contend that payment could not be allowed for hours worked in excess of normal subsequent to February 6, 1943, the effective date of section 150.5. However, they argue that the claims of Martin and Redwine are barred in their entirety by the statute of limitations, regardless of whether the hours were worked prior or subsequent to that date. Because there was no right to payment for overtime worked prior to February 6, 1943, this contention will be considered only in relation to hours worked after that date.

[8] Section 19630 of the Government Code, as here material, provides: "No action or proceeding shall be brought by any person having or claiming to have a cause of action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose." This is the statute of limitations applicable to salary claims of employees or those who have been separated from service, *Philbrick v. State Personnel Board*, 53 Cal.App.2d 222, 230, 127 P.2d 634, and controls the time for bringing any action upon a claim for overtime services. *Broyles v. State Personnel Board*, 42 Cal. App.2d 303, 307, 108 P.2d 714.

It is conceded that each of these proceedings was commenced within one year after the date of the petitioner's separation from service. Relying upon *Dillon v. Board of Pension Com'rs*, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800, the respondents contend that the statute commenced to run upon August 21, 1945, when the department rejected all claims for accumulated overtime. Martin and Redwine argue that this contention was concluded by *Howard v. Lampton*, supra, 87 Cal.App.2d at pages 456-457, 197 P.2d 69, which held that the statute did not start to run until the date of separation from service.

In the *Dillon* case, the question before the court was whether the period of limitation upon the right to claim a widow's pension commenced to run at the death of the husband or was to be measured from the date each payment of the pension would have become due. Holding that the date of death was decisive, the court said: "A cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time. (Citations.) The cause of action to establish the right to a pension accrued to plaintiff at the time of her husband's death. At any time following the death she could

demand a pension from the board and upon refusal could maintain a suit to enforce such action." 18 Cal.2d at page 430, 116 P.2d at page 39.

No cause of action to compel the payment of overtime claims accrued to Martin and Redwine prior to their separation from service. Until that date, they might have been given compensating time off whenever their departmental superiors deemed it convenient to the service. The petitioners had no legal remedy to compel their superiors to give them time off at any specific time, or at all. Only in the event uncompensated overtime remained upon their separation from service did a right accrue to them to compel action by the department.

The respondents argue, however, that upon the department's denial of credits for accumulated overtime a cause of action accrued, "not to compel compensating time off or the cash equivalent of time off, but to establish status as a person having compensable overtime to his credit usable if, as and when compensating time off could be granted". In essence, this position is that the petitioners had a cause of action to establish their right to compensation for overtime even if there was no remedy to enforce such right. Although no specific reference is made to it, the respondents apparently suggest that there might be an action for declaratory relief.

However, the availability of such an action would in no way affect the period of limitations commencing upon the department's breach of its obligation to pay for accumulated overtime. As stated in *Maguire v. Hibernia Sav. & L. Soc.*, 23 Cal. 2d 719, 146 P.2d 673, 151 A.L.R. 1062, "the period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for 'coercive' relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred. On the other hand, if declaratory re-

lief is sought 'before there has been any breach of the obligation in respect to which said declaration is sought,' or within the statutory period after the breach, the right to such relief is not barred by lapse of time. (Citations.) There is no anomaly in the fact that a party may have a right to sue for declaratory relief without setting in motion the statute of limitations. Quiet title actions, forerunners of declaratory actions, may be maintained when an adverse claim to property is asserted, but the period of limitations does not commence to run at that date." 23 Cal.2d at page 734, 146 P. 2d at page 681.

The amounts to which Martin and Redwine are entitled are to be computed by "projecting the accumulated time on a calendar basis so that the lump sum will equal the amount which [they] would have been paid had [they] taken the time off but not separated from the service". Govt.Code § 18005. At the time of his separation from service, Martin's salary amounted to \$340 per month, or \$1.70 per hour based upon a 48-hour week. Subsequent to February 6, 1943, he accumulated 100½ overtime hours, or a sum equal to \$170.85. Redwine's salary at the time of his separation from service was \$310 per month, or \$1.54 per hour. For the 33 hours of accumulated overtime for which he legally may claim compensation, he is entitled to \$50.82.

Insofar as the judgment directs the state officials to approve the petitioners' claims in excess of these enumerated amounts, the judgment is reversed. In all other respects, it is affirmed, each party to pay his own costs on appeal.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

These cases were correctly decided by the District Court of Appeal, Third District, see *Martin v. Lampton*, 240 P.2d 21, and I adopt the views there expressed. However, I desire to comment on the position taken by the majority here.

The record discloses that the state employees here involved worked overtime at the express command of their superiors with the promise of time off for the overtime, yet the majority denies them compensation therefor on the grounds that there is no statutory authority for the payment of such overtime or promise to pay it, and that as to their claim for overtime since the enactment of section 150.5 of the State Civil Service Act, Stats.1937, Ch. 753, in 1943 expressly providing for overtime pay, it is barred by the statute of limitation.

The overtime pay here claimed must be allowed under *Pohle v. Christian*, 21 Cal. 2d 83, 130 P.2d 417. In that case plaintiff sought to recover a lump sum for accumulated vacation pay after he was separated from his position. It was held that he was entitled to pay for the vacation accumulated prior to his severance on the ground that sections 359c and 359d of the Political Code then authorized vacations and the accumulation of vacation time. *It made no provision, however, for payment of accumulated vacation time after separation from service, where the vacation was not taken prior to separation.* That case has since been followed. *Clark v. State Personnel Board*, 56 Cal.App.2d 499, 133 P.2d 11; *Verry v. Eckel*, 61 Cal.App.2d 595, 143 P.2d 394. The majority seeks to escape the effect of that case by asserting that at common law there is no right to recover for overtime when a person is hired by the month, and there is no statute authorizing payment for overtime as there was authorizing a vacation in the *Pohle* case. In that reasoning the majority is in error. The statutes in force at the time the overtime service was rendered provided: "Eight hours of labor constitutes a day's work, unless it is otherwise expressly stipulated by the parties to a contract." Labor Code, § 510. "Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control or by the authority of any mu-

nicipal corporation, or of any officer thereof." Labor Code, § 1810. "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Labor Code, § 551. "No employer of labor shall cause his employees to work more than six days in seven." Labor Code, § 552. While those provisions do not expressly state that they apply to the state as an employer, there is no reason why they should not inasmuch as they are not in derogation of the state's sovereignty and there is no reason why we should suppose that the Legislature intended to require private employers to treat their employees in a more favorable manner than its own employees. There is, therefore, statutory authority which fixes the hours of labor like that in the *Pohle* case which authorizes a vacation and an accumulation thereof for which pay may be recovered on separation from service. From such authority it follows that work beyond those hours is overtime and compensation therefor should be paid the same as in the *Pohle* case where it was held that from the establishment of the right to a vacation and to accumulate it, a right to be paid for the vacation when not taken ensued. Moreover, it should be noted that the heads of departments of the state "may arrange and classify the work of the department" and adopt rules and regulations "necessary to govern the activities of the department" and may "assign" to its "employees such duties as [it] sees fit." Govt.Code, § 11152. Having that authority it could, as it did, require employees to work overtime and make a valid promise to give time off in lieu thereof. Having failed to give the time off before the separation of the employee from service, like an untaken vacation in the *Pohle* case, it is proper to award the employee money for the withheld time off as was done for untaken vacation time in the *Pohle* case. It is clear, therefore, that there was statutory authority for agreeing to give time off for overtime, and in lieu thereof compensation, and the *Pohle* case is controlling.

In addition, however, the state is estopped to assert that the department of motor

vehicles through the chief of the highway patrol did not have authority to promise time off for overtime. The case of *Boren v. State Personnel Board*, 37 Cal.2d 634, 234 P.2d 981, is clearly distinguishable. In the *Boren* case there was positive statutory authority to transfer an employee from one part of the state to another (here we have no positive statutory provision that there shall be no pay for overtime; the statutes are to the contrary) and there was no showing in that case of unjust enrichment by the state at the expense of the employee as we have here. Here the employee was promised time off to compensate for overtime. In reliance thereon he gave extra time to the state. If the state may take that extra labor without paying for it as the majority holds, the state is being unjustly enriched at the expense of the employee. We have, therefore, a clear case of estoppel. There are many cases where estoppel may run against the government. See cases cited, *Farrell v. County of Placer*, 23 Cal.2d 624, 628, 145 P.2d 570, 153 A.L.R. 323. A few instances may be pointed out in which the justice of invoking estoppel is present as much or even less than here. In *Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547, the City of Los Angeles was held estopped to abandon eminent domain proceedings where, in reliance thereon, defendant property owner had acquired other property and constructed a building thereon. It was there said 3 Cal.2d at page 330, 44 P.2d at page 557, "If the city had expressly agreed by its officers, with defendants' grantors, even in parol, that a certain line should constitute the boundary line between the street and the grantor's property, and upon the faith of such agreement the grantors had erected a block of buildings flush with the line of the street, as agreed upon by all parties, it would be a hard law that would allow the city to repudiate that agreement, and destroy the grantor's property. No court should countenance such a thing, and an estoppel *in pais* will rise up in the pathway of a city, to bar it and its principal, the people, from the commission of such a grievous wrong; and to give the acts of this city a very limited meaning, we think

its conduct in the present case at least equivalent to an oral agreement as to the location of the true boundary line of the street." To the same effect, see *McGee v. City of Los Angeles*, 6 Cal.2d 390, 57 P.2d 925. In *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002, the city was estopped to claim property which it owned but said it did not and in reliance thereon the person who had been in possession thereof built a building on it. The same situation, except it was a canal through a city, was involved in *Fresno v. Fresno C. & I. Co.*, 98 Cal. 179, 32 P. 943. Land claimed by the city as streets was considered in *City of Sacramento v. Clunie*, 120 Cal. 29, 52 P. 44. In *City of Los Angeles v. County of Los Angeles*, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370, a county was held estopped to collect from a railroad company additional payments for use of its land when it had been accepting certain payments for 15 years. In *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 P. 189, the city was held liable for water it received and was estopped to deny liability on the claim that its ordinance providing for payment was invalid. In *Tyra v. Board of Police etc. Com'rs*, 32 Cal.2d 666, 197 P.2d 710, it was held that the city was estopped to plead the statute of limitation in an action by an employee for a pension where the pension commissioners had erroneously told him he could not receive a pension while he was receiving workmen's compensation. *Baird v. City of Fresno*, 97 Cal.App.2d 336, 217 P.2d 681, is particularly applicable. It was there held that the city was estopped, when a pension was claimed, to rely on the invalidity of its determination made many years before that its employee should be credited with 9 years of service with the city. Mention is made in some of these cases that where there is general power authorizing action by a governmental body in a particular field, the government may be estopped to assert irregularity in the exercise of that power. Here we have the general power in the department, Govt.Code, § 11152, *supra*, and it has been so recognized by this Court. *Nelson v. Dean*, 27 Cal.2d 873, 168 P.2d 16, 168 A.L.R. 467. None of the fore-

going authorities presents a clearer case for estoppel than the case at bar.

I would, therefore, affirm the judgment.

SCHAUER, Justice (dissenting) to opinion by EDMONDS, Justice.

I would affirm the judgment. It is fundamental in California that before a trial court's judgment will be reversed on appeal the appellant must show that there has been error of law resulting in a miscarriage of justice. (Cal.Const., Art. VI, § 4½.) I do not find such showing here.

There is no suggestion of fraud or overreaching on the part of either petitioner. Each faithfully discharged the duties assigned to him and each during the periods of time involved worked many hours in excess of his regular hours of duty. Thus, during the years 1939, 1940, 1941, 1942, and 1943, Mr. Redwine worked a total of 370.75 overtime hours and was allowed 38 hours compensating time off, leaving a net balance of 332.75 compensating hours off due him. During 1941, 1942, and 1943, Mr. Martin performed a total of 568.5 hours of overtime work and was allowed 32.5 hours of compensating time off, leaving a balance due him of 536 compensating time off hours.

During the period when the overtime balance was accruing there appears to have been outstanding a "Headquarters General Order" providing either that (Headquarters General Order No. 295) "Employees ordered to work beyond the hours ordinarily required or hours overtime in addition to what is considered their regular full day's work, may be allowed time off on the day following or at some other convenient time in lieu of the overtime hours worked," or that (Headquarters General Order No. 394) "Employees ordered to work beyond the hours ordinarily required and considered as a full days work may be allowed

compensating time off in lieu of such overtime worked." ¹

It thus appears that employes in the position of petitioners here were entitled to compensating time off to balance their overtime, such compensating time off to be allowed at the convenience of the employe's superior officer. Although (prior to February 6, 1943) there was no statute providing for cash payment in settlement for overtime worked it is quite apparent that the state did expect to balance its accounts with employes for overtime services by allowing an equivalent amount of compensating time off. If the petitioners here had remained in the state service indefinitely and had eventually, at the convenience of their superiors, been allowed the full amount of their overtime as compensating time off I think that neither this litigation nor any based on such allowance would ever have arisen.

However, apparently in recognition of the fact that employes who had accumulated substantial amounts of overtime credits might not be able to remain in their employment long enough to work out a balancing of the account on a compensating time off basis and that there might be a serious question as to the right of the employe to assert, or the state to pay in cash, claims for the value of the overtime which might remain uncompensated upon a separation from service, the State Civil Service Act was amended to cover the situation. Effective February 6, 1943, section 150.5 was added. It provides (Stats. 1943, ch. 20, § 2, p. 136; Now Govt.Code, § 18005):

"Upon separation from service without fault on his part, a person is entitled to a lump sum payment as of the time of separation for any unused or accumulated vacation or for any time off to which he is entitled by reason of

1. Headquarters General Order No. 295 was dated September 28, 1939, by its terms became effective October 1, 1939, and superseded Headquarters General Order No. 243, issued July 23, 1936. Headquarters General Order No. 394 was dated August 5, 1942, and superseded No. 295. The substance of Headquarters

General Order No. 243 is not shown here (it does appear in the companion case of *Jarvis v. Henderson*, Cal.Sup., 255 P.2d 426) but there is no contention that it differed materially from Nos. 295 and 394 in respect to the allowance of compensating time off for overtime worked.

previous overtime work where compensating time off for overtime work is provided for by the appointing power or by rules of the State Personnel Board.

"Such sum shall be computed by projecting the accumulated time on a calendar basis so that the lump sum will equal the amount which the employee would have been paid had he taken the time off but not separated from the service. Persons separated from service through fault of their own are entitled to a lump sum payment for such compensating time off for overtime work, similarly computed, and in addition, such portion, if any, of unused vacation as the State Personnel Board may determine."

I see no valid objection to applying such section to the petitioners here. Their service extended beyond the effective date of the quoted statute. Up to and at the time of their separation, the trial court was justified in concluding, they had a right to compensating time off. The state could settle that account with them either by permitting them to continue in employment at the prevailing current wage until they had been given compensating time off to fully balance their accumulated overtime or, by virtue of the quoted statute, which we must presume the Legislature found good reason for enacting, it could settle by the "lump sum payment." That the "lump sum payment" was more desirable to the state than having the employee continue on the payroll, occupying a position but on a time off basis until his accumulated overtime was fully offset, is readily understandable. The state may well have needed to fill the position with a person who would be immediately available for work. Upon separation from the service without fault on their part the petitioners, by virtue of the statute, became entitled to the "lump sum payment." This is no gift of public money; it does not present petitioners with anything of value which they have not earned; it is merely an alternative method of settling a current account which the state has found to be advantageous to it.

Much that is said in my dissent in *Treu v. Kirkwood*, Cal.Sup., 255 P.2d 409, is equally applicable here.

Since no error of law resulting in miscarriage of justice is shown the judgment should be affirmed.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



40 Cal.2d 600

JARVIS v. HENDERSON et al.

Sac. 6281.

Supreme Court of California, in Bank.

April 3, 1953.

Former State Highway Patrol officer brought action against the Director of the Department of Motor Vehicles for the State of California and others to compel payment for overtime work performed by former State Highway Patrol officer. The Superior Court of Sacramento County entered judgment and the Director of the Department of Motor Vehicles and others appealed. The Supreme Court, Edmonds, J., held that former State Highway Patrol officer was not entitled to recover compensation for overtime work prior to February 6, 1943.

Judgment and order reversed with directions to enter judgment denying petition for writ of mandate.

Carter and Schauer, JJ., dissented.

Prior opinion 240 P.2d 27.

1. States ⇐59

The salary of a civil service employee of the state is fixed by statute and rule of the State Personnel Board and may not be altered by contract.

2. States ⇐63

In absence of a statute specifically authorizing compensation in addition to a fixed monthly salary of an employee of the state, there is no right to payment for overtime.

3. States ⇐59

When salary of state employee is fixed by time, as by the day or month, employee is bound, in absence of statute, to render services without regard to number of hours

worked, and rule is equally applicable to work performed on what otherwise would have been days off or holidays.

4. States ⇐59

If time off is not granted by statute to state employee, it is then included within period for which employee is being paid his salary and is time when he may be required to perform services.

5. States ⇐63

Statute authorizing payment for overtime worked by State employees is not retroactive. Government Code, § 18005; Const. art. 4, § 32.

6. States ⇐61

Former State Highway Patrol officer who worked 129 days more than would have been required by a six day work week less all legal holidays, was not entitled to recover for overtime worked prior to February 6, 1943. Government Code, §§ 18005, 18020-18021, 18023-18025.

Earl D. Desmond and George W. Artz, Jr., Sacramento, for petitioner and appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents and appellants.

EDMONDS, Justice.

The principal question here, as in *Martin v. Henderson* (*Redwine v. Henderson*), Cal.Sup., 255 P.2d 416, is whether a former state highway patrol officer is entitled to payment for hours worked prior to February 6, 1943, in excess of regular hours of duty, for which he received no compensating time off during his period of service. An additional question presented is whether such officer may receive payment for work performed before that date on days which normally would have been days off or holidays.

The facts are undisputed. Jarvis entered service with the highway patrol in April, 1931, and was appointed to the civil service position of state traffic officer in March, 1933. In July, 1934, he was assigned to the duties of personal bodyguard and chauffeur

for the Governor. This assignment terminated in January, 1939, when he returned to the regular duties of a state traffic officer. He resigned from the department on January 31, 1948.

It is stipulated that between January 1, 1935, and December 31, 1938, Jarvis worked 129 days more than would have been required by a six-day work week less all legal holidays. Between January 1, 1935, and August 31, 1939, it is stipulated that he worked 7,682 hours in excess of what would have been required of him had his duties been confined to an eight-hour day. A further stipulation is that his salary was fixed on a monthly basis and was fully paid.

In July, 1944, Jarvis demanded equivalent days off for the claimed 129 extra days of work. On September 1, 1944, the chief of the highway patrol denied his request upon the ground that any right to compensating time off was suspended by Headquarters General Order No. 295. In 1945, he filed an affidavit of his claim for overtime, pursuant to Information Bulletin No. 323 issued by the chief of the highway patrol. This claim was rejected on August 21, 1945, by Headquarters Information Bulletin No. 329 and he never received any compensating time off for such overtime.

The chief of the highway patrol on May 17, 1933, issued Headquarters Information Bulletin No. 52, effective immediately, providing that traffic officers "will take two successive days off every second week". Headquarters General Order No. 243, issued on July 23, 1936, permitted the accumulation of days off under certain circumstances and provided for the allowance of "time off in lieu of overtime". According to the order: "Effective immediately, all days lost and time accumulated previous to January 1, 1936, are cancelled."

Effective October 1, 1939, Headquarters General Order No. 295 canceled Bulletin No. 52 and Order No. 243. It suspended "all accumulative days accumulated prior to January 1, 1939". In addition, it provided: "In the future employees ordered by their superiors to work on their regular days off or legal holidays, will be allowed

a day in lieu thereof which will be termed an accumulative day. All accumulative days approved by the immediate superior must be taken as soon thereafter as is practical and at the convenience of the service." It also provided for time off for overtime work. *Martin v. Henderson*, supra.

Order No. 295 was canceled by Headquarters General Order No. 394, effective August 5, 1942. By the new order: "All days accumulated prior to January 1, 1939 remain suspended." It provided that: "Employees ordered to work on their regular days off or on legal holidays will be allowed a day in lieu thereof which shall be termed an accumulative day. Squad Commanders shall arrange for the taking of accumulative days as rapidly as possible without undue impairment of the service." Provision was also made for time off in lieu of overtime. *Martin v. Henderson*, supra.

Information Bulletin No. 287 was issued December 9, 1942, in clarification of Order No. 394. It stated that "it is entirely optional with the immediate superior whether compensating time off is allowed and when it shall be taken. If an employee is resigning * * * any overtime Must Be Allowed Before Employee Works His Final Day. * * * There is nothing in the Patrol regulations which establishes a mandatory eight hour day. The determination of what constitutes overtime and if and when compensatory time off shall be taken is to be made by the immediate superior of the individual concerned. * * * Any individual who believes he is being discriminated against has the right to appeal his case through the proper channels to Headquarters."

On September 29, 1943, Headquarters General Order No. 428 canceled Order No. 394. It provided that state traffic officers "shall not receive compensating time off for time worked in excess of their normal work schedule or be permitted to accumulate overtime for such work". Also, when a state traffic officer "is required to work a full shift or longer on a day that he is not normally required to work he shall be allowed a compensating day off. If the compensating day off cannot be granted within

ten days without unduly impairing the services of the California Highway Patrol, the employee shall be permitted to accumulate to his credit such compensating day off, provided that he shall at no time be entitled, without the consent in writing of the Chief of the California Highway Patrol, to a greater total than ten working days".

Order No. 428 was superseded by Headquarters General Order No. 432, permitting the accumulation of days off for work done in addition to a six-day week less legal holidays after November 17, 1943. This order was in turn canceled by Headquarters General Order No. 448 on September 5, 1944, which permitted "compensating time off in lieu of overtime worked, provided that in no event shall it be permissible for any person to accumulate a total greater than 240 uncompensated overtime hours. * * * (Ordinary 'days off' or 'holidays' worked since November 17, 1943, which formerly have been considered as 'accumulative days' under Headquarters General Order No. 432, shall be reduced to overtime hours worked and included in the maximum total of 240 hours)."

On June 5, 1945, the chief of the highway patrol issued Information Bulletin No. 323 requiring proof of any claim for overtime hours accumulated prior to September 29, 1943. Each of the claims presented pursuant to this bulletin was rejected and all overtime hours claimed to have been accumulated prior to September 29, 1943, were canceled by Headquarters Information Bulletin No. 329, issued on August 21, 1945. *Martin v. Henderson*, supra.

The first statute authorizing payment upon separation for accumulated overtime became effective February 6, 1943. Stats. 1943, ch. 20, § 2, p. 136; now Govt.Code § 18005; *Martin v. Henderson*, supra. On June 7, 1943, section 73 was added to the State Civil Service Act, Stats. 1937, ch. 753, providing for a "normal work week" to be established by the State Personnel Board for each civil service class and requiring overtime compensation or time off in lieu of overtime. Stats. 1943, ch. 1041, § 1, pp. 2976-2977; now Govt.Code §§ 18020-18021, 18023-18024. Not until September 15, 1945, was there any statute entitling civil servants

to time off on designated holidays or to compensation or time off in lieu thereof for holiday work. Stats.1945, ch. 1016, p. 1962; Govt.Code § 18025.

The trial court found that, during the period Jarvis worked overtime, an eight-hour work day was established as normal for all members of the highway patrol and all time worked beyond that was compensated by equivalent time off as a matter of right. The understanding that such time off would be granted was, the trial court found, "a part of the contract of employment entered into by and between the appointing power of the California State Highway Patrol and * * * Jarvis upon his entering upon his service * * * (in 1931) and continued to be part of said contract of employment during the term of his employment". It also found, as a part of the contract of employment, an understanding that one day out of every seven, exclusive of holidays, should be a day off as a matter of right and if a traffic officer worked on a day which should have been a day off or holiday, he should be compensated by an equivalent day off. According to the findings, Jarvis was entitled to cash compensation for overtime and extra days for which time off had not been granted at the rate of pay he was earning at the time the overtime and extra days were worked. The court found that no cause of action arose to enforce compensating time off for such hours and days until separation from service and no statute of limitation barred the present proceeding. It concluded that Jarvis' claims for cash payment for overtime hours and extra days should be allowed.

After the court made its minute order that judgment be for Jarvis as prayed, he moved for leave to amend his petition to claim recovery upon the basis of \$325 per month, the salary he was receiving at the time of his resignation. He also moved to set aside submission of the cause for the purpose of producing evidence in support of the proposed amendments. Following the denial of these motions, judgment was entered directing a peremptory writ of mandate to issue requiring the approval and payment of Jarvis' claims in the amount of \$7,225.82 for overtime and \$788.90 for ex-

tra days worked. The respondents' motions for a new trial and to vacate the judgment and enter judgment in their favor in conformity with the findings were denied. Both Jarvis and the respondents appealed from the judgment. The respondents also appealed from the order denying their motion to vacate the judgment and enter judgment in their favor.

The respondents contend that Jarvis was paid a monthly salary which, by statute, constituted compensation in full for all services which might be rendered by him and no compensation for overtime work or work on normal days off or holidays could be allowed in the absence of statute. They also argue that his claim is barred by the statute of limitations. In addition, they assert that Jarvis cannot be paid from funds of the highway patrol for work done as bodyguard and chauffeur, a position in the Governor's office and not in the patrol.

Jarvis, on the other hand, contends that his appointment was contractual, a condition of the contract being payment for overtime and work done on normal days off and holidays. He also argues that section 18005 of the Government Code operates retroactively to grant him compensation for such work. According to him, his cause of action is not barred by a statute of limitations and his position at all times was one within the highway patrol for which its funds are obligated. In support of his appeal, he contends that the trial court abused its discretion in denying his motion to amend the petition and that the judgment fails to conform to the statutory method of computing the lump sum payment for accumulated overtime and days off.

The contention that Jarvis' appointment was contractual is without merit. It is based upon the assumption that he was appointed in 1931 by the board of supervisors of his county, pursuant to section 30 of the California Vehicle Act of 1923. Stats.1923, ch. 266, § 30, p. 520. However, prior to his appointment, the statute had been amended to provide for appointment of traffic officers by the chief of the patrol with salaries fixed by the director of public works and to bring all appointees within civil service status. Stats.1929, ch. 308, § 1, pp. 617-619.

The amendment eliminated the prior provision for appointment by contract between the chief of the division and the board of supervisors.

[1-4] No statute or rule of the appointing authority authorized payment for either overtime or work on normal days off or holidays at any time prior to or during the period for which compensation is being claimed. Even had there been such rule or understanding affecting members of the highway patrol, it would have been unenforceable. The salary of a civil service employee is fixed by statute and rule of the State Personnel Board, and may not be altered by contract. *Martin v. Henderson*, supra; *Boren v. State Personnel Board*, 37 Cal.2d 634, 641, 234 P.2d 981. In the absence of a statute specifically authorizing compensation in addition to a fixed monthly salary, there is no right to payment for overtime. *Martin v. Henderson*, supra. When the salary is fixed by time, as by the day or month, the employee is bound, in the absence of statute, to render services without regard to the number of hours worked. *Robinson v. Dunn*, 77 Cal. 473, 19 P. 878. The rule is equally applicable to work performed upon what otherwise would have been days off or holidays. If time off is not granted by statute, cf. *Pohle v. Christian*, 21 Cal.2d 83, 90, 130 P.2d 417, it is then included within the period for which the employee is being paid his salary and is time when he may be required to perform services.

[5, 6] The statutes enacted in 1943 providing for a normal work week and payment for overtime, Stats.1943, chs. 20, 1041; now Govt.Code §§ 18005, 18020-18021, 18023-18024 and in 1945 allowing time off on holidays or compensation therefor, Stats.

1945, ch. 1016, p. 1962; Govt.Code § 18025, were not, and could not be, retroactive. Const., art. IV, § 32; *Martin v. Henderson*, supra; *Robinson v. Dunn*, supra, 77 Cal. at page 475, 19 P. 878. Because, at the time Jarvis did the work specified in his claim, there was no statute permitting additional compensation for services required to be performed at the monthly salary fixed for his position, he may not recover.

These conclusions make it unnecessary to consider the other contentions of the parties.

The judgment and the order denying the motion to vacate the judgment are reversed with directions to the superior court to grant the motion and enter judgment denying the petition for a writ of mandate.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

This case presents the same questions involved in *Martin v. Henderson* and (*Redwine v. Henderson*) Cal.Sup., 255 P.2d 416, and for the reasons stated in my dissenting opinion therein, I cannot agree with the majority here.

The judgment of the trial court awarding the state employee compensation for overtime should be affirmed.

SCHAUER, Justice (dissenting) to opinion by EDMONDS, Justice.

The legal issues here are basically the same as, or similar to, those considered in *Martin v. Henderson*, Cal.Sup., 255 P.2d 416. For the reasons stated in my dissent in the *Martin* case, I would affirm the judgment.

**HAWAIIAN PINEAPPLE CO., Limited, v.
INDUSTRIAL ACC. COMMISSION et al.
S. F. 18616.**

Supreme Court of California, in Bank.

April 14, 1953.

Rehearing Denied May 7, 1953.

Proceeding on employer's application for writ of review to annul Industrial Accident Commission's award of additional compensation on ground that employee was injured by reason of serious and wilful misconduct of employer. The Supreme Court, Shenk, J., held that the findings made by Commission did not support the award.

Award annulled.

Carter, J., dissented.

1. Administrative Law and Procedure ⇨484
Workmen's Compensation ⇨1820

The Industrial Accident Commission and not the referee makes the findings in compensation cases. Labor Code, § 5953.

2. Workmen's Compensation ⇨939

"Serious and wilful misconduct" of employer for which additional compensation should be awarded denotes a greater degree of culpability than mere negligent or even grossly negligent conduct and involves at least an intention to perform an act or omission with actual knowledge or that which in law is deemed to be equivalent of actual knowledge of the peril to be apprehended from the act or omission. Labor Code, § 4553.

See publication Words and Phrases, for other judicial constructions and definitions of "Serious and Wilful Misconduct".

3. Negligence ⇨11, 13

While "gross negligence" may involve intent to perform the act or omission, "wilful misconduct" involves further intent that the performance be harmful or that it be done with positive, active and absolute disregard of consequences.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Negligence" and "Wilful Misconduct".

4. Workmen's Compensation ⇨939

Serious and wilful misconduct of employer for which additional compensation should be awarded cannot be established by showing acts any less culpable, any less deliberate, or any less knowing or intentional, than is required to prove wilful misconduct. Labor Code, § 4553.

5. Workmen's Compensation ⇨939

Serious and wilful misconduct of employer for which additional compensation should be awarded is basically the antithesis of negligence, the two types of behavior being mutually exclusive, and an act which is merely negligent and consequently devoid of either intention to do harm or of knowledge or appreciation of fact that danger is likely to result therefrom cannot at the same time constitute wilful misconduct. Labor Code, § 4553.

6. Workmen's Compensation ⇨1752

Findings of Industrial Accident Commission that employer failed to provide and maintain proper and adequate safety devices or employ means reasonably adequate to render employment and place of employment safe did not show serious and wilful misconduct of employer sufficient to sustain award of additional compensation for disability due to injuries sustained by operator of fork lift truck which was struck by switch engine while crossing tracks between employer's warehouse and plant. Labor Code, § 4553.

7. Workmen's Compensation ⇨939

Reckless disregard of safety of employees is not sufficient in itself to constitute "serious and wilful misconduct" of employer for which additional compensation should be awarded, unless such disregard was more culpable than a careless or even grossly careless omission or act and was an affirmative and knowing disregard of consequences. Labor Code, § 4553.

8. Workmen's Compensation ⇨1752

Finding of Industrial Accident Commission that employer knew or should have known had he put his mind to it that failure to provide adequate safety devices was likely to result in serious injury did not constitute a finding that employer had that

degree of knowledge of consequences of his act as would make his conduct wilful within Workmen's Compensation Act provision for additional compensation where employee is injured by reason of serious and wilful misconduct of employer. Labor Code, § 4553.

9. Workmen's Compensation ⇐1674, 1752

In proceeding on claim for compensation for disability due to injuries sustained by operator of fork lift truck when switch engine struck truck while it was crossing tracks between employer's warehouse and plant, evidence and findings of Industrial Accident Commission did not show that employer had the knowledge of consequences of its act or omission necessary to constitute performance of such act or omission serious and wilful misconduct for which additional compensation should be awarded. Labor Code, § 4553.

10. Workmen's Compensation ⇐939

The words "serious and wilful misconduct" must be given the same meaning in Workmen's Compensation Act section providing for additional compensation for wilful misconduct of employer as they have in section authorizing reduction of compensation where employee has been guilty of such misconduct. Labor Code, §§ 4551, 4553.

11. Workmen's Compensation ⇐1935

Findings of Industrial Accident Commission must be interpreted liberally in favor of sustaining an award, even where reference to the record is required.

Brobeck, Phleger & Harrison and Rinaldo Sciaroni, Jr., San Francisco, for petitioner.

Edmund J. Thomas, Jr., San Francisco, Leonard M. Levy, Sacramento, Alvin L. Dove, San Francisco, Johnson, Morgan, Thorne, Speed & Bamford and Robert Morgan, San Jose, for respondents.

SHENK, Justice.

This is a proceeding in review to annul an award by the Industrial Accident Commission of additional compensation to Ken-

neth Churchill, an employee of the petitioner, pursuant to the provisions of Labor Code Section 4553. An award of normal compensation is not contested. The award of \$15 per week additional compensation was based upon a finding that an industrial injury suffered by the employee was caused by the "serious and wilful misconduct" of the employer.

The employee operated a fork lift truck at the employer's cannery in San Jose. Switch tracks used by the Southern Pacific Company ran between the plant and an associated warehouse, making it necessary for lift drivers when returning from the warehouse to drive out of a doorway in the warehouse, down a short ramp, across two sets of switch tracks, up a short ramp and through a doorway into the main plant. A third set of tracks, used to "spot" freight cars alongside the warehouse, lay between the switch tracks and the warehouse but did not extend through the ramp, being blocked off on both sides of the ramp.

At noon in May, 1950, the employee Churchill drove out of the warehouse doorway onto the ramp as a switch engine approached on his right. He did not stop his truck. Manually operated blinker lights over the doorway had not been turned on. The employee testified that he looked into a mirror reflecting a view of the tracks but that he could see only as far as the second of two box cars which were spotted alongside the warehouse wall adjacent to the ramp on his right, and that the switch tracks were clear as far as he could see. There was evidence also that the box cars shut off the view by the train crew of the fork lift truck coming out of the doorway until it was practically on the track and about eleven feet from the engine. The employee testified that he too first became aware of the engine at this point; that he speeded his motor to get across the tracks ahead of the engine, but his truck was struck in the back end and upset, causing the injuries for which the contested award was made.

Prior to and on the day of the accident there were approximately fifteen fork lift

trucks in operation throughout the plant. Four of these trucks were continuously making crossings between the warehouse and the main plant. The injured employee testified that he alone had made between 20 and 50 crossings the morning of the accident. There was evidence that the switching engine passed the crossing on an average of four times a day during the period immediately prior to the accident.

The employer had taken precautions to prevent the occurrence of accidents at the crossing. Over the middle of each doorway there was placed a sign with crossed white lines and the letters "R R" on them. In addition stop signs were posted at each doorway. Prior to the accident and following a near accident to another lift truck driver a mirror 17 by 21 inches in size was installed on the wall of the main plant opposite the doorway in the warehouse and approximately 50 feet distant therefrom, and placed in such a position that it reflected a view of the switch tracks to a fork lift driver leaving the warehouse. There was evidence that the view down the tracks afforded by the mirror was limited in some instances to no more than twenty feet, depending on the position at which one left the warehouse doorway.

It was conceded that the employer had an "energetic safety program" and that the employer's safety committee had been instrumental in promulgating various safety rules, including one which required that fork lift operators stop their trucks before crossing the tracks. The drivers, including the injured employee, had been furnished copies of the safety rules and had occasionally been warned of the failure of drivers to stop at the crossing or of driving their trucks at top speed which varied from three to five miles per hour. However, there was evidence that for an indefinite period immediately prior to the accident the drivers had not complied with the rule requiring them to stop, despite the warnings. Their failure to comply with the warnings was attributed by the drivers to the fact that their work load, even in the slack season, required that they hurry.

In accordance with a recommendation of the employer's safety committee made in 1947 or 1948, the employer had placed a watchman at the crossing during the so-called "operating season" at the plant, July through October of each year. The watchman acted as a look-out and gave a warning of approaching trains. One of his duties was to pull a manually operated switch which started blinker stop lights above the doorways when a train was coming. During the slack season when the accident occurred no watchman was employed, and no one was assigned the duty of sounding an alarm of an approaching switch engine. There was evidence that during the slack season the blinker lights were either not operated when a switch engine approached, or were operated by "anybody who happened to come along."

Although an approaching engine on all occasions rang a bell, the fork lift operators could not clearly hear it because the motor directly below the seat on the fork lift was noisy. The crew of the switch engine did not provide a flagman nor at any time did a member of the crew operate the manually controlled blinker lights in the doorways.

[1] The injured employee filed a claim before the commission wherein additional compensation was sought under Section 4553 of the Labor Code. That section provides that the amount of compensation otherwise recoverable shall be increased one-half where the employee was injured by reason of the "serious and wilful misconduct" of his employer. The commission found that the employer "failed or omitted to provide and maintain proper and adequate safety devices to warn of the approach of switch engines along said railroad right of way or to adopt and use means, methods, operations and processes reasonably adequate to render applicant's employment and place of employment safe * * *." It was determined that the injury to the employee "was caused by the misconduct of the employer" and that the misconduct was "serious and wilful". The referee had found on the same facts that the injury was caused by the applicant's

own "careless disregard of the hazard of the right of way crossing" and that the conduct of the employer did not "constitute a reckless disregard of the safety of others and a willingness to inflict the injury complained of", citing *E. Clemens Horst Co. v. Industrial Accident Comm.*, 184 Cal. 180, 193 P. 105, 16 A.L.R. 611. However, it is for the commission, not the referee, to make the findings. Labor Code § 5953; *Liberty Mutual Ins. Co. v. Industrial Accident Comm.*, 33 Cal.2d 89, 92, 199 P.2d 302. The questions presented relate to the sufficiency of the evidence to support the findings of the commission and to the conclusions of the commission as to serious and wilful misconduct.

In support of the commission's findings there was substantial evidence that the fork lift drivers crossed the tracks scores of times a day; that the fact that they failed to make the required stop at each crossing was condoned by the employer and made necessary by the work load; that both the view of the drivers and that of the railroad crew were limited by the location of the tracks with respect to the doorways and the spotting of freight cars near the doorways; that the size of the mirror together with the distances involved did not give a clear view of the tracks for a sufficiently safe distance; that during the slack season the blinker light was unreliable, and served as much as a trap as it did as a protection, for the reason that it was operated only by the chance of some one being present when a train approached; that the danger to which the fork lift drivers were exposed could have been eliminated, as it was in the "operating season" by the use of a watchman, or by automatic signal, and that the employer had been so informed by one of the drivers following a near accident of the same nature as the one here involved.

[2-5] The commission was called upon to apply to its findings of fact a recognized standard of conduct in order that it could further find whether the employer had failed to maintain that standard. Although this inquiry involves questions of fact, the

standard itself is a matter of law. The statute defines the standard as one which requires an employer to abstain from "serious and wilful misconduct", which expression has often been the subject of judicial interpretation by our courts. In our recent decision, *Mercer-Fraser Co. v. Industrial Accident Comm.*, 40 Cal.2d 102, 251 P.2d 955, this problem was considered at length. It was held that "serious and wilful misconduct" denotes a greater degree of culpability than mere negligent or even grossly negligent conduct. It was pointed out that the additional award was actually in the nature of a penalty; that it cannot be insured against; and that its imposition upon evidence of conduct any less culpable than that specified by the statute would constitute an unlawful taking of the property of one person for the benefit of another. In arriving at the legislative intent in phrasing the statute other decisions were considered which had attached meanings to the following similar terms, many employing the element of wilfulness: "willful and wanton negligence", "wilful negligence", "wanton and willful misconduct", "wanton and reckless misconduct", "wilful misconduct" all as used in tort actions, *Donnelly v. Southern Pacific Co.*, 1941, 18 Cal.2d 863, 869, 118 P.2d 465, 468; "wilful misconduct" as used in the so-called guest statute, Vehicle Code Section 403, *Porter v. Hofman*, 1938, 12 Cal.2d 445, 447, 85 P.2d 447; *Meek v. Fowler*, 1935, 3 Cal.2d 420, 425, 45 P.2d 194; *Howard v. Howard*, 1933, 132 Cal.App. 124, 22 P.2d 279. These cases all held that where conduct was described as "wilful" as opposed to negligent conduct in any degree, it involves at least an intention to perform an act or omission with actual knowledge, or that which in law is deemed to be the equivalent of actual knowledge of the peril to be apprehended from the act or omission. While gross negligence may involve an intent to perform the act or omission, wilful misconduct involves the further intent that the performance be harmful or that it be done with a positive, active and absolute disregard of the consequences. *Meek v. Fowler*, 1935, *supra*, 3

Cal.2d 420, 425-426, 45 P.2d 194. It was concluded in the Mercer-Fraser case [251 P.2d 963] that "serious and wilful misconduct" as that expression is used in Section 4553 of the Labor Code "cannot be established by showing acts any less culpable, any less deliberate, or any less knowing or intentional, than is required to prove wilful misconduct." It was stated in that case that "the true rule is that serious and wilful misconduct is basically the antithesis of negligence, and that the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute wilful misconduct * * *."

[6-9] In the present case it must be determined whether the commission has applied the standard set forth in the Mercer-Fraser case in determining that the employer's misconduct was "serious and wilful". It was held in that case that the findings with regard to the conduct of the employer constituted nothing more than findings of negligence. The same is manifestly true with regard to the findings in the present case previously set out to the effect that the employer failed to "provide and maintain proper and adequate safety devices" or to employ means "reasonably adequate to render applicant's employment and place of employment safe". However, further findings to the effect that this conduct "evinced a reckless disregard for the safety of said employee" and that the employer "knew or should have known had he put his mind to it that such failure or omission was likely to result in serious injury" more closely approach those factual elements necessary to determine that the employer's misconduct was "serious and wilful". Nevertheless, as stated, the conduct must be with knowledge of the peril to be apprehended, or done with a positive and active disregard of the consequences. A "reckless disregard" of the safety of employees is not sufficient in itself unless the evidence shows that the disregard was more culpable than a careless or even a

grossly careless omission or act. It must be an affirmative and knowing disregard of the consequences. Likewise, a finding that the "employer knew or should have known had he put his mind to it" does not constitute a finding that the employer had that degree of knowledge of the consequences of his act that would make his conduct wilful. The standard requires an act or omission to which the employer *has* "put his mind". Mercer-Fraser v. Industrial Accident Comm., supra, 40 Cal. 2d 102, 251 P.2d 955. The evidence and the findings of the commission do not show that the employer had the knowledge of the consequences of its act or omission necessary to make the performance of that act or omission a wilful one.

In considering the findings of the commission as a whole and in the light of the fact that the only relevancy individual findings have to the issues presented in the present case is in regard to whether the employer is liable for *additional* compensation, it is apparent that the commission has imposed upon the employer a standard much stricter than that authorized by law. Because the specific findings of the commission fall short of what was defined as serious and wilful misconduct in the Mercer-Fraser case it must be concluded that the commission was in error in regard to the proper standard.

[10] It is significant that the statute works both ways—hence the importance of correctly defining its terms. While Section 4553 provides for an additional one-half of the normal compensation where the employer's "serious and wilful conduct" causes the injury, Section 4551 provides that "Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half * * *." The words "serious and wilful misconduct" must be given the same meaning in each section. Parkhurst v. Industrial Accident Comm., 1942, 20 Cal.2d 826, 831, 129 P.2d 113; E. Clemens Horst Co. v. Industrial Accident Comm., 1920, supra, 184 Cal. 180, 188, 193 P. 105. It was suggested in the Mercer-Fraser case that in

determining whether an employer's misconduct would justify increasing an award it would be significant to determine first whether that same misconduct would justify reducing an award made to the one responsible for the misconduct were he the injured party.

[11] We are not unmindful of the rule requiring that findings be interpreted liberally in favor of sustaining an award, even where reference to the record is required. Looking at the record it is devoid of any substantial evidence that the employer intended to do harm, or that it had actual knowledge of the probable consequences of its failure to provide more adequate safety devices or a safer place to work or that it exercised an affirmative and knowing disregard for the safety of the injured employee. There is evidence that a similar accident was closely avoided shortly before the injury here complained of. It is true that at least a constructive knowledge could have been imputed to the employer at that time that such an accident might occur again. However, the employer thereafter took steps to remove this hazard. There is no evidence that the employer had knowledge of any kind that this remedy was inadequate, nor does the record reveal that there was any reason for it to believe that the circumstances which nearly caused a first accident continued to exist.

The present action does not involve the employer's violation of an express statute or commission safety order designed to protect employees. The rules laid down in such cases, see *Bethlehem Steel Co. v. Industrial Accident Comm.*, 23 Cal.2d 659, 145 P.2d 583; *Parkhurst v. Industrial Accident Comm.*, supra, 20 Cal.2d 826, 129 P.2d 113; *Blue Diamond Plaster Co. v. Industrial Accident Comm.*, 188 Cal. 403, 205 P. 678, as to what constitutes "serious and wilful misconduct" therefore have no application.

The award of additional compensation is annulled.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

By its decision here the majority has completed the reactionary process, commenced by its decision in *California Shipbuilding Corp. v. Industrial Accident Comm.*, 31 Cal.2d 278, 188 P.2d 32, and carried forward by its decisions in *Mercer-Fraser Co. v. Industrial Accident Comm.*, 40 Cal.2d 102, 251 P.2d 955 and *Sutter Butte Canal Co. v. Industrial Accident Comm.*, 40 Cal.2d 139, 251 P.2d 975, of judicial repeal of the workmen's compensation law that an award shall be increased for wilful misconduct of the employer. Labor Code, § 4553. I reiterate what I said in my dissents in those cases. The lethal blow has now been struck and section 4553 of the Labor Code has been nullified and stricken from the statute book by judicial interpretation. By these decisions this Court has blotted out four decades of progress in the field of social legislation for the benefit of the working men and women of this state, and overruled numerous decisions of this Court and the District Court of Appeal without even mentioning them.

The majority opinion holds that neither the findings nor the evidence establishes serious and wilful misconduct.

With reference to the findings, they are clearly sufficient under the authorities cited in my dissent in *Mercer-Fraser Co. v. Industrial Accident Comm.*, supra, 40 Cal.2d 102, 251 P.2d 955. They expressly state that the general superintendent of the employer *knew* that his failure to provide safety devices was likely to result in serious injury. While it is also found that he should have had that knowledge, that in no way detracts from the finding of actual knowledge.

Briefly, the facts are that the employer maintained an extremely dangerous condition on its property, that is, a railway crossing which must be crossed by its employees, and had taken no steps to protect the employees against that peril. I say it took no steps because the evidence shows that the steps it did take were so com-

pletely ineffectual as to be no protection whatsoever. Moreover, one of the steps taken, the presence of the signal light to warn of an approaching train, went beyond being ineffectual; it operated as a pitfall and trap for the employees inasmuch as it was operated sometimes and not others. All these conditions the employer knew of, yet it did nothing to correct them.

A witness, Amaro, testified that three days before the applicant employee was injured, he was engaged in the same work, and while driving a lift truck across the railroad tracks, barely escaped being struck by a train. He told Spiegel, the employer's representative in charge, of his near injury and that the signal light should be fixed so as to turn on automatically when a train was approaching because "you couldn't see the train when you came out of the door" to cross the tracks, that is, in effect, that *none* of the employer's devices served to safeguard against the peril; that a watchman or flagman should be put on the crossing. A mirror was placed by the employer at the door the same day of Amaro's near injury purportedly to give an operator of the lift truck a view of approaching trains but it only gave a view 20 feet down the tracks. He saw the employer's superintendent at the crossing after the signal lights were installed and it may be inferred that the latter knew that they operated only sporadically when some one happened to operate them. It was not customary for the truck drivers to stop at the crossing because their work load was heavy. This was also known to the superintendent.

A representative of the employer testified he knew there was a train operating on the crossing at the time of the accident and that no one was operating the stop lights.

Summarizing, the evidence shows that there was here a very dangerous railroad crossing that must be continually traversed by the employees. Its danger was apparent to any one from a view of the physical facts. The employer knew of that danger prior to the accident because it had placed lights to signal the approach of a train and had a man to operate them during the

busier times and because its superintendent was specifically advised by an employee, who had a "close call," of the danger and that none of the devices gave effective protection. In the face of that knowledge the employer failed to do anything about it—permitted its employees to bear the risk of this very real hazard. Certainly it is wholly reasonable to draw an inference that its conduct was in reckless disregard of its employees' welfare. Indeed, its conduct amounts to intentionally subjecting its employees to injury, and this condition was permitted to exist solely because protection would cost the employer money. In the face of the foregoing facts which the record discloses without contradiction, the majority opinion states: "The evidence and the findings of the commission do not show that the employer had the knowledge of the consequences of its act or omission necessary to make the performance of that act or omission a wilful one * * *. Looking at the record it is devoid of any substantial evidence that the employer intended to do harm, or that it had actual knowledge of the probable consequences of its failure to provide more adequate safety devices or a safer place to work or that it exercised an affirmative and knowing disregard for the safety of the injured employee." I cannot reconcile the foregoing statements with an honest analysis of the record in this case. It is undisputed that during the so-called busy season, the employer maintained a watchman at the crossing to guard against such accidents as the one here involved. The employer, therefore, knew that the crossing was a dangerous one and that safety measures must be taken to guard against accidents of this character. The only satisfactory safety measure which had been employed was the maintenance of a watchman or an employee to manually operate the blinker lights. This safety measure was abandoned by the employer during the non-busy season although the risk was just as great to the employee during the non-busy season as during the busy season. In the face of this factual background may it be said with the slight-

est regard for the truth, that "The evidence and the findings of the commission do not show that the employer had the knowledge of the consequences of its act or omission necessary to make the performance of that act or omission a wilful one," or that "the record is devoid of any substantial evidence that the employer * * * had actual knowledge of the probable consequences of its failure to provide more adequate safety devices or a safer place to work or that it exercised an affirmative and knowing disregard for the safety of the injured employee."

I am constrained to repeat a statement hereinabove made, that the only reason this hazardous condition was permitted to exist was solely because the maintenance of an adequate safety measure would cost the employer money. The Legislature by its enactment of section 4553 of the Labor Code sought to correct this evil, but the majority of this Court, solicitous only of the financial welfare of the employer, says no, it is too great a burden for the employer to bear. So we are back where we were 40 years ago so far as the enforcement of safety regulations is concerned.

It is the old story of the will of the people and the Legislature being defeated by reactionary court decisions. To protect employees against unnecessary risks, the Legislature enacts a law providing that an employer must provide a safe place for his employees to perform their work, and that failure to do so constitutes wilful misconduct on the part of the employer entitling an employee injured thereby to an increased award of compensation. Obviously such a law tends to create increased vigilance on the part of employers to provide safety devices and thus reduce the number of industrial injuries. There can be no doubt that the present law has had a salutary effect. Its nullification by this Court is not only a travesty on social justice but an insidious abuse of judicial power.

I would affirm the award here made.

Rehearing denied; CARTER, J., dissenting.

HOLT v. INDUSTRIAL ACC. COMMISSION et al.
Civ. 8275.

District Court of Appeal, Third District,
California.
April 17, 1953.

Petition for review of a decision of the Industrial Accident Commission after reconsideration granted. The District Court of Appeal, Schottky, J., held that in annulling award it would not seek to preclude taking of further proceedings in matter insofar as such proceedings might be proper under Labor Code.

Award annulled and cause remanded for further proceedings.

Workmen's Compensation — 1949

District Court of Appeal in annulling award in favor of widow and minor child of deceased employee based on alleged serious and willful misconduct of employer, because record did not sustain finding of willful misconduct, would not seek to preclude taking of further proceedings in matter insofar as such proceedings might be proper under Labor Code, and would remand case to Industrial Accident Commission for further proceedings in accordance with law. Labor Code, § 5953.

Leonard, Hanna & Brophy, San Francisco, Leon E. Warmke, Stockton, for petitioner.

T. Groezinger, San Francisco, Joseph Michael, Stockton, for respondents.

SCHOTTKY, Justice.

Petitioner filed a petition in this court seeking to review a decision of the Industrial Accident Commission after reconsideration granted.

The petition alleged that Frank Holt, petitioner, is an individual doing business as J. D. O'Brien Crane and Rigging Service, and that on July 6, 1950, at Modesto, California, John Therkelsen, while employed as an oiler on a crane owned by petitioner, sustained injuries occurring in the

course of and arising out of his employment which proximately caused his death. The petition alleged further that following hearings the Industrial Accident Commission granted the respondent widow and minor children of Therkelsen the additional sum of \$3,000 against petitioner, based on the alleged serious and wilful misconduct of the petitioner. The allegations upon which the findings and award of the Commission were predicated were as follows:

"That applicant further alleges that the death of her husband was due to the wilful and serious misconduct of the employer and fellow employee and bases such allegation on the following facts:

"(a) The fellow employee was operating a crane in violation of Safety Order No. 2603 of the California Industrial Accident Commission.

"(b) The fellow employee was advised prior to the moving of the crane to the position in which the accident occurred, that high voltage wires were overhead.

"(c) During the operation of the crane the fellow employee was continually warned to be careful of the high voltage wires and on various occasions was warned that the 'boom' of his equipment was 'getting close' to the wires.

"The applicant further alleges, in addition to the specific violation of the above noted safety order, that the death of the applicant's husband was due to the serious and wilful misconduct of the employer or his managing representative."

The facts, as developed at the hearings before the Industrial Accident Commission are not in dispute and are substantially as follows:

Spears Construction Company, general constructors, in the course of constructing a sewer farm at Modesto, California, in Stanislaus County, required a particular type of equipment that they did not have readily available to them.

The petitioner, Frank Harrison Holt, as owner and operator of the J. D. O'Brien Crane and Rigging Service, was contacted by the Spears Construction Company representative, Mr. Stitt. As a result of such contact, a truck-crane was rented from petitioner by the Spears Construction Company, equipped with an oiler and a crane operator. The crane went to the location on July 6, 1950, the day of the accident. When the crane arrived at the location where the construction was being carried on, a three corner discussion took place between James Stitt, superintendent for Spears Construction Company, the deceased John Therkelsen, and the crane operator. The purpose of the discussion was to outline where the crane would operate from, in order to avoid the necessity of swinging heavy loads of concrete over the heads of the workmen who would be on the roof of the vacuator then under construction. In the course of this conversation, Stitt advised both the crane operator and the deceased to avoid the electric lines suspended on the nearby poles that bordered in close proximity, to one side of the vacuator. Stitt was unaware of the actual voltage, if any, carried in the lines, but assumed that the lines carried at least 440 volts as pumps requiring such voltage were being operated nearby.

In his petition for a writ of review petitioner contended that:

"I. The record is insufficient to support a findings and award of serious and wilful misconduct on the part of your petitioner."

"II. There is no evidence to show that the employer or his managing representative had any knowledge of the existence of the potential hazard on July 6, 1950."

Respondent Industrial Accident Commission filed an answer admitting the material facts as related by petitioner and conceding that the record does not sustain the finding of serious and wilful misconduct, and agreeing that the writ of review should be granted and that the Industrial Accident Commission's decision after reconsideration granted be annulled. Said answer states further that "Respondent Commission

therefore, and at this time, agrees that the Petition for Writ of Review be granted by this court; that the Industrial Accident Commission's Decision after Reconsideration Granted be annulled and that the case be remanded to the Commission for further proceedings in accordance with law, pursuant to Labor Code, Section 5953."

We issued a writ of review and set the matter for hearing. Upon the oral argument it was agreed by all parties that the finding of serious and wilful misconduct is not supported by the record, and our examination of the record leads us to the same conclusion. However, petitioner contended that the award should be annulled with directions to respondent Commission to render a decision in favor of petitioner. In answer to this contention respondent argued that under section 5953 of the Labor Code an appellate court may either affirm or annul an order, decision or award of the Commission, or may remand the case for further proceedings before the Commission. Respondent argued further that even if the court annuls an award it is still subject to the continuing jurisdiction of the Commission and that it is within the power of the Commission to make a similar decision to that annulled after further proceedings have been had, so long as the Commission remains within the "rule of the case." Petitioner then stated that he was apprehensive that the remanding of the case for further proceedings will only afford the Commission the opportunity of repairing their record in some manner so as to ostensibly produce the same result, to wit: misconduct of the employer.

In view of the fact that the record admittedly does not sustain the finding of wilful misconduct the award must be annulled. However, we do not feel that we should by our order annulling the award seek to preclude the taking of any further proceedings in the matter in so far as such proceedings may be proper under the provisions of the Labor Code. We must assume that in any further proceedings the respondent Commission will not do otherwise than act in accordance with the purpose, intent and language of the applicable

statutes as construed by our appellate courts.

The award is annulled and the cause remanded for further proceedings.

VAN DYKE, P. J., and PEEK, J., concur.



STIVERS et al. v. DEPARTMENT OF EMPLOYMENT OF THE STATE et al.*

Civ. 19308.

District Court of Appeal, Second District,
Division 3, California.

April 14, 1953.

Rehearing Denied May 1, 1953.

Hearing Granted June 11, 1953.

Action was brought to recover taxes paid under protest under the California Unemployment Insurance Act. The Superior Court of Los Angeles County entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Shinn, P. J., held that where four partners owned citrus groves and also owned packing house, 80% of the products of which came from their own citrus groves and 20% which came from groves of others, employees at packing house were engaged in agricultural labor, and act was not applicable to them.

Judgment reversed.

1. Partnership Ⓒ66

Partnership may, in its partnership name, become an employer of labor, so as to effectively bind its members, but, in doing so, it acts on their behalf and not as a separate entity.

2. Taxation Ⓒ111.22

Where four partners owned citrus groves and also owned packing house, 80% of the products of which came from their own citrus groves and 20% which came from groves of others, employees at packing house were engaged in "agricultural labor," and California Unemployment Insurance Act was not applicable to them.

* Subsequent opinion 267 P.2d 792.

Gen.Laws, Act 8780d, §§ 7(a), 7.1, 9, 45.11(d).

See publication Words and Phrases, for other judicial constructions and definitions of "Agricultural Labor".

Ivan G. McDaniel, Kenneth N. Dellamater, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for respondents.

SHINN, Presiding Justice.

Plaintiffs sued to recover employer's taxes paid under protest under assessments levied under section 45.11(d) of the California Unemployment Insurance Act, Deering's Gen.Laws, Act 8780d. The demurrer of James G. Bryant as Director of Employment and other defendants was sustained without leave to amend and plaintiffs appeal from the ensuing judgment. The assessments were for the period January 1, 1944, through September 30, 1947, and amounted to \$5,348.20. Plaintiffs pursued all necessary administrative proceedings prerequisite to court action.

The labor for which the assessments were levied was performed in a packing house and the question is whether it was agricultural labor and hence exempt under the Act. It was alleged in the complaint that plaintiffs Morgan A. Stivers, Glenn Stivers, Howard Stivers and Archie Stivers were, during the period in question, members of a partnership which owns, with numerous other assets, 357 acres of citrus groves. Subsequently, Archie Stivers died and J. B. Stivers, as executor of his estate, joins with the others as a plaintiff. Raymond K. Stivers owned separately an additional 70 acres of groves. All the property stood in the name of Morgan A. Stivers or of himself and his wife and he had the management of all the properties of the partnership. The same four parties owned a packing house and this was managed by Raymond K. Stivers. Eighty per cent of the products handled in the packing house came from

Stivers' groves and not over 20 per cent from the groves of others. The packing house operations were conducted by a partnership consisting of the four owners of the groves, Raymond K. Stivers having a one-third interest in this partnership and the other members a two-thirds interest. All the cost of operating the groves was paid by the packing house partnership. The several groves were charged with this expense, and were credited with all the receipts from products sold, against which was a charge per box for packing, plus an additional charge for the operation and maintenance of the groves owned by Raymond K. Stivers and those owned by the owning partnership. The packing house partnership did not operate, maintain or manage any non-citrus groves; the primary and sole purpose of the packing house partnership was to produce, harvest, pick, sell and ship citrus fruits from the Stivers' groves. It was alleged that two-thirds of the (Stivers) citrus fruits packed were produced in the groves of the owning partners and one-third in the groves owned by Raymond K. Stivers.

Our discussion will be devoted to the following propositions: If the packing house partnership, as distinguished from its individual members, is to be regarded as a separate entity, and the employing unit of the packing house workers, or if the principal packing house operation was not merely incidental to the farming operation, the labor would not be agricultural labor under the terms of the Act and the regulations of the Department of Employment, whereas, if the packing house partnership was merely an agency of the owners of the groves and the individuals who compose both partnerships were, in reality, the employers, and if the principal packing house operation was merely incidental to the farming operation, all the labor in the packing house would be regarded for unemployment tax purposes as agricultural labor and hence exempt. We are of the opinion that the latter is the case.

Section 7(a) of the Act provided that the term "employment" does not include "agricultural labor." The Act did not de-

fine agricultural labor. During the year 1944 and until January 1, 1945, there was in force Rule 7.1 of the department defining agricultural labor and which read as set out below.¹

As of April 1, 1945, without material change, Rule 7.1 became § 43 of Title 22 of the Administrative Code, which was amended June 1, 1945, to read as set out below.²

In California Employment Commission v. Kovacevich, 27 Cal.2d 546, 165 P.2d 917, former Rule 7.1 was interpreted to mean that packing house labor, in order to be classed as agricultural, must be performed by an employee of the owner or tenant of

the farm on which the materials are produced, and the services must be carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. With somewhat different arrangement, § 43 of Title 22 of the Administrative Code imposed the same conditions.

Inasmuch as 80 per cent of the packing services were performed on Stivers' fruit and 20 per cent on other fruit, certain other enactments are to be considered.

By Stats.1939, pp. 2850-2853, § 7 of the Unemployment Reserves Act, Stats.1935, p. 1226, was amended to read as set out below.³ The same provision is found in §

1. "Agricultural Labor Defined—The term 'Agricultural Labor' includes all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, the raising, feeding, management of livestock, poultry and bees; which includes among others, the spraying, pruning, fumigating, fertilizing, irrigating and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, processing, packing, packaging, transporting, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Nor do such services constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations."

2. "Agricultural labor exempted from 'employment' by Section 7(a) of the Act includes all services performed:

"(a) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting of any agricultural or horticultural commodity; the raising, feeding, and management of livestock, poultry and bees; which includes among others,

the spraying, pruning, fumigating, fertilizing, irrigating and heating which may be necessary and incident thereto.

"(b) In the employ of the owner or tenant of a farm on which the materials in their raw or natural state were produced, in connection with the drying, processing, packing, packaging, transporting, and marketing of such materials.

"(c) In the employ of the owner or tenant of a farm with respect to ordinary farming operations in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, if substantially all of such services are performed on a farm.

"(d) The provisions of subsections (b) and (c) are not applicable with respect to the services referred to unless such services are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. Nor are the provisions of said subsections applicable to services performed in commercial canning or commercial freezing."

3. (b) "If the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this paragraph the term 'pay period' means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is made."

7.1 of the Act, Stats.1945, pp. 1486 and 2230; Deering's Gen.Laws, Act 8780d. It also appears as § 42(b) of Title 22 of the Administrative Code, effective April 1, 1945, which contains the additional provision set out below.⁴

We may inquire first whether it appeared from the allegations of the complaint as a matter of law that the packing services were incidental to a commercial operation as distinguished from the farming operation. It was alleged that they were merely incidental to the latter and we think it may not be questioned that the facts pleaded would have justified a finding that this allegation was true. We can conceive of no reason to doubt that the principal purpose of the packing house operation was to facilitate the marketing of the crops from the Stivers' groves.

Plaintiffs contend that the share of the services amounting to 20 per cent rendered to the public was likewise incidental to the farming operation. We deem it unnecessary to decide this question. Even if it be assumed that the labor performed in packing nonStivers fruit, if considered by itself, would be subject to tax, it should be deemed tax exempt under former § 7 of the Act, which became § 7.1 under the 1945 amendment, for the reason that more than 50 per cent of the entire service was agricultural. It is therefore immaterial whether the 20 per cent of services on nonStivers fruit were agricultural and tax exempt, or non-agricultural and tax subject, inasmuch as the entire service was rendered to the same employer.

Exemption from tax liability rests upon the further condition that the packing house laborers were working for the owners of the groves. We are satisfied that they were.

Any type of organization, including a partnership, may become an employing

unit, § 9. So may a partnership be an owner or a tenant. Granting that the packing house partnership was nominally the employing unit with respect to the packing house labor, and recognizing that title to the groves was not vested in the partnership as an entity distinct from its members, we cannot fail to recognize the fact that the groves belonged to the individuals who composed the packing house partnership. This fact establishes that the individuals were in a real sense the employers of the workers.

Defendants say that the decision in Cal. Employment Commission v. Butte County, Etc., Ass'n, 25 Cal.2d 624, 154 P.2d 892, 897, "is viewed to be determinative of the present controversy." We believe otherwise. The defendant was a cooperative association, incorporated as a nonprofit farmers organization under civil code sections. It had 48 members, paying \$300 each, and 23 applicants for memberships who had paid \$10 each. All were entitled to the handling and marketing services. The association conducted a warehouse business in which it was obliged to receive and store products offered to it by the general public without discrimination; it also purchased and sold to its members and applicants, and might also sell to the public, merchandise commonly used in farming operations; it also maintained a public scale for the use of the public. Any profits made in its operations were distributed ratably among the regular members. Applicants for membership received nothing. The association was not the owner, tenant or operator of any farm. The court said: "Upon this record the conclusion seems inescapable that the defendant association is in essence a commercial enterprise". It was claimed for the association that it was a mere agency through which the members and applicants processed and market-

ation is ordinarily made to the employee by the person employing him."

4. (a) "Where employees perform services for an employer in both exempt and nonexempt employments, such employer shall maintain accurate records showing the hours worked by and the wages paid

to employees in each of said employments. Such segregation must be made with respect to each individual employee rather than on the basis of the employer's operations as a whole and may be made on a percentage or other basis found by the Department to be reasonable."

ed their products. The court rejected this claim, stating 25 Cal.2d at page 636, 154 P. 2d at page 898: "Such observation is not only squarely at variance with the facts of this case—demonstrating that the defendant association in *all* its services functions as a unit *wholly independent* of the farmers comprising its membership—but is likewise contrary to the elementary legal principle that a corporation is a complete legal entity separate and apart from the individuals who own it." It was therefore held that the operation of the various enterprises, while helpful, were "not an incident to ordinary farming operations as distinguished from * * * commercial operations", and that the labor employed therein was not tax exempt. The features of the operations in that case which the court deemed to be controlling are absent from the present case. The factual features of the present case from which we conclude that the major part of the services here in question was incidental to a farming operation, were absent from the former case. The court in that case did not hold, as respondents contend, that any service rendered to the public would make the running of a packing house a commercial operation. It did hold that the commercial operations of the Rice Growers Association were not incidental to a farming operation.

Respondents contend that the Stivers partnership was an entity separate from the members thereof, just as the Rice Growers Association was an entity separate from its members. The distinctions are obvious. The principal differences are that the individuals who composed the two Stivers partnerships were the sole owners of the groves and the packing house, operated both the farming and the packing operations through their respective managers, that all the acts of their managers were the acts of the partners, and all the duties and obligations of the partnerships the duties and obligations of the individual members. Certainly it could not be contended that the groves were in an ownership distinct and separate from that of the individual partners.

[1] A partnership may be regarded as a legal entity for some purposes and not

for others. It may in its partnership name become an employer of labor so as to effectively bind its members, but in doing so it acts on their behalf and not as a separate entity. The theory that a workman employed by a partnership is not the employee of each member of the partnership was expressly rejected in *Reed v. Industrial Acc. Com.*, 10 Cal.2d 191, 73 P.2d 1212, 1213, 114 A.L.R. 720. Reed was employed by a partnership, Gordon and Mellott. Mellott became insured before he formed a partnership with Gordon. Reed was denied a compensation award against the insurer on the theory that he was an employee of the partnership, which was not insured. The award was annulled. The court held that Reed was the employee of the individuals who composed the partnership and was therefore insured. We quote from the opinion a passage which we regard as conclusive on the point: "The underlying fallacy in respondent's argument is the assumption that the partnership is a distinct unit, separate from the members thereof. Occasional suggestions of this 'entity' theory of partnership are found in statutes or decisions, but, apart from exceptional situations, a partnership is not considered an entity, but an association of individuals. See *First Nat. Trust & Savings Bank v. Industrial Accident Commission*, 213 Cal. 322, 331, 2 P.2d 347, 78 A.L.R. 1324; 9 Cal. L.Rev. 119. In consonance with this view, an employee of a partnership is an employee of each of the partners, and no individual partner may escape liability to such employee on the ground that only the partnership and not the individuals composing it can be held. It is immaterial whether the liability of the partners in this situation is joint and several, or joint, for even in the case of joint liability, a several judgment may be had against an individual partner by proper joinder and pleading. See *Palle v. Industrial Commission*, 79 Utah 47, 7 P.2d 284, 81 A.L.R. 1222; *Merchants' Nat. Bank [of Los Angeles] v. Clark-Parker Co.*, 215 Cal. 296, 9 P.2d 826, 81 A.L.R. 778. The result is that W. B. Mellott, a partner in the firm of Gordon & Mellott, was an employer of petitioner Reed, and was undoubtedly liable to Reed

for workmen's compensation. Since W. B. Mellott procured insurance with respondent company to cover such liability, and paid the required premium therefor, the company must perform its obligation by paying the award."

The principle stated is supported by numerous authorities cited by the court and by many others. This entire line of authority is ignored in the brief of the respondents, although it directly supports the contention of the appellants that they, as individuals, were the real employers of the packing house workers. Respondents say that the packing house workers are as much in need of unemployment insurance as other workers, and apparently contend that this fact should influence the interpretation of the law by the courts. The same could be said of all agricultural workers and many others whose wages are tax exempt. We have only to apply the law as it is written. The argument of the respondents has an answer in the Kovacevich case, 27 Cal.2d at pages 549, 550, 165 P. 2d at page 919, where it is said: "While it is true that such legislation should be liberally construed so as to afford all the relief which the language of the act indicates that the Legislature intended to grant (California Employment Commission v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 630, 154 P.2d 892), the interpretation should not exceed the limits of the statutory intent. * * * In view of the express statutory intent to except 'agricultural labor,' any labor which is essentially agricultural in nature, and which cannot be otherwise regarded by reason of any change in the custom of doing it, should not be included within the operation of the act by administrative or judicial legislation under the guise of liberal interpretation."

The requirement that the employer of both exempt and nonexempt labor must keep the account of each employee so as to record the time spent in each type of employment in each pay period, § 42, Title 22, note 4 above, was met by the allegations of the complaint that such records were kept.

[2] We hold that upon proof of the facts pleaded by plaintiffs the court could

properly find that plaintiffs were the employers of the packing house labor; that not less than 80 per cent of the packing house services were incidental to ordinary farming operations as distinguished from commercial operations, and hence were agricultural, and could properly conclude therefrom that all the wages paid were tax exempt.

The judgment is reversed; defendants to be permitted to answer.

WOOD and VALLÉE, JJ., concur.



117 Cal.App.2d 167

**CITY OF LOS ANGELES v.
FISKE et al.
Civ. 19240.**

District Court of Appeal, Second District,
Division 2, California.
April 3, 1953.

Proceedings by city to condemn certain parcels of realty for playground purposes. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment from which defendant landowners appealed. The District Court of Appeal, Moore, P. J., held that city's street easement over portion of such area did not become merged with fee taken for playground purposes, and valuation was to be determined with consideration of existence of easement.

Judgment affirmed.

1. Eminent Domain ⇐191(6)

Descriptions used by city in condemning certain property which were identical with those by which landowners acquired lots in question, were adequate on which to predicate taking of title by city, and gave title in fee to center of adjacent street, in view of rule that ownership of city lot extends to center of adjoining street. Business and Professions Code, § 11657.

2. Boundaries ⇨20(1)**Eminent Domain** ⇨191(6)

When a highway is referred to in a grant, or by description in eminent domain proceedings, the reference is to the highway as opened and actually used.

3. Eminent Domain ⇨68, 147

Ordinance of city declaring certain area, including area over which state had highway easement to be necessary for use by city for playground purposes, was conclusive determination of public interest and necessity, and did not compel conclusion that only a "paper easement" for highway purposes was retained, or that highway should be deemed vacated and total fee value of lots including highway portion, should be considered in making award. Code Civ. Proc. § 1241, subd. 2.

4. Municipal Corporations ⇨657(2)

The power to vacate a city street is vested solely in the municipality, and act of vacating can be done only upon finding that property in question is unnecessary for present or future uses as a street.

5. Municipal Corporations ⇨63(1)

Courts are powerless to interfere with municipal control of streets except upon convincing evidence of fraud, arbitrary action or an abuse of discretion.

6. Municipal Corporations ⇨658

Fact that city acquired fee underlying highway for playground purposes did not result in merger of highway easement and fee, but city was obligated as trustee to maintain easement for use of all people of state separate from its distinct interest for playground purposes.

7. Eminent Domain ⇨147

Where city had street easement over portion of lots condemned for playground purposes, possibility of abandonment of that easement was so remote and speculative that it could add no value to property condemned.

8. Eminent Domain ⇨149

Record supported determination of value of lots condemned for playground purposes in area adjacent to street over which city had easement, including determination

that fee underlying street easement was worth only nominal sum.

9. Eminent Domain ⇨205

Record was insufficient to warrant conclusion that awards in condemnation proceeding had been result of injustice and oppression.

10. Evidence ⇨155(8)

In condemnation proceeding of area for playground purposes, wherein it appeared that city had street easement over portion of area and owners contended that valuation should be predicated on value without presence of easement, and offered certain documents for purpose of proving that they had applied for vacation of easement, city was properly allowed to introduce balance of documents in same showing that application had been denied on recommendation of city engineer and city Planning Commission, for purpose of demonstrating improbability of vacation of any part of street easement.

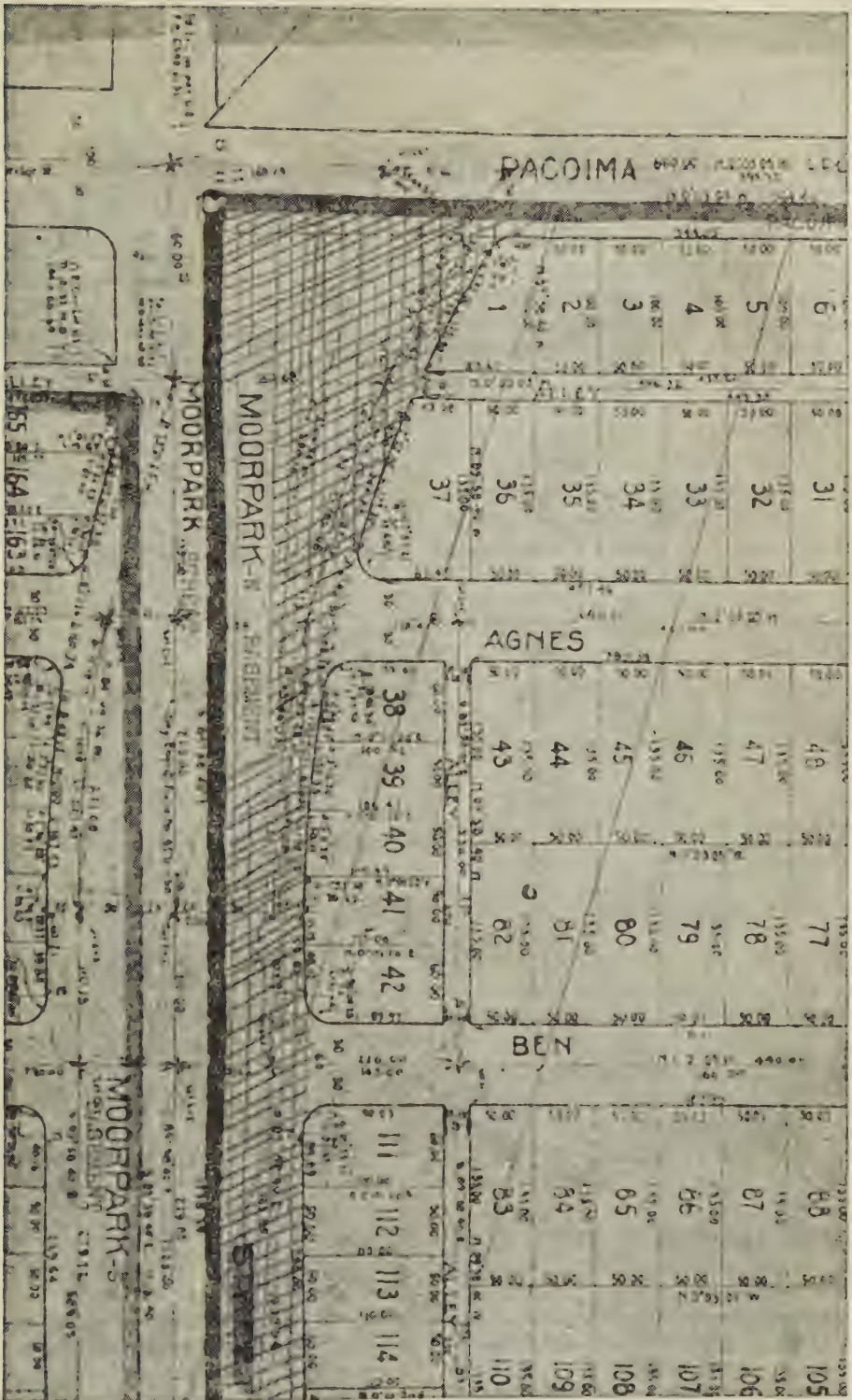
S. V. O. Prichard, Beverly Hills, for appellants.

Ray L. Chesebro, City Atty., Charles F. Reiche, Asst. City Atty., Peyton H. Moore, Jr., Deputy City Atty., Los Angeles, for respondent.

MOORE, Presiding Judge.

This action was instituted to condemn certain parcels of land under the eminent domain power. While no question is raised as to the right of the city to condemn the parcels, a serious controversy rages with respect to the appraisals approved by the court. A reversal of the judgment below is demanded on the ground of alleged inadequacy of the award.

The parcels condemned are included in a subdivided area north of and adjacent to Moorpark Street which runs in an eastwest direction. On the west of the subdivision is Laurel Canyon Boulevard, formerly Pacoima Avenue. The tract is numbered 8582, and a map of it is recorded in Book 163 in the office of the county recorder. The area directly involved is shown in a drawing presented herewith.



To the north of the parcels condemned and extending southeasterly across Moorpark Street is a 200-foot right of way for the Tujunga Wash Channel. The southerly ends of lots 1, 37, 38, 39, 40, 41 and 42 are the parcels taken by the judgment. The shaded area below them is covered by an easement for street purposes in favor of the City of Los Angeles. It is marked Moorpark-N to indicate that it is politically a part of Moorpark Street on its north side while the easement adjacent to that street on its south side is marked Moorpark-S. Moorpark Street is a paved boulevard fifty feet wide and has been so maintained for a long time.

Sufficiency of Description

[1] Appellants contend that the descriptions used by the city in condemning the property were inadequate. That such contention is baseless is readily demonstrable. The legal description in the complaint of "Parcel 1" which is identical with the descriptions of the other parcels except for lot numbers is as follows:

"That portion of Lot 1, Tract No. 8582, as per map recorded in Book 163, Pages 31 and 32 of Maps, in the office of the County Recorder of Los Angeles County, lying southerly of the southwesterly line of the Tujunga Wash Channel, 200 feet wide, as described in Final Judgment had in Case No. 518236 of the Superior Court of * * the County of Los Angeles, a certified copy thereof being recorded in Book 23923, Page 83, Official Records, in the office of the County Recorder of said County." Such descriptions are identical with those used by appellants to acquire the lots in question. In each the number of the lot is followed by the tract number, with reference to the book and page of the map's records, which in turn is followed by: "lying Southerly of the Southerly line of the 200 foot flood control channel described in Notice of Complaint filed in Action No. 518236 in Super-

rior Court of the State of California, in and for the County of Los Angeles * * * Subject To: * * * Conditions, Restrictions, Reservations, Covenants, Rights of Way, and Easements now of record, if any."

Surely, it cannot be seriously contended that the city could not properly have used the same descriptions by which appellants acquired the parcels. In view of the law that ownership of a city lot extends to the center of the adjoining street, appellants had title to the area south of the parcels condemned to the center of Moorpark Street. It logically follows that in this proceeding by alleging the description contained in the deeds to appellants, the city acquired the underlying fee to the center of Moorpark Street. This includes, of course, the underlying fee of Moorpark-N, shaded on the accompanying plot. In view of the acceptance by the city of the offers to dedicate Moorpark Street and Pacoima Avenue, now Laurel Canyon Boulevard, the description by reference to the appropriate map was proper. Bus. & Prof. Code, sec. 11657. The city thus took whatever interest appellants had. See Civ. Code, sec. 1112; *Anderson v. Citizens Savings & Trust Company*, 185 Cal. 386, 392, 197 P. 113; *Earl v. Dutour*, 181 Cal. 58, 60, 183 P. 438, 6 A.L.R. 1163; *Severo v. Pacheco*, 75 Cal.App.2d 30, 35, 170 P.2d 40.

[2] Appellants assert that the term "Moorpark Street" in the city's ordinance of public interest and necessity is ambiguous and inconsistent. Such is not the fact. In the first section of the ordinance of public interest and necessity, the term Moorpark is used to designate the general area needed for playground uses.¹ By section 2, in order to avoid ambiguity, the area to be condemned was described as "those portions of lots 1, 37, 38, 39, 40 and 41, lying southerly of the southwesterly line of the Tujunga Wash Channel." This clearly describes the shaded (Moorpark-N) areas as that needed for play-

1. "The Council of the City of Los Angeles finds and determines that the public interest and necessity require the acquisition in fee by the City of Los Angeles of certain real properties, for public playground and recreation purposes,

located northerly of and adjacent to Moorpark Street between Ben Avenue and Laurel Canyon Boulevard, herein-after in Section 2 of this Ordinance more particularly described."

grounds. In referring to Moorpark Street in the ordinance, no interpretation is to be indulged other than that generally applied, namely, when a highway is referred to in a grant the reference is to the highway as opened and actually used. 11 C.J.S., Boundaries, § 36, p. 590.

Necessity For Condemnation.

[3] Appellants assert that Moorpark-N is subject merely to a "paper" easement; that the resolution of necessity for playground purposes is inevitably inconsistent with necessity for highway purposes, and that therefore the trial court should have considered the easement as vacated and considered the total fee value of both Moorpark-N and the stub-end lots in making the award.

Section 1241 of the Code of Civil Procedure provides: "* * * 2. * * * when * * * the legislative body of * * * an incorporated city * * * shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such * * * city * * * of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the * * * necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury * * *." By virtue of such statute, the acquisition of the stub-ends and adjacent Moorpark-N was therefore conclusively determined by the ordinance of public interest and necessity to be necessary for use by the city. Contrary to appellants' contention, the action of the city council does not mean that only a

"paper easement" for highway purposes is retained. Neither, as a matter of substantial justice, should it be deemed vacated.

[4, 5] The power to vacate a city street is vested solely in the municipality. The act of vacating can be done only upon a finding that the property in question is unnecessary for present or future uses as a street. Sts. & Hwys. Code, secs. 8300-8331. Courts are powerless to interfere with municipal control except upon convincing evidence of fraud, arbitrary action or an abuse of discretion. See *People ex rel. Webb v. City of San Rafael*, 95 Cal. App. 733, 740, 273 P. 138; *People ex rel. Wagner v. City of Pomona*, 88 Cal.App.2d 460, 466, 198 P.2d 959, 200 P.2d 176.²

[6] There is no necessary inconsistency between the city's two distinct interests in Moorpark-N. Nor is there a merger. The future necessity of Moorpark-N for street purposes is borne out by the reports of the Planning Commission and the city engineer. In view of the obligation of the city as a trustee to maintain the easement for highway purposes for the use of all the people of the state, there could be no merger therewith of the city's playground interest, simply because it acquired the underlying fee of Moorpark-N for playground purposes. *People v. County of Marin*, 103 Cal. 223, 231-232, 37 P. 203, 26 L.R.A. 659; *Las Posas Water Company v. County of Ventura*, 97 Cal.App. 296, 301, 275 P. 817.

Determination of Value.

[7] Appellants scorn the city's easement over Moorpark-N as a "paper easement" and contend that in evaluating the property condemned, the court should have disregarded the "paper easement." They assert the property should have been treated "as an entire corner." But appellants fail to note that in view of the subsisting street easement, the underlying fee remaining in Moorpark-N has only a nominal value. The possibility of abandonment of the easement is so remote and speculative that it can add no value to appellants' interest. *Romero v.*

2. The power to vacate a city street is not to be confused with the abandonment of highways by counties where a roadway

has been impassable for five consecutive years. Sts. & Hwys.Code, secs. 954, 957.

Department of Public Works, 17 Cal.2d 189, 194, 109 P.2d 662; City of San Gabriel v. Pacific Electric Railway, 129 Cal.App. 460, 466, 18 P.2d 996.

[8] Since it was neither alleged nor proved that Moorpark-N has any underlying oil or minerals or any other resource of value other than the building that could take place thereon, its higher market value in October, 1950, must have depended upon the possibility of appellants' commercial use of the area. Not only was such use not available because of the unvacated city easement, but the area was restricted to R-4 structures. As stated above, there is no evidence that the city in October of 1950 or at any time intended to abandon the easement. Hence, the asserted "potential right to the reversionary interest" in the area was valueless. But even assuming the certainty of vacation of the easement, no business could have been conducted on Moorpark-N or the stub-end lots in violation of the R-4 zoning restriction. Hence, appellant Hexter's opinion that his "potential right" to have the easement vacated, coupled with the opportunity to use it, was worth \$51,000 means nothing in view of the tremendous hindrances to be overcome before the area could be utilized commercially. Similarly, the testimony of witness Frisbie as to a value of \$37,258 is based upon not only the stub-end parcels, but also upon the underlying fee of Moorpark-N, which in view of the valid easement and the zoning restrictions could have only a nominal value. A proper valuation of Moorpark-N was demonstrated to the satisfaction of the trial court by the testimony of expert witnesses Lockwood, Packard, and Gastlin in asserting that the stub-ends were worth not to exceed \$5,950; the fee underlying Moorpark-N, only a nominal sum.

"Injustice And Oppression."

[9] Appellants' charges of "injustice" and "oppression" in the award have no factual basis. Appellants paid \$900 for the stub-end parcels in 1947; by the judg-

ment of the trial court they were allowed \$9,680, a profit in excess of 1000 per cent. This is scarcely the "next to nothing" complained of by appellants. It should be noted, moreover, that the sum allowed is nearly twice the amount that three expert witnesses testified the parcels are worth.

Rulings on Evidence.

[10] Respondent's file No. 35070 was properly received into evidence, despite the objections of appellants. Once appellants had offered certain documents contained in that file for the purpose of proving they had applied for a vacation of the easement, it was proper for the city to show that the application had been denied on recommendation of the city engineer and city Planning Commission, thus demonstrating the improbability of the vacation of any part of the easement over Moorpark-N. The city council's denial of appellants' petition is scarcely a hearsay utterance "made in the absence of the opposite party." On the contrary, it was a legislative action—the minutes of which were a reply to the petition. The cases cited by appellants, Hughes v. Pacific Wharf & Storage Company, 188 Cal. 210, 205 P. 105; Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745, do not involve action by a legislative body. Neither of them is pertinent.

Appellants assign as prejudicial error the receipt into evidence of a copy of a report by the Public Works Committee to the City Council on October 29, 1951, in reference to appellants' petition for vacation of the Moorpark-N easement. The report read in part "that such areas will be required in the future for highway purposes; also the City Planning Commission * * * recommended that this vacation be disapproved. We recommend, as recommended by the City Engineer and the City Planning Commission that the request for vacation be denied." Appellants claim that under section 8323 of the Streets and Highways Code³ the report was inadmissible because the exhibit itself fails to show

3. "The city council shall, on the day fixed for the hearing, or on the day to which the hearing is postponed or continued,

hear the evidence offered by any person interested. If the city council finds from all the evidence submitted, that any

by its terms affirmatively that the property on which the vacation was requested was neither needed for a street nor the existence of any prospective use of the property as a street. Because that section contains no requirement for such a finding by the city council, the point demands no further discussion.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



SOKOLOW et al. v. CITY OF HOPE.*

Civ. 19279.

District Court of Appeal, Second District,
Division 2, California.

April 17, 1953.

Hearing Granted June 11, 1953.

Action against charitable corporation for injuries sustained by volunteer waitress while serving food for benefit of the corporation. The Superior Court, Los Angeles County, R. Morgan Galbreth, J., granted defendant's motion for a directed verdict, and plaintiffs appealed from the ensuing judgment. The District Court of Appeals, McComb, J., held that it had been proper to direct the verdict since there was no evidence of any negligence on the part of the defendant which could have been the proximate cause of the waitress's injuries.

Affirmed.

I. Appeal and Error ⇐854(5)

On appeal from judgment predicated upon directed verdict, appellate court is not restricted to consideration of single ground stated by trial judge as reason for directing verdict, but will sustain trial court's action if it was proper upon any ground.

2. Charities ⇐45(2)

In absence of any evidence showing negligence of charitable corporation which

could have been proximate cause of injury sustained by volunteer waitress when she fell while serving food for such organization, trial court properly directed verdict against waitress in her action against corporation.

3. Appeal and Error ⇐110, 123

An appeal does not lie from a verdict or from an order denying a motion for new trial in a civil action.

Trope & Trope, Eugene L. Trope and Sorrell Trope, Beverly Hills, for appellants.

Moss, Lyon & Dunn, Richard B. Coyle and Henry F. Walker, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment predicated upon the granting of defendant's motion for a directed verdict after trial before a jury in an action to recover damages for personal injuries, plaintiffs appeal. There are also purported appeals from the verdict and from the order denying plaintiffs' motion for a new trial.

Facts: The Central Jewish Committee rented the Shrine Auditorium for the purpose of holding a "Town Fair". The net proceeds of such event were to be given to the defendant, City of Hope, which is a charitable organization. Plaintiff Jean Sokolow, acting in the capacity of a volunteer waitress at the fair, serving foods and coffee, fell with the result that she was injured.

In the room, at about the place where plaintiff fell, was a gas pipe which had been installed temporarily to supply fuel for the purpose of cooking.

At the end of the trial defendant made a motion for a directed verdict on the ground, among others, that there was "no showing or evidence of any negligence on the part of this defendant which was the proximate cause of the accident in question." The

street or part thereof, described in the ordinance of intention, is unnecessary for present or prospective public street pur-

poses, the city council may make its order vacating such street or part thereof."

trial court granted the motion saying: "The Court feels that the agency has not been satisfactorily shown to hold the City of Hope as a corporation liable for the accident that the evidence shows took place."

Question: Did the trial court err in granting defendant's motion for a directed verdict?

No. This rule is here applicable:

[1] On appeal from a judgment predicated upon a directed verdict, an appellate court is not restricted to a consideration of the single ground stated by the trial judge as the reason for directing the verdict, but will sustain the trial court's action if it was proper upon any ground. (United Air Services, Ltd. v. Sampson, 30 Cal.App. 2d 135, 138[1], 86 P.2d 366.)

[2] Applying this rule to the facts at bar it is evident the trial court's order was properly made for the reason that the record is devoid of any evidence showing negligence of defendant which was the proximate cause of Mrs. Sokolow's injury.

The record fails to show the cause of her fall. She testified:

"Well, it was between 2:00 and 3:00 o'clock in the afternoon and the crowd was very big and everyone wanted to eat at the same time. They all come and clamored for food and they wanted it so I served—I had a party of about ten and I served them sandwiches of different kinds; and then they went to sit down at the table further down than the table where we worked. And while standing there and working, one man hollered out, 'Hand me a cup of coffee, please.' And I took the cup and the urn was right near me with the coffee already done. I took that cup of coffee and I was going out to hand it to the man because they were at the table; and as I reached the corner of the stand wherever the table was, I felt I was falling. I tripped on something. I felt I was falling and I tried to prevent myself, but I couldn't. That is all I know. The Court: Until when? The Witness: Until after they woke me up. I fell. I don't know what happened, * * *

Another witness, Mrs. Greenberg, merely testified that she saw Mrs. Sokolow fall

and Mr. Sokolow testified that he was 30 or 40 feet away from his wife when she fell and learned of her fall from another person. None of the witnesses testified as to the cause of Mrs. Sokolow's fall or any fact from which the jury could reasonably determine the cause of the fall. Hence any verdict in favor of plaintiffs of necessity would have been predicated upon guess, conjecture and speculation. Clearly the order of the trial court was correct.

In view of our conclusion it is unnecessary to consider other points discussed by counsel in their brief.

[3] An appeal does not lie from (1) a verdict or (2) an order denying a motion for a new trial in a civil action. (Sawyer v. Sunset Mutual Life Ins. Co., 8 Cal.2d 492, 501[7], 66 P.2d 641.)

The appeals from the orders are dismissed and the judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



116 Cal.App.2d 207

PEOPLE v. McKENNA.

Cr. 4864.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, John J. Ford, J., under information charging in six counts that defendant altered court records, and she appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained convictions.

Affirmed.

I. Records ⇐22

Evidence sustained conviction under information with six counts charging alteration of court records. Government Code, §§ 6200, 6201.

2. Criminal Law ⇨1159(2)

Where evidence was sufficient to sustain convictions, District Court of Appeal on appeal was powerless to interfere with convictions for any asserted lack of evidentiary support.

3. Criminal Law ⇨29

Test whether one or more offenses results from single act or transaction is the identity of the offenses as distinguished from the identity of the transactions from which they arise.

4. Indictment and Information ⇨129(1), 191

One may be convicted of more than one offense arising out of a single transaction, if each is stated in a separate count and, when offenses differ in their necessary elements, the one is not included in any other.

5. Records ⇨21, 22

Since statute provides in disjunctive that stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting of court records is a crime, any one of those acts relating to any one paper or record constitutes the offense, and commission of all of the acts relating to any one of the records constitutes the crime. Government Code, §§ 6200, 6201.

6. Indictment and Information ⇨129(1)

Information charging in six counts that defendant stole, removed and secreted specified file of action in Superior Court, and that she destroyed, mutilated, defaced, altered, and falsified five separate documents in the same file was not defective, on ground that information charged only a single crime and that the offense was erroneously split into six counts. Government Code, §§ 6200, 6201.

1. Section 6200. "Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by

7. Indictment and Information ⇨71

In prosecution for altering court records, failure of information to specify with particularity in what regard each document had been altered was not error. Government Code, §§ 6200, 6201; Pen.Code, § 952.

8. Indictment and Information ⇨95

Where manner in which offense was committed is not an element of the offense, it is not necessary for information to set forth specific details of the wrongful act.

9. Records ⇨22

Defendant's pleadings and papers, which were involved in civil action and which were in custody of county clerk as ex officio clerk of superior court in which action was pending, were "public documents" and were within scope of subject matter of statute making alteration of court records an offense. Government Code, §§ 6200, 6201; Code Civ.Proc. §§ 78, 78.1(f).

See publication Words and Phrases, for other judicial constructions and definitions of "Public Document".

10. Criminal Law ⇨43

Fact that civil action was pending before reviewing court did not deprive superior court of jurisdiction of criminal prosecution for alteration of court records in the civil action. Government Code, §§ 6200, 6201.

Catherine A. McKenna in pro. per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by information with six counts of violating the Government Code, section 6201.¹ Count I charged that

imprisonment in the State prison not less than one nor more than 14 years."

Section 6201. "Every person not an officer referred to in Section 6200, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the State prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars (\$100), or by both such fine and imprisonment."

on or about March 26, 1951, she had stolen, removed and secreted a specified file of an action in the superior court in which she was defendant. Counts II through VI alleged that she had destroyed, mutilated, defaced, altered and falsified five separate documents in the same file. On her plea of "not guilty as charged in the information" and waiver of trial by jury, the matter was submitted on the transcript of the preliminary hearing. The court then found her guilty as charged in counts I, II, III and VI. The appeal is from the judgment of conviction and from the order denying a new trial. She seeks a reversal on the grounds that (1) the evidence is insufficient to support the verdict; (2) the trial court lacked jurisdiction of the action; (3) the information was defective.

There is ample evidence in the record to support the implied findings that appellant had surreptitiously removed the superior court file from the custody of the county clerk and that she thereafter altered and falsified three documents contained therein. It was established that on March 26, 1951 the clerk had lawful custody of file No. 564971. The Register of Actions wherein is entered the date of each paper or document filed in an action reflected that the complaint in such case had been filed on September 15, 1949 and that the answer of appellant and her husband, J. Irving McKenna, was filed on September 28, 1949; that a motion to retax costs was filed on November 15, 1950 and that two notices of appeal were filed on January 12 and February 6, 1951, respectively.

Miss Chrisman, an employee of the clerk's office, testified that on March 26, 1951 appellant procured the file from the transcript department, removed it to a table in the same room and examined it. Miss Chrisman entered appellant's name on a card used by the office to indicate to whom a file is given and for what purpose. The witness did not see the file again that day and no one in the department knew its whereabouts. On two separate days, to wit, the 3rd and the 27th of April, 1951 the witness searched for the file without success. It was not in the fil-

ing section. On April 30 the file was found on the counter in the general filing section of the office and returned to Miss Chrisman by a deputy clerk. At that time the witness noticed "peculiar marks" in the filing dates on some of the documents therein. Subsequent investigation by the district attorney's office revealed that after the lost file had been returned it contained papers apparently differing in content from those originally filed.

In support of the charge (count II) that the "Answer" in the file had been altered, the witness, Mr. Clark Sellers, a qualified examiner of questioned documents, testified that in his opinion pages 1 and 5 of the answer in the file when returned were typed by the use of a typewriter different from that used in writing pages 2, 3 and 4, and that all five pages had been completed on typewriters found in appellant's home. Pages 2, 3 and 4 were written on the Underwood portable and also differed from those same pages in the copy of the answer served on opposing counsel in September, 1949. Since by appellant's own testimony and from the serial number appearing on such typewriter she did not acquire it until December 1950 it was easily to be inferred that after removing the file from its place of lawful custody she altered her own pleadings by substituting three pages for those originally filed.

In support of count III charging appellant with having altered and mutilated the paper entitled "Motion to Retax Costs and Notice of Motion" it was established by the Register of Actions that such paper was filed on November 15, 1950 while the paper upon the return of the file purportedly bore a filing date of January 15, 1951. Mr. Sellers testified that the original date as stamped had been erased and a typewritten date inserted; that such was reproduced on a typewriter having type similar to appellant's portable.

[1,2] As to the alteration and mutilation of the document entitled "Notice of Appeal" (count VI), it was established that the Register reflected such paper to have been filed on February 6, 1951 but that

upon return of the file, the filing date on the notice was January 29, 1951. The expert witness testified that the original stamped date had been erased and the type-written words and figures "Jan. 29" placed above the erasure and that such insertion was made by type of the same style as that on appellant's portable. In view of such evidence pointing to appellant's guilt on all counts, this court is powerless to interfere with the judgments for any asserted lack of evidentiary support. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

[3,4] In contending that the information was defective, appellant argues that it properly charged only a single crime and that such offense was erroneously split into six counts. The test as to whether one or more offenses results from a single act or transaction is stated to be "the identity of the offenses as distinguished from the identity of the transactions from which they arise." *People v. Venable*, 25 Cal.App.2d 73, 74, 76 P.2d 523. One may be convicted of more than one offense arising out of a single transaction if each is stated in a separate count and, when the offenses differ in their necessary elements, the one is not included in any other. *People v. Craig*, 17 Cal.2d 453, 457, 110 P.2d 403.

[5,6] The Government Code, sections 6200-01, provides in the disjunctive that the "stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting" of certain official or public records is a crime. It is apparent that any one of those acts relating to any one paper or record constitutes the offense, or that the commission of all of the acts relating to any one of the records constitutes the crime. See *People v. Lawlor*, 21 Cal. App. 63, 65-66, 131 P. 63. Accordingly, the removal of the file was itself a violation of the statute as was the alteration and mutilation of each of the specified documents in that file. The elements of the crime charged in each count were distinct and not included in the crime charged in any other. It is evident that the lawmakers contemplated an offense to have been committed when any act denounced by the statute has been

done in connection with any specified record.

[7,8] There was no error in the failure of the information to specify with particularity in what regard each document had been altered. Penal Code, sec. 952. When the manner in which the offense was committed is not an element of the offense, it is not necessary to set forth the specific details of the wrongful act. *People v. Beesly*, 119 Cal.App. 82, 85-86, 6 P.2d 114, 970; *People v. Pierce*, 14 Cal.2d 639, 646, 96 P.2d 784.

[9] The argument is made that the papers involved herein were merely appellant's private papers, her personal pleadings, and hence not within the scope of the subject matter of the statute. On the contrary, they were public documents. Such papers constituted the "record * * * or * * * paper or proceeding of any court, filed * * * in any public office" and were included in the very letter of section 6200. They were in the custody of the county clerk as ex officio clerk of the superior court. Code Civ.Proc. secs. 78, 78.1(f).

[10] Appellant's final contention that the court lacked jurisdiction of the action must be rejected. The instant proceeding is criminal in nature. It is concerned only with whether appellant had performed criminal acts with regard to the file of an action in the superior court. By no stretch of the imagination can it be viewed, as she urges, as a collateral attack on the judgment in the civil action, *Elbert Ltd. v. McKenna*, Cal.App., 254 P.2d 107. In no manner does it relate to or affect the judgment in that civil lawsuit. Moreover, though that action was then pending before the reviewing court, such pendency did not in the least deprive the superior court of its jurisdiction to proceed on the criminal charges. The court retained jurisdiction over its records. They properly remained within its physical control and custody. *Fay v. Stubenrauch*, 141 Cal. 573, 575, 75 P. 174.

The judgment and order are affirmed.

McCOMB and FOX, JJ., concur.

117 Cal.App.2d 376

ADAMS v. HENNING et al.

Civ. 4391.

District Court of Appeal, Fourth District,
California.

April 17, 1953.

Hearing Denied June 11, 1953.

Action was brought to recover for damage to potato crop allegedly caused by spray released from aircraft over adjoining land. The Superior Court of Kern County entered judgment based on granting of motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain finding that some of the spray was deposited on the potato crop and that damage resulted and that therefore it was error to grant motion for nonsuit.

Judgment reversed.

1. Appeal and Error ⇨927(3)

On appeal from judgment based on granting of motion for nonsuit, evidence was required to be construed most favorably to plaintiff.

2. Appeal and Error ⇨989

On appeal from judgment based on granting of motion for nonsuit, conflicts in the evidence were not to be considered.

3. Appeal and Error ⇨989

On appeal from judgment based on granting of motion for nonsuit, credit was required to be given only to that part of plaintiff's evidence tending to support complaint.

4. Appeal and Error ⇨1010(1)

On appeal from judgment based on granting of motion for nonsuit, judgment may be sustained only when it appears that there is no substantial evidence which would have supported judgment for plaintiff.

5. Damages ⇨188(1)

Negligence ⇨134(4)

In action to recover for damage to potato crop allegedly caused by chemical spray released from aircraft over adjacent land, evidence was sufficient to justify finding that some of the spray was deposited on the potato crop and that damage resulted.

6. Trial ⇨139(1)

Where factual questions were presented, on which findings should have been made, it was error to grant motion for nonsuit.

West, Vizzard, Howden & Baker, Bakersfield, for appellants.

Conron, Heard & James, Bakersfield, for respondents.

BARNARD, Presiding Justice.

[1-4] The plaintiff has appealed from a judgment in favor of the defendants based upon the granting of their motion for a nonsuit. On such an appeal the evidence must be construed most favorably to the plaintiff; conflicts in the evidence are not to be considered; credit must be given only to that part of the plaintiff's evidence which tends to support the complaint; and the judgment may be sustained only when it appears that there is no substantial evidence which would have supported a judgment in favor of the plaintiff. Reynolds v. Filomeo, 38 Cal.2d 5, 236 P.2d 801.

This action involved alleged damage to a crop of potatoes owned by the plaintiff. The plaintiff had three fields of potatoes on her land, the southerly field consisting of about 28 acres. The defendant Henning had a field of potatoes immediately south of the 28-acre field, the two fields being separated only by a fence. On August 4, 1948, and again on August 21, 1948, the defendants caused a spray to be released from an aircraft over the land of the defendant Henning. For this purpose the aircraft flew in a north and south direction, cutting off the spray near the boundary and then turning over the plaintiff's field and flying back over the defendants' field, where the spray was again released. This spray was an emulsion containing three chemicals, two being of a kind used for killing insects and the third, known as 2,4-D, used for killing weeds.

An employee of the plaintiff testified that while he was cultivating in the middle of this 28-acre field on August 21, he saw

the plane come up, shutting off the spray near the boundary and then circling over the field in which he was working and going back over the defendants' field, and that he could see the dust rise but could not tell whether any of the spray came across the fence line. However, the next day he observed that there was a wasting away of the leaves, a brownish color and a curling of the leaves of the potatoes on the plaintiff's land. The plaintiff testified to observing the same condition prior to August 21 and after that date. She also testified that the crop from that field, when harvested, was much smaller than that produced on her other two fields; that the potatoes were small and blistered and of an inferior grade; and that the potatoes "broke down" and decayed while they were being shipped to Los Angeles and San Diego to such an extent that they were rejected by the officials when they arrived.

Two potato experts testified that the application of 2,4-D to a potato plant would cause a rolling and spiraling of the leaf and would cause most plants to age prematurely and die. Another expert testified that the application of 2,4-D would have quite a contrary effect on the plants, causing them to grow faster, develop more rapidly, and mature earlier. There was also evidence that while very little was known about 2,4-D at that time it was later classified by the State Department of Agriculture as a hazardous substance and a special permit was required before it could be applied to any form of plant life.

[5,6] The evidence was not sufficient to support some of the elements of damages relied on by the plaintiff, and the evidence as a whole seems to predominate in favor of the defendants. There was a notable absence of any evidence as to the effect of this spray on the potatoes on defendants' land, where it was admittedly applied in much larger quantities, and where its injurious effect, if any, would naturally be more apparent. There was also evidence that some of the effects normally to be expected from the use of this spray were not found on plaintiff's land, and other evidence indicating that

a large part, if not all, of the damage was caused by other things. However, viewed in the light most favorable to the plaintiff, a part of the evidence would justify an inference that some of this spray was deposited on at least a part of the plaintiff's land, and that some damage resulted therefrom. Factual questions were thus presented, upon which findings should have been made. Under familiar rules, it was error to grant the motion for a nonsuit.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



**VALLINDRAS v. MASSACHUSETTS
BONDING & INSURANCE
CO. et al.*
Civ. 15148.**

District Court of Appeal, First District,
Division 1, California.

April 7, 1953.

Rehearing Denied May 7, 1953.

Hearing Granted June 4, 1953.

Action against sheriff and his surety for alleged false imprisonment of plaintiff. The Superior Court, City and County of San Francisco, sustained demurrers to amended complaint without leave to amend, and plaintiff appealed. After appeal had been filed, sheriff died and his executor was substituted for him. The District Court of Appeal, Peters, P. J., held that complaint, which alleged that, after plaintiff had been adjudged guilty of contempt for failure to pay attorney's fees and support payments for wife, sheriff took plaintiff into custody under order of commitment, which failed to specify amount plaintiff had to pay to obtain his release from jail, and that plaintiff remained in custody until released 75 days later by habeas corpus proceeding, stated a cause of action as against a general demurrer, and sustaining of general demurrer without leave to amend, constituted an abuse of trial court's discretion.

Judgment reversed.

* Subsequent opinion 265 P.2d 907.

1. Appeal and Error ⇨863

On appeal from judgment sustaining defendants' demurrers without leave to amend in action for false imprisonment, the District Court of Appeal was interested only in whether complaint stated essentials of a cause of action for false imprisonment.

2. Sheriffs and Constables ⇨157(3)

Sheriff and his surety are civilly liable for deputy's torts.

3. Sheriffs and Constables ⇨168(1)

Allegations that sheriff, through a deputy, took plaintiff into custody under a void and illegal commitment would not impair statement of cause of action against sheriff and his surety for actual damages even though surety may not be liable for punitive damages.

4. Officers ⇨114

Void process does not protect a ministerial officer.

5. Evidence ⇨65**Officers** ⇨114

Ministerial officers are presumed to know the law and are bound at their peril to know general jurisdiction of courts whose process they are called upon to enforce, and, if they execute process which the court has no jurisdiction to issue, they are liable.

6. False Imprisonment ⇨20(1)**Pleading** ⇨225(2)**Sheriffs and Constables** ⇨168(1)

Complaint which alleged that, after plaintiff had been adjudged guilty of contempt for failure to pay attorney's fees and support payments for wife, sheriff took plaintiff into custody under order of commitment which failed to specify amount plaintiff had to pay to obtain his release from jail, and that plaintiff remained in custody until released 75 days later by habeas corpus proceeding stated a cause of action against sheriff and surety for false imprisonment, and it was an abuse of the trial court's discretion to sustain the general demurrers without leave to amend. Civ.Code, § 43.5(a); Code Civ. Proc. § 262.1.

7. Abatement and Revival ⇨52

Statute providing for action against personal representative of decedent who had wasted, destroyed, taken, or carried away, or converted to his own use property of any person is a general statute providing for survival of all torts, except those provided for in statute pertaining to survivability of actions for physical injuries. Probate Code, § 574; Civ.Code, § 956.

8. Abatement and Revival ⇨55(1)

Alleged losses of \$550 in costs and counsel fees, of \$50 a week wages while in jail, and of \$1,100 in earnings after release, which losses were allegedly sustained by one claimed to have been falsely imprisoned, constituted injuries to "property" within statute allowing action against personal representative of decedent who had wasted, destroyed, taken or carried away, or converted to his own use, property of any person, and, therefor, cause of action for such damages survived death of sheriff whose deputy had imprisoned plaintiff. Probate Code, §§ 573, 574; Civ. Code, §§ 954, 956; Code Civ.Proc. §§ 376, 377.

See publication Words and Phrases, for other judicial constructions and definitions of "Property".

9. Abatement and Revival ⇨54

Cause of action for physical injuries, such as loss of health, mental suffering, etc., allegedly sustained by one claimed to have been wrongfully imprisoned by sheriff's deputy survived sheriff's death under statute providing for survivability of actions for personal injuries. Civ.Code, § 956.

10. Abatement and Revival ⇨52

Cause of action for exemplary damages for alleged false imprisonment by sheriff through his deputy did not survive sheriff's death. Probate Code, §§ 573, 574; Civ.Code, §§ 954, 956; Code Civ.Proc. §§ 376, 377.

11. Appeal and Error ⇨1201(4)

Upon reversal of judgment sustaining general demurrers in action for alleged false imprisonment, the trial court could, in its discretion, require clarification of un-

certainities or ambiguities and deletion of any allegations in complaint which were improper.

Allan L. Sapiro, Elinor R. Carson and McNeil, Markley & Sapiro, San Francisco, for appellant.

Raymond D. Williamson, San Francisco, for respondents.

PETERS, Presiding Justice.

This action for \$11,650 compensatory and \$10,000 punitive damages for false imprisonment was brought by plaintiff against the late sheriff Murphy and his surety. The trial court sustained demurrers of both defendants to the amended complaint without leave to amend. Plaintiff appeals. After the appeal was filed Sheriff Murphy died, and his executor has been duly substituted. The two basic questions presented are whether the amended complaint does state a cause of action, and, if so, whether an action for false imprisonment survives the death of the tort-feasor.

The amended complaint states a cause of action. After setting forth the jurisdictional facts, it alleges that on April 10, 1950, in a certain divorce action then pending, plaintiff in the instant case was adjudged guilty of contempt for failure to pay attorney's fees and certain sums for the support of his wife. The order of commitment pursuant to which the sheriff took plaintiff into custody is set forth in full in the amended complaint. The last portion of that order reads as follows: "Now, therefore, it is hereby ordered, adjudged and decreed that * * * John A. Vallindras, is in contempt of this Court, and the Sheriff * * * is hereby ordered to take said defendant into custody * * * to be imprisoned in the County Jail * * * until the sum of _____ shall have been paid, or until he be otherwise discharged according to law, and until further order of this Court in the premises."

The amended complaint then alleges that this order "was illegal and void upon its face" in that it failed to specify the act by which plaintiff could secure his release from custody, that is, the amount that had

to be paid by plaintiff to obtain his release from jail was left blank. The same blanks appear in two other portions of the order. It is then alleged that "without jurisdiction and pursuant to said void order" the sheriff took plaintiff into custody where he remained for seventy-five days until released by virtue of the order of the Supreme Court in a habeas corpus proceeding—In re Vallindras, 35 Cal.2d 594, 220 P.2d 1.

By way of damages plaintiff alleged a loss of \$550 in costs and counsel fees expended in the habeas corpus proceedings; that he lost earnings of \$50 per week while in jail, and because of his incarceration was discharged from his job when he was released and could not secure new employment until September 5, 1950 (he had been discharged from jail on June 30, 1950); and as a result suffered \$1,100 in loss of earnings. It is then alleged that because of the unlawful arrest "plaintiff suffered and sustained great physical inconvenience and discomfort, nervous upset, loss of time, mental anguish, loss of health, humiliation of mind, shame, public ridicule, invidious publicity, and public disgrace, to his great loss and damage" in the sum of \$10,000. Exemplary damages of \$10,000 are also prayed for.

The trial court filed a memorandum opinion and sustained demurrers of both defendants without leave to amend, and judgment was thereupon entered in favor of defendants.

[1] The demurrers were general and special. On this appeal respondents call attention to some uncertainties in the complaint and to some conclusions that are alleged, and seek to sustain the judgment on these grounds. On this appeal we are interested only in whether the complaint states the essentials of a cause of action for false imprisonment. If so, even though the pleading may be subject to criticism, if the errors can be corrected it was error to sustain the demurrers without leave to amend. *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 172 P.2d 867.

[2, 3] The theory of the complaint is that the sheriff, through a deputy, took plaintiff into custody under a void and il-

legal commitment. There can be no doubt that the sheriff and his surety are liable civilly for the torts of the deputy. *Abbott v. Cooper*, 218 Cal. 425, 23 P.2d 1027. While the surety may not be liable for punitive damages, such allegations do not impair the statement of the cause of action for actual damages.

The problem presented is whether the order of commitment here involved was, as a matter of law, void on its face or whether it was "regular" on its "face" within the meaning of section 4168 of the Political Code as it read in April of 1950. That section in 1951 was transferred unchanged to the Code of Civil Procedure as section 262.1 Stats. of 1951, Chap. 655, at p. 1847. If the commitment was regular on its face the trial court properly sustained the demurrers; if void on its face, it did not. That section then provided and now provides: "A sheriff or other ministerial officer is justified in the execution of, and shall execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." See, also, § 43.5(a) of the Civil Code.

These sections do not protect the sheriff in the present proceeding for the reason that the case of *In re Vallindras*, 35 Cal.2d 594, 220 P.2d 1, necessarily held that this very commitment was void on its face. The commitment was challenged in that case by a petition for a writ of habeas corpus. Habeas corpus is normally a "jurisdictional" writ (see discussion 13 Cal.Jur. p. 223, § 7) and is used only to inquire into "the question of jurisdiction and the validity of the process upon its face." (13 Cal. Jur. at p. 218, § 4.) The Supreme Court necessarily found in the *Vallindras* case that this very commitment was void and not regular on its face. Otherwise, it would not have issued the writ of habeas corpus. In its opinion the Supreme Court quoted the order of commitment and then bluntly held that this order "does not meet the law's requirements" in that it "fixes no amount which *Vallindras* must pay to purge him from contempt and secure his release." 35 Cal.2d at page 596,

220 P.2d at page 2. The Court, on the same page, then pointed out that "Section 1219 of the Code of Civil Procedure provides that when a person is to be imprisoned until such time as he shall perform a certain act, '* * * the act must be specified in the warrant of commitment.' As in the case of *In re Wells*, 29 Cal.2d 200, 173 P.2d 811, the order upon which *Vallindras* is held by the sheriff does not meet this statutory mandate."

The case of *In re Wells*, relied upon in the *Vallindras* case, in no uncertain manner held that a commitment of the type here involved was absolutely void upon its face. As one of the grounds of its opinion the Supreme Court stated, 29 Cal.2d at page 202, 173 P.2d at page 812: "Upon another ground the judgment of contempt here is void in its entirety. It purports to confine the petitioner 'until he purges himself of said contempt,' but it does not comply with section 1219 of the Code of Civil Procedure, which section governs commitments of that nature. That section provides, 'When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he has performed it, and in that case the act must be specified in the warrant of commitment.' Here the judgment (which constitutes the 'warrant of commitment') does not specify the act or acts by which petitioner is to purge himself of contempt. The questions which he must answer are not recited. He is 'remanded to the Sheriff * * * until he obeys said order of this Court.' It is not stated that petitioner must restore any funds to any bank account. If it was intended to prescribe such a condition the commitment would have to so specify. Furthermore, the judgment must not only specify the act to be performed; it must also include a finding that such act is within the power of the contemner to perform. Otherwise it is void." See, also, *In re Moulton*, 100 Cal.App.2d 559, 224 P.2d 76; *In re Scroggin*, 103 Cal.App.2d 281, 229 P.2d 489.

The trial court, in its memorandum opinion, held that the commitment order here involved was not void on its face but

was simply voidable, being the result of an inadvertent omission, and further, that the Superior Court had "jurisdiction" but simply committed "error" in the exercise of that "jurisdiction." The court had some difficulty in squaring these conclusions with the holding in the Wells case, above quoted, to the effect that such orders are "void," and finally concluded that the Supreme Court used this term inadvertently and incorrectly. We cannot agree with these conclusions of the trial court. We see no escape from the conclusion that the cases of *In re Vallindras* and *In re Wells*, necessarily stand for the propositions that the Superior Court has no jurisdiction to issue such orders of commitment, and that such orders are void and not merely voidable.

[4,5] There can be no serious doubt that process that is void does not protect a ministerial officer. *Reilly v. United States Fidelity & Guaranty Co.*, 9 Cir., 15 F.2d 314; *Sparks v. Buckner*, 14 Cal.App.2d 213, 57 P.2d 1395. As was said in *Brichman v. Ross*, 67 Cal. 601 at page 603, 8 P. 316, at page 317: "Ministerial officers are presumed to know the law, and are bound at their peril to know the general jurisdiction of the courts whose process they are called upon to enforce; and if they execute process which the court has no jurisdiction to issue, they are liable."

[6] For these reasons it must be held that the complaint states a cause of action against the sheriff and his surety for false imprisonment.

This leaves for consideration the question of the survivability of this action against the sheriff and his surety. As already pointed out, after the appeal was perfected, Sheriff Murphy died. His executor has been substituted. The question presented is whether a cause of action for false imprisonment survives the death of the alleged tort-feasor.

At common law, tort actions died with the person by whom or to whom the wrong was done. (See 1 Cal.Jur.2d p. 93, § 63.) Only those tort actions survive where some statute so provides. Prior to the statutes about to be mentioned it was held that a

false imprisonment action did not survive the death of the tort-feasor. *Harker v. Clark*, 57 Cal. 245; *Vragnizan v. Savings Union etc. Co.*, 31 Cal.App. 709, 161 P. 507.

From an early date California has adopted various statutes to provide for the survivability of some tort actions. One group of these statutes provided that, in spite of the death of either party, tort actions, subject to certain conditions, involving injury to real or personal property survived. Civ. Code, § 954; Probate Code, §§ 573, 574; see 1 Cal.Jur.2d p. 98, § 70. Until 1946, however, it was generally thought that tort actions involving injuries to the person did not survive. In that year the case of *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913, 177 A.L.R. 1379, was decided. The majority of the court held that the heirs of one decedent could maintain an action against the personal representative of another decedent in a case where the defendant's decedent had shot and killed the plaintiff's decedent and then committed suicide. The conclusion that the cause of action survived was reached by what was called a "liberal" interpretation of that portion of section 574 of the Probate Code as amended in 1931 which allows an action against the personal representative of a decedent who had "wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person". The court interpreted the word "property" in this section in its broadest sense, and as altering the common law rule of non-survivability, and reasoned that the loss to the plaintiff of the right of future support from his decedent amounted to a taking away of the "property" of such person, because by such action the estate of the plaintiff's decedent had been diminished. Thus Probate Code, section 574, was interpreted to be a statute providing for the survivability of all tort actions involving injury to property as that term was interpreted in the opinion. In *Moffat v. Smith*, 33 Cal.2d 905, 206 P.2d 353, Probate Code section 574 was applied in this manner in favor of a living plaintiff injured in an automobile accident so as to permit him to recover from the representative of the

deceased tort-feasor for the loss of potential future earnings caused by the accident. The rule of the Hunt case has been applied to various factual situations. See *Mecum v. Ott*, 92 Cal.App.2d 735, 207 P.2d 831; *Nash v. Wright*, 82 Cal.App.2d 475, 186 P.2d 691; *Smith v. Minnesota Mut. Life Ins. Co.*, 86 Cal.App.2d 581, 195 P.2d 457; *City of Los Angeles v. Howard*, 80 Cal. App.2d 728, 182 P.2d 278; *Smith v. Stuthman*, 79 Cal.App.2d 708, 181 P.2d 123.

In 1949 the Legislature provided for survivability by legislation. This was accomplished by the addition of section 956 to the Civil Code, the amendment of sections 376 and 377 of the Code of Civil Procedure and the amendment of sections 573 and 574 of the Probate Code. (See 37 Cal. L.Rev. 644, at p. 657.) For present purposes we are interested only in the amendment to section 574 of the Probate Code and the addition of section 956 to the Civil Code. The amendment to section 574 of the Probate Code consisted of adding to the section, the provisions of which otherwise remained unchanged, the following sentence: "This section shall not apply to an action founded upon a wrong resulting in physical injury or death to any person." Section 956, the new section added to the Civil Code, so far as pertinent here, provides: "A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury * * *."

The question presented is whether the cause of action for false imprisonment involving the type of damages here alleged under these sections survives the death of the tort-feasor. Those damages, among others, included loss of earnings both before and after the time of incarceration, physical inconvenience and discomfort, nervous upset, mental anguish, loss of health, humiliation, shame, public ridicule, invidious publicity and public disgrace. The respondents argue that section 956 of the Civil Code limits survivability to physical injury and death cases and by implication denies it to such torts as false im-

prisonment, malicious prosecution, libel, slander, and violation of the right of privacy. In support of this interpretation respondents rely on certain statements in an article by Lawrence Livingston in 37 California Law Review, p. 63. The author was a member of a committee of the State Bar that proposed and drafted the legislation in question. The author argues (p. 72) that only actions involving physical injury and death should survive, and that torts of the type here involved should not survive. Undoubtedly the author of the article believed that the legislation proposed would accomplish these results. Others have not so interpreted the legislation. In a student comment on the legislation written after its passage, appearing in 37 Cal.L.Rev. at p. 657, it is stated (p. 659):

"* * * the Hunt case implied that Probate Code section 574, as it then existed, was a general survival statute, and that any tort action, involving injury to the estate, would survive the death of either the injured party or the tort-feasor. Later decisions support this position [citing some of the cases cited supra] * * *

"Although the amendment has limited Probate Code section 574 so that it does not apply to torts involving physical injury or death, the section says nothing of other torts. Since in the Hunt case, and those following it, the courts seem inclined to accept the broadest possible interpretation of 'property,' it is possible to argue that torts involving physical injury and death survive under Civil Code section 956 and Code of Civil Procedure sections 376 and 377, and that other torts, e. g. false imprisonment, malicious prosecution, libel and slander, survive under Probate Code section 574 and *Hunt v. Authier*."

The same general thought was expressed by Thomas E. Stanton, Jr. in commenting on the legislation in the November-December, 1949, issue of the State Bar Journal at p. 424.

We think the conclusion is inevitable that, if we start with the premise that Hunt

v. Authier properly interpreted section 574 of the Probate Code (and this court is bound by that decision), then all that the 1949 legislation accomplished was to provide expressly for the survivability of causes of action for physical injuries and wrongful death, but that as to other torts, such as false imprisonment that involve damage to property as that term was interpreted in *Hunt v. Authier*, they survive under section 574. This may not have been the intent of the lawyer committee that proposed the legislation, but it is what the legislation that was adopted actually accomplished.

The only logical explanation of *Hunt v. Authier* is that it interpreted section 574 of the Probate Code to be a general tort survival statute as to those torts involving injury to the estate or property of the plaintiff. If section 574 so provided before 1949, obviously the identical language in the section which the Supreme Court found sustained that interpretation, and which remained unchanged by the 1949 amendments, means the same thing after 1949, except that it does not apply to causes of action resulting in personal injury or death which are now covered by other sections of the law.

This interpretation is suggested, if not compelled, by the reasoning of *Cort v. Steen*, 36 Cal.2d 437, 224 P.2d 723. There the automobile accident in which plaintiff was injured occurred in 1947. Thereafter the driver of the car died. In January, 1948, plaintiff commenced his action against the driver's administrator, alleging injury to his person and property. The trial court sustained a demurrer to both counts on the ground that the action did not survive. In 1949 the survivability amendments were adopted. The Supreme Court in 1950 affirmed as to injuries to the person but reversed as to the count involving injury to the property or estate of plaintiff. The court first held that survivability was a matter of substance, and that since the statute providing for survivability of personal injury actions was not passed until 1949, the statute was not retroactive and that count did not survive. But as to the count relating to injury to the prop-

erty or estate of the injured party, even though section 574 of the Probate Code had been amended in 1949 as above indicated, that cause of action survived under the theory of *Hunt v. Authier*. In other words, by excluding wrongs resulting in physical injury or death from section 574 of the Probate Code, injuries to "property" as that term was defined in the *Hunt* case still survived. The court pointed out that *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913, 177 A.L.R. 1379, and *Moffat v. Smith*, 33 Cal.2d 905, 206 P.2d 353, had held that torts resulting in injury to property survived under section 574 of the Probate Code and then concluded, 36 Cal.2d at page 440, 224 P.2d at page 724: "The 1949 act did not constitute a repeal of the survival provision as it related to such recovery." See *Hume v. Lacey*, 112 Cal.App.2d 147, 245 P.2d 672; note, 25 So.Cal.L.Rev. 112.

[7] Under these cases and the 1949 amendments it must be held that section 956 of the Civil Code provides for the survivability of actions for physical injuries. But that section is not all inclusive. Section 574 of the Probate Code is a general statute providing for the surviving of all torts, except those provided for in section 956 of the Civil Code, which result in injury to property as defined in *Hunt v. Authier*.

[8-10] Now how do these rules apply to the instant case? The complaint alleges loss of \$550 in costs and counsel fees, a loss of \$50 a week wages while in jail, and a loss of earnings of \$1,100 after plaintiff was released. Those certainly constitute injury to property within the meaning of section 574 of the Probate Code as interpreted in *Hunt v. Authier*. The cause of action for such damage survives. The plaintiff also alleges various items of damage amounting to physical injuries—loss of health, mental suffering, etc. The cause of action for such damage survives under the express terms of section 956 of the Civil Code. The cause of action for exemplary damages, of course, does not survive under any theory.

[11] Thus, although it is obvious that the complaint in some respects is subject

to special demurrer, and should be redrafted, it was an abuse of discretion to sustain the demurrer without leave to amend inasmuch as the complaint states a cause of action not subject to general demurrer. The trial court in its discretion may require the clarification of uncertainties or ambiguities and the deletion of any allegations held improper in this opinion. *Wennerholm v. Stanford Univ. School of Medicine*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



116 Cal.App.2d 769

Barbara W. KARRELL, doing business as **Builders Investment Company**, Respondent, v. **D. D. WATSON**, as **Real Estate Commissioner of the State of California**, Appellant.

Civ. 19217.

District Court of Appeal, Second District,
Division 2, California.

April 15, 1953.

Hearing Denied May 14, 1953.

Appeal from Superior Court, Los Angeles County.

On petition for rehearing.

Prior opinion, 254 P.2d 651.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for appellant.

Albert Lee Stephens, Jr., and Ralph J. Geffen, Los Angeles, for respondent.

PER CURIAM.

On petition for rehearing respondent's main argument is that the facts of *Manning v. Watson*, 108 Cal.App.2d 705, 239 P.2d 688, are not distinguishable from those at bar. The *Manning* accusation alleged only a conviction of certain sections of the United States Code, 38 U.S.C.A. §§ 697, 715, while the commissioner attempted to prove specific acts of a fraudulent and dishonest character.

In the instant case the accusation contained the essential allegations absent from the *Manning* complaint, to wit, the nature and elements of the deeds for which Miss Karrell had been convicted,—a crime which patently constituted dishonesty, untruthfulness and moral turpitude, and stigmatized respondent with a bad reputation. The theory of the commissioner herein was that it was necessary to prove only the conviction of the crime and that its nature involved dishonest or fraudulent acts. The cases, therefore, are not in conflict.

It is to be observed, also, that *Manning* made restitution of his perfidious profits and thereby displayed his respect for the law, if not a true penitence for his crimes.

Petition denied.

McCOMB, J., dissents.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



117 Cal.App.2d 315

In re **CATLETT'S ESTATE**.

ALLEN v. CATLETT.

Civ. 19387.

District Court of Appeal, Second District,
Division 2, California.

April 14, 1953.

Proceeding in matter of estate wherein Superior Court, Los Angeles County, Joe Raycraft, J., decreed that legatee was not entitled to bequest and legatee appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that provision in will that testator was to receive board and lodging from legatee at cost of \$50 per month was condition precedent to legatee's right to inheritance and was the sole motive for the bequest, so that where testator died before moving into legatee's house, legatee was not entitled to bequest.

Decree affirmed.

I. Wills Ⓒ657

Where in a will certain conditions are specific and the performance of them must

be accomplished prior to vesting of interest, condition is a condition precedent. Probate Code, §§ 142, 143.

2. Wills Ⓒ703

Evidence sustained finding that provision in will that testator was to receive board and lodging at a cost of \$50 a month in legatee's home was condition precedent to legatee's right to inheritance and was the sole motive for the bequest, so that where testator died before moving into legatee's house, legatee was not entitled to bequest.

3. Executors and Administrators Ⓒ510(5)

In view of fact that executrix represented beneficiaries and creditors of estate and in view of fact that executrix was named as respondent by appellant, executrix was a proper party to appeal from order settling final account and supplement thereto and decreeing that appellant was not entitled to bequest.

Johnson & Johnson and W. Ward Johnson, Long Beach, for appellant.

Walker & Horn and M. W. Horn, Long Beach, for respondent.

McCOMB, Justice.

This is an appeal from an order settling the final account and supplement thereto and decree of distribution under the will of Clara T. Catlett who died November 23, 1950, leaving a will containing among other provisions the following:

"Fourth: All of the rest, residue and remainder of my property, both real and personal, of whatsoever kind and character, and wheresoever situated, I hereby give, devise and bequeath to my friend, Evelyn M. Davenport, provided she be living at the time of my death, and provided also that the trial arrangement shall prove successful whereby I am to receive my board and lodging at a cost to me of \$50.00 per month, in the home to be provided by Evelyn M. Davenport and N. Frank Allen, after their marriage.

In the event that this trial arrangement has not succeeded, and it is impossible for me to continue freely and happily as a boarder in their home at the rate of Fifty Dollars (\$50.00) per month, and have free access to the room we agree upon, with the right to freely receive my friends at reasonable times, and to be reasonably independent in my own arrangements, then this residuary bequest to Evelyn M. Davenport is not to be effective; and I give, devise and bequeath all of the said rest, residue and remainder of my estate as follows:

"One-Half ($\frac{1}{2}$) thereof to my cousin, Ward Vanderberg; and

"One-Half ($\frac{1}{2}$) thereof to my step-granddaughter, Shirley Catlett."

The probate judge ordered distribution of the estate with a minor adjustment for difference in inheritance tax to Ward Vanderberg and Shirley Catlett in equal shares.

Questions: First: Did the trial court err in finding that the terms upon which Evelyn M. Allen should inherit all of decedent's estate were conditions precedent to her right to such inheritance?*

No. Section 142 of the Probate Code defines a condition precedent as follows:

"A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will."

[1] This section is here controlling. Where, as in the present case, certain conditions are specific and the performance of them must be accomplished prior to the

* Formerly Evelyn M. Davenport.

vesting of an interest, the condition is a condition precedent. (*Brennan v. Brennan*, 185 Mass. 560, 71 N.E. 80, 81; *Clark v. Capital National Bank*, 91 Cal.App.2d 865, 869, 206 P.2d 16.)

A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. (Sec. 143, Probate Code.) In the instant case the title was not to vest until the time of decedent's death. Therefore it is evident that the conditions stated in the will were conditions precedent and not conditions subsequent, since such conditions obviously could not take place subsequent to the death of decedent.

[2] The evidence disclosed in the present case that Evelyn M. Allen, formerly Evelyn M. Davenport, came to live with decedent in July, 1945, and from that date until October 7, 1950, did all of the housework, cooking, washing and ironing, and took care of decedent. At various times decedent stated to Mrs. Allen that if she would stay with her until she died, whatever she had would be given to Mrs. Allen. On October 7, 1950, decedent went to the hospital and on October 10, 1950, executed a will containing the paragraph set forth above.

Shortly before defendant entered the hospital, Mr. and Mrs. Allen purchased a home at 390 Orizaba Avenue, in Long Beach. Decedent was shown a room that would be hers when she came to live with them. On October 14, 1950, decedent was removed from the hospital to a nursing home where she remained until the time of her death.

This evidence fully supports the finding of the probate court that the conditions precedent to Mrs. Allen being entitled to decedent's estate were never performed or fulfilled.

Second: *Was the condition precedent the sole motive for the bequest to Mrs. Allen?*

Yes. It is evident from reading the Fourth paragraph of the will, and the evi-

dence relative to decedent's statements to Mrs. Allen, that the sole motive for making the bequest to Mrs. Allen of her entire estate was that she be provided a home or lodging at a cost of not to exceed \$50 per month during the period of her life subsequent to the execution of the will.

Estate of Nathan, 89 Cal.App.2d 789, 201 P.2d 865, is not here in point for the reason that in such case the court merely held that there had been a substantial compliance with the conditions precedent stated in the will. There is no evidence in the present case of any compliance with any conditions precedent.

[3] Third: *Is respondent, who is the executrix of the will of decedent, a proper party to this appeal?*

Yes. The executrix filed her final account, report and petition for distribution and for fees, and interpretation of the will. The probate judge having made his ruling, appellant, who had objected to the account and petition for distribution, took the present appeal, naming the executrix as respondent. It was the duty of such executrix to carry out the wishes of decedent under the direction of the probate judge and to take the necessary steps to protect the interest of beneficiaries and creditors of the estate. Since the beneficiaries' interest would be affected by a reversal or modification of the decree it is proper for respondent to appear in the present proceedings before this court.

Estate of Ross, 179 Cal. 358, 182 P. 303, and Estate of Murphey, 7 Cal.2d 712, 62 P.2d 374, are not here in point, for in such cases the executor prosecuted the appeal and our Supreme Court held that not being an aggrieved party it was not entitled to maintain the appeal. Here the executrix (respondent) is not appealing but is appearing upon the invitation of appellant who has thus waived any right to claim that respondent is not properly before this court.

Affirmed.

MOORE, P. J., and FOX, J., concur.

ANGLIN v. CONWAY et al.*
Civ. 4615.

District Court of Appeal, Fourth District,
California.

April 7, 1953.

Hearing Granted June 4, 1953.

Action by assignee against wife of person who had agreed to furnish supplies and all things necessary in drilling of oil well for labor and services rendered by assignors in drilling of well. The Superior Court, Kern County, entered judgment adverse to wife, and wife appealed. The District Court of Appeal, Griffin, J., held that evidence was insufficient to establish that wife had accepted liability to pay assignors' claims for services rendered after wife's visit to well prior to its completion or that wife had become substituted as assignors' employer by her statements and acts.

Judgment reversed.

1. Master and Servant ☞1

Right of alleged employer to control or end services of employees whenever employer sees fit is necessary element to establishment of employer-employee relationship.

2. Master and Servant ☞6

In action by assignee against wife of person who had agreed to furnish supplies and all things necessary in drilling of oil well for labor and services rendered by assignors in drilling of well, evidence, bearing on existence of employer-employee relationship between wife and assignors, was insufficient to establish that wife had any right to control or end services of assignors whenever she saw fit.

3. Master and Servant ☞1

Engagement of employees, fixation of wages and assumption of authority and control over employees in directing their actions and in their ultimate discharge are necessary elements to creation of relationship of employer-employee.

4. Frauds, Statute of ☞23(4)

Even if wife of person who had agreed to furnish supplies and all things necessary in drilling of oil well for labor and services rendered in drilling of well, had, prior to completion of well, orally agreed to pay

for wages previously earned, such agreement would be violative of statute providing that promise to pay debts of another must be in writing. Code Civ.Proc. § 1973, subd. 2.

5. Husband and Wife ☞232(3)

In action by assignee against wife of person who had agreed to furnish supplies and all things necessary in drilling of oil well for labor and services rendered by assignors in drilling of well, evidence was insufficient to establish that wife accepted liability to pay assignors' claims for services rendered after wife's visit to well prior to its completion or that wife became substituted as assignors' employer by her statements and acts.

6. Frauds, Statute of ☞33(1)

Where husband had agreed to furnish supplies and all things necessary in drilling of oil well, but his wife was nowhere mentioned in documents creating liability, alleged liability of wife for such services could not be predicated on theory that wife, after well had been partially completed, had orally promised to answer for antecedent debt of her husband and that such promise constituted an original obligation of wife, in view of fact that wife had received no beneficial consideration for such promise. Code Civ.Proc. § 1973, subd. 2.

Wallace & Cashin, Los Angeles, for appellant.

Roger C. Donahue, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action against Alline E. Conway, Estate of H. A. Conway, Deceased, and George Harwood, alleging in eight separate causes of action, that defendants became indebted to respondent's assignors for labor and services rendered in several amounts, totaling \$2,383.80. Defendant Harwood was not served with summons. The court found that defendant Estate of H. A. Conway, deceased, was not liable, and entered judgment against appellant Alline E. Conway.

* Subsequent opinion 263 P.2d 1.

It is alleged in each cause of action that all of the plaintiff's assignors assigned their respective interests in their claims to plaintiff. Appellant Conway, by answer, denied this fact. The court found that the claims had been thus assigned. But for two possible exceptions, respondent offers no proof of any such assignments. On appeal from the judgment, claiming insufficiency of the evidence to support it, appellant now argues that the burden of proof of the fact that respondent's assignors assigned their claims and complied with section 300 of the Labor Code in respect thereto, was upon plaintiff, and in the absence of evidence on the subject respondent may not recover, and that defendant is not estopped to question the sufficiency of such proof on appeal.

There would be merit to this contention had it not been for the actions and conduct of counsel for the appellant in the opening statement to the court, leading counsel for respondent and the court to believe the only issue before the trial court to determine was the issue of appellant's liability. *Martin v. Going*, 57 Cal.App. 631, 207 P. 935. The record shows that the court inquired of counsel as follows:

"The Court: And this is an action on assigned claims for wages?

"Mr. Donahue: Particularly labor, Your Honor.

"The Court: And the defense is they were not contracted by this defendant. Is that correct?

"Mr. Wallace: That is correct, Your Honor.

"Mr. Donahue: In talking with counsel for this defendant, Your Honor, he believes we can confine the issues in this case to the question of the liability of this named defendant. * * *

"The Court: I presume that would be his endeavor, at least.

"Mr. Donahue: Confine it to that rather than first have to establish the accounts. * * *

"The Court: You mean, Mr. Wallace, that you are not prepared to contest the correctness of the items, but only the liability? * * *

"Mr. Wallace: * * * If there is no liability, the question of the accounts will not become material. * * *

"The Court: Well, let's go ahead with the issue, then."

During the course of the trial, the question was propounded by counsel for respondent regarding the assignment of one of the claims:

"Q. (By Mr. Donahue): Now, you have assigned your claim against Alline E. Conway to M. H. Anglin. Did you not? A. Yes, sir.

"Mr. Wallace: I object to that. It calls for a conclusion of the witness. I will stipulate the purpose is he assigned his claim against * * *

"The Court: In other words, it is his conclusion as to the effect of this legal document?

"Mr. Wallace: He signed the document.

"Mr. Donahue: Well, it is just to identify this man as one of the parties in this action.

"Mr. Wallace: We are not going to quarrel with that.

"Mr. Donahue: That is the only purpose of the question.

"The Court: All right, let it stand."

While a close question is presented in respect to the question of waiver and the right of appellant now to raise the question for the first time on appeal, we prefer to determine the question of the sufficiency of the evidence to support the finding pertaining to the liability of the appellant on any of the alleged assigned claims.

The facts indicate that defendant Harwood negotiated with a Mr. and Mrs. Bolling to drill an oil well on property leased by the Bollings. These negotiations resulted in the execution of a written drilling agreement between the Bollings and H. A. Conway, dated August 22, 1949. By its terms, among other things, Mr. Conway agreed to furnish all supplies and all things necessary in the drilling of the well. The agreement was signed by H. A. Conway and acknowledged in Colorado on September 3, 1949, and the Bollings acknowledged it on

August 22. It was recorded on September 15, in Kern County. Appellant's name was not mentioned therein in any manner.

Defendant Harwood proceeded with the matter and apparently moved equipment on to the property, employed one Rivers as superintendent, who, in turn, employed the workmen here involved under him. The log of the well, kept by Rivers and some of these workmen shows the "rigging up" was commenced on August 29, on "Well No. 1 * * * Quinn lease * * * name, H. A. Conway, 722 Crescent Drive, Beverly Hills, Cal." There was no change in the name H. A. Conway to that of appellant or any other person up to September 22, when the work ceased. The well was drilled to a depth of 2235 feet, and about September 15th a dry hole resulted and the claims here involved were unpaid. All of the pay-roll record and tax statements, signed during this period by the respective workmen, gave their employer's name as H. A. Conway, at his address in Beverly Hills. No other name appears thereon as employer, and no change in this respect is indicated. A notice of nonresponsibility was posted and recorded by the Bollings on August 30, which recites that notice is given that the Bollings have entered into a contract with H. A. Conway for the purpose of drilling a well on the premises described, and that George Harwood is associated with H. A. Conway in the performance of the contract.

So far as the record is concerned, there is no evidence that H. A. Conway visited the property or knew anything about the transaction other than signing the contract. He was in Colorado during this period. About September 12, he was ill and returned to Los Angeles. He died on November 15. The only evidence supporting the court's finding attaching liability to appellant Mrs. Conway may be thus summarized:

It appears from appellant's testimony that on Sunday, September 4, Harwood phoned appellant's son in Los Angeles and asked if he wanted to see an oil well come in; that he replied that he would and that appellant and her two sons went to Delano; that they did not know where the well was

located but through inquiry found it; that they there met Harwood, Bolling and Rivers; that they watched for some time but the well did not come in; that appellant and one son remained overnight; that Harwood wanted to pay the workmen and asked her to write checks on her bank account in Los Angeles; that he stated he would give her the money to cover them; that she changed the bank checks obtained at Delano and issued checks to the workmen; that she returned home the following day, and on the following Monday deposited the \$1,000 given her by Harwood, in her bank account. Her account, maintained under the name of H. A. or Mrs. H. A. Conway, showed a deposit of \$1,500 on that date. The checks were paid when presented.

Rivers testified generally that when he was originally employed Harwood agreed to pay him \$700 per month; that Harwood wrote the name H. A. Conway on the log book; that drilling work was commenced about August 28th; that appellant, on the third or fourth day thereafter, came out to the well; that Harwood introduced her to him as the "boss"; that appellant evidently didn't know anything about the well; that she came back another time (about two days later) and he told her the workmen had to have some money and she wrote out checks for them; that she came to the well about four times in all; that on her fourth trip she mentioned that her husband was in Colorado; that he (Rivers) told her they were worried about money for the men and for casing; that she said: "In just a few days we will have money and we will have casing, and we will complete the well"; that Harwood "verified" her statement; that thereafter he called her at her home in Los Angeles (almost daily) about paying the men; that after the drilling was shut down she told him she was endeavoring to have someone take over the well and put up money to clear the debts; that she gave him a check to repair the pump; that thereafter he and appellant and some others went to the district attorney's office in Bakersfield about labor checks Harwood had given which were not paid; that appellant told the district attor-

ney that Harwood agreed to furnish the rigging and her only obligation was to pay the labor; that she gave Harwood about \$1,200 for that purpose but he failed to deposit it; that she said to Rivers: "I will see that you get yours"; that Harwood originally told him that he and Mr. Conway were going to drill all the wells; that Mr. Bolling was present; that about October 24th he (Rivers) and the laborers went to see the Labor Commissioner. H. A. Conway was named by some of the laborers in their claims as the one owing them. Apparently, no action was taken by the Labor Commissioner against appellant.

Rivers' wife testified that she saw appellant at the well on two or three occasions; that on one visit appellant said that "the well had better come in or it would be murder for her * * * because * * * it is my allowance I am using"; that she wanted to replace the money back to that account. Other workmen stated originally they were told that Mr. Conway and Harwood were drilling a well and they were to work for them; that later appellant was at the well and that she was introduced to them by Harwood as the "boss"; that they all read the notice of nonresponsibility posted on the property; that they visited appellant in Los Angeles about their claims; that they knew Mr. Conway was in Colorado and was ill; that while at appellant's home a phone call was made to him and Mrs. Conway said that she was "responsible only for the labor * * * I will see you get payed"; that they went to the Labor Commissioner about their claims but never asked that he collect those claims from appellant.

Appellant, in addition to what has been heretofore stated, testified generally that she and her husband were introduced to Harwood when he and her husband leased certain property in Newhall; that the first she knew of the drilling of this well was at the time of her first visit to the property when Harwood called her son and when she issued the checks for Harwood; that that was the first time she ever saw Rivers; that she did not know at that time that Mr. Conway had any interest in that well; that she, personally, had no interest in it, finan-

cially or otherwise; that she did not learn that Mr. Conway had any interest in it until "the thing all blew up"; that she never visited the well again until it was shut down; that she visited with Mrs. Rivers but she denies ever making the remarks attributed to her by Mrs. Rivers. She denied any conversation with the employees about wages at the well or that she was ever introduced to them as the "boss". She denied making any statement to them at the Labor Commissioner's office that she was to pay for the labor, denied such a conversation with them at her home, and stated that their visit was on the day of the night when her husband died at the hospital in Los Angeles; that she did tell them Harwood had a man interested in taking over the well and paying the laborers "because they should have been paid"; that none of the laborers here involved asked her to pay their claims, and she never told them she would. She testified she filed a separate income tax return from that of her husband and that she never claimed any loss on account of the drilling of the valueless well.

Upon the filing of the action by respondent, appellant demanded and received a bill of particulars, which sets forth the various claims. Each recites that the individual claimant was hired by W. H. Rivers, superintendent for H. A. Conway Oil Company. The evidence indicates that there never was such a company formed.

Upon this evidence the court found generally that the claimants were employed by appellant; that she paid a certain amount thereon by her personal check and that the total amount of \$2,076.88 remained due and unpaid; that the allegations contained in appellant's answer were untrue; that there was no evidence introduced that indicated H. A. Conway or his estate were in any way liable. Judgment was entered against appellant.

[1-3] On appeal the first argument is that the evidence does not show that respondent's assignors were employed by appellant. They concede that their initial employment was by Rivers and that Harwood arranged for this. There is no evi-

dence showing that appellant was, at that time, their employer nor was it so indicated in the signed agreement between the Bollings and H. A. Conway. Rivers testified he was employed by Harwood. Unless the evidence is sufficient to show a joint enterprise or partnership venture between Harwood and appellant or between appellant and her husband, there is no substantial evidence connecting appellant with the initial employment of Rivers or those employed by him. If respondent did so contend at the trial, he has abandoned such contention on appeal. In his brief he recites that "The facts clearly indicate that this was not a partnership venture, neither was it a joint venture. It was a venture instituted by appellant through her friend George Harwood in anticipation of profit and in anticipation of pleasing or financially helping *Dr. H. A. Conway*. * * *

Here the appellant was engaged in a venture to obtain oil, and the normal rules applicable to normal business operations cannot nor will apply. She, in plain language, was gambling." Just what proposition of law or fact is presented by this statement is not clearly understandable to us. If respondent relies upon employer-employee relationship, the evidence falls far short of proof that the appellant, as the employer, had the right to control or end the services of the employees whenever she saw fit to do so. This was a necessary element. *Press Publishing Co. v. Industrial Accident Commission*, 190 Cal. 114, 120, 210 P. 820; *Elison v. Dallugge*, 139 Cal.App. 366, 33 P.2d 878. Here, appellant did not employ the men (which the claimants well knew), did not fix their wages, and it clearly appears that she assumed no authority nor control over them in directing their activities and did not ultimately discharge them. They refused to do further work unless they were paid by some one, which action on their part was not unusual. Under the theory of employer-employee relationship these were necessary elements. *Anderson v. Badger*, 84 Cal.App.2d 736, 741, 191 P.2d 768.

[4] Although respondent does not indicate in his brief the theory upon which the judgment might be supported, the only

remaining point would be the argument by appellant's conduct and actions in paying the labor claims that were accumulated at the time of her visit to the well, by her introduction to the workmen as the "boss", and the statements charged to her as having been made, she assumed all further liability thereafter and agreed to pay the workmen herself for any future services they might perform in drilling the well. Although appellant denied any such conversation, accepting them as true, we do not believe the evidence would support any such finding, if made. If we may assume that these claims were for wages earned before she made any agreement to pay them (if her conversation amounted to that) such agreement was invalid as being in violation of section 1973, subdivision 2, of the Code of Civil Procedure, in that any valid promise made by her to pay the debts of another would have to be in writing. *Swim v. Juhl*, 72 Cal.App. 363, 237 P. 552.

[5] We conclude that the evidence is not sufficient to show that appellant accepted the liability to pay the claims contracted after her visit to the well or that she became substituted as claimants' employer by the statements and acts attributed to her.

The general principles of law here applicable are set forth in *McClenahan v. Keyes*, 188 Cal. 574, 206 P. 454. In that case plaintiff, a physician, recovered a judgment in the trial court against the mother of an adult daughter for services rendered in connection with the illness of the daughter. The question was whether or not the mother entered into a contract of employment with the plaintiff. The charges were for services rendered by the doctor to the daughter, both before and after the mother acquired knowledge of the serious condition of her daughter. The physician, during the period of his employment, continued to make charges upon his books against the daughter, and subsequently brought suit for the full amount against her. He failed to recover against the daughter except for the services rendered when the daughter was un-

conscious. He thereafter filed his claim against the estate of the mother and brought an action thereon. As to her liability, plaintiff depended upon certain statements of the mother made to plaintiff, and upon certain transactions had with others. It appears there that the mother made a statement that the plaintiff would be adequately compensated for his services rendered and requested him to render further service. The daughter was a wealthy woman and able to pay for the services rendered to her. The Supreme Court held that the mother was not liable for such services in the absence of a contract on her part to pay therefor, and that the evidence produced was insufficient to establish either an express or an implied contract to do so. The court said if it had been the intention either of the plaintiff or the mother that she should become personally responsible for the payment of such services it would have been very simple for him to have secured from her a direct statement to that effect. The fact that the respondent carried the account on his books in the name of the daughter and subsequently brought suit against her to recover the full amount claimed for all services rendered would clearly seem to indicate that he did not enter into an agreement with the mother that he would accept her as a primary debtor, and there was nothing said by the mother, as testified to by him, which would indicate that the mother intended to assume that obligation in the place and stead of her daughter. On the contrary, it would seem that the mother studiously avoided stating that she would be personally responsible for the plaintiff's services; that if, however, it be assumed that the mother in fact promised to pay for the plaintiff's services, another consideration would lead to the conclusion that there was no liability on the part of the mother for these services rendered to the daughter. Plaintiff was already performing services for the daughter, presumably under a contract for that purpose. The law is clear that if any credit was in

fact given to the daughter the mother could not be held as the original promisor, but at most a mere guarantor; that in such a case, in order that the promise of the mother to answer for the antecedent obligation of the daughter should be considered an original obligation and therefore not required to be in writing, the statute provides that the promise is deemed original only when made upon a *consideration beneficial to the promisor*, whether moving from either party to the antecedent obligation or from another person. There was nothing in the arrangement between the plaintiff and the mother to indicate that liability for the continued services of the plaintiff was to be assumed by the mother as a condition for the continued performance of services by the plaintiff in connection with her daughter.

[6] In the instant action no consideration beneficial to the promisor thus appears. An examination of all the written documents creating the original obligation shows that they do not mention appellant and by no construction of any of the terms thereof can it be said that appellant would be entitled to any interest in the oil well had it come in or been a success, or that she would have been individually benefitted in any manner by accepting the obligation to pay the workmen after her visit to the well. Any claim of appellant's liability under this theory is therefore not tenable. Another fact to be noted is that respondent failed to call as his witness Mr. Bolling, who apparently was a party to the contract and engineer on the job.

Lastly, appellant takes exception to a statement in respondent's brief to the effect that the judgment herein, by reason of execution, was satisfied on June 4, 1952, because no stay bond on appeal was given. We are not, as yet, concerned with this problem and therefore must disregard the statement.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

**HAYWARD LUMBER & INVESTMENT
CO. v. CONSTRUCTION PROD-
UCTS CORP.**
Civ. 18811.

District Court of Appeal, Second District,
Division 2, California.

April 7, 1953.

Rehearing Denied April 29, 1953.

Hearing Denied June 4, 1953.

Claim and delivery action by lessor against lessee for leased machinery and for wrongful detention thereof. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment for lessor, and lessee appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain trial court's finding that lessee's letter constituted an attempt to renew lease for one year only and not an exercise of option in lease to renew on two year basis.

Judgment affirmed.

See also 110 Cal.App.2d 386, 243 P.2d 52.

1. Bailment ⇨31(3)

In claim and delivery action by lessor against lessee for leased machinery and for wrongful detention thereof, evidence was sufficient to sustain finding that lessee's letter constituted an attempt to renew lease for one year only and not an exercise of option in lease to renew on two year basis.

2. Appeal and Error ⇨1008(3)

Where there was extrinsic evidence clarifying crucial documents, and inferences were conflicting, trial court's finding as to effect of instrument, which finding was compatible with the evidence, would not be disturbed upon appeal.

3. Contracts ⇨24

The offer must be accepted in terms in which it is made and alteration of such terms is tantamount to a rejection of original offer and making of counter offer.

4. Bailment ⇨31(3)

In claim and delivery action by lessor against lessee for leased machinery and for wrongful detention thereof, evidence was not sufficient to establish that lessee had given lessor oral notice of lessee's intention to renew lease.

5. Landlord and Tenant ⇨86(2)

To avail himself of option of renewal given by lease, lessee must advise lessor in unequivocal terms of his unqualified intention to exercise option in precise terms permitted in lease.

6. Bailment ⇨22

The hold-over doctrine of realty leases is not applicable to hiring of personality.

7. Bailment ⇨22

Lessee's act of retaining possession of leased personal property did not imply renewal of lease, which contained option to renew, in absence of agreement thereto by lessor and lessee.

8. Bailment ⇨34

In claim and delivery action by lessor against lessee for leased machinery and for wrongful detention thereof, where lessee's answer did not ask for relief under statute pertaining to equitable principle of relief against a forfeiture nor contain any averments suggesting that such relief was sought, failure to give relief under statute was not error. Civ.Code, § 3275.

9. Pleading ⇨18

Party relying upon an equitable defense must plead it with some particularity. Civ.Code, § 3275.

10. Contracts ⇨318, 346(2)

Statute providing for equitable principle of relief against forfeiture presupposes that party seeking relief is in default and requires such party to plead and prove facts that will justify its application. Civ. Code, § 3275.

11. Bailment ⇨22

In claim and delivery action by lessor against lessee for leased machinery and for wrongful detention thereof, where lease, which contained option to renew, was not terminated by lessor because of lessee's default, statute providing for equitable principle of relief against forfeiture was not applicable. Civ.Code, § 3275.

12. Contracts ⇨172

An "option" is an offer by which optionor binds himself in advance to make

contract if optionee accepts upon the terms and within time designated in option.

See publication Words and Phrases, for other judicial constructions and definitions of "Option".

13. Contracts ⇨172

Because optionor is bound while optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with terms of option, and, by varying terms of option in purported renewal, optionee in effect rejects option.

14. Bailment ⇨22

In claim and delivery action by lessor against lessee for leased machinery and for wrongful detention thereof, where lessee, by varying from terms of option in his purported renewal of lease, in effect rejected option, which then became extinguished with expiration of term of lease, statute providing for equitable principle of relief against forfeiture was inapplicable.

15. Landlord and Tenant ⇨86(1)

Option to renew, which was contained in lease and which lessee in effect rejected by varying from terms thereof in purported renewal of lease, was extinguished upon expiration of term of lease.

16. Judgment ⇨720, 725(1)

Only such matters which appear on face of judgment to have been adjudicated or which were necessarily included in judgment are res judicata in subsequent action.

17. Judgment ⇨735

Rights, claims, or demands arising out of subject matter involved in prior litigation are not res judicata in subsequent litigation if they constituted separate or distinct causes of action which were not placed in issue in prior litigation.

18. Judgment ⇨715(3)

Where lessee had option to renew lease of realty for one year and lease of personalty for two years, judgment for lessee in prior unlawful detainer action, wherein it was determined that lessee had given proper notice of renewal of lease

of realty for one year, was not res judicata of issues in subsequent claim and delivery action by lessor against lessee for leased machinery and for wrongful detention thereof since no issue raised in subsequent action was tendered or adjudication had thereon in prior action.

Larwill & Wolfe, Michael F. Shannon and Thomas A. Wood, Los Angeles, for appellant.

Philip T. Lyons, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from a judgment awarding plaintiff the possession of certain leased personal property (or its value) and for damages for the detention thereof.

Plaintiff was conducting a business under the fictitious firm name of Hayward-Hallett Equipment Company, which in 1948 had been losing substantial sums of money. In the latter part of that year, plaintiff and defendant entered into a contract whereby defendant agreed to take over and liquidate an inventory of parts used in the construction of hoists and compressors which plaintiff utilized in its business. It was agreed that to accomplish this liquidation, defendant would continue the business of Hayward-Hallett Equipment Company by manufacturing and selling compressors and hoists fabricated from the parts in the inventory. To effectuate this purpose, the agreement provided that plaintiff lease to defendant the real and personal property used in the operations of the Hayward-Hallett Equipment Company. The personal property, which is the subject of this action, consisted of machinery and specialized tools requisite to the manufacture of hoists and compressors.

On July 12, 1949, the parties entered into a new agreement containing leases on the aforementioned real and personal property which was in substitution of the earlier contract. This agreement provided that the lease of the real property was to be for a term of two years, from January 1, 1949, to December 31, 1950, defendant having an option to renew the lease "from

year to year from and after December 31, 1950, for an additional five year period, to December 31, 1955." The agreement further specified that the leases of the special tooling, machine tools and other tools and supplies was "for the period from January 1, 1949, to December 31, 1950," and granted defendant an option to renew these leases "for a period of two years from January 1, 1951, to December 31, 1952." (Italics added.) The agreement set forth that in the event of the exercise of the renewal options, the monthly rentals would be fixed by agreement of the parties, or by arbitration upon their failure to arrive at a mutual agreement. The agreement also made provision for defendant to sell an enumerated list of hoist and compressor parts belonging to plaintiff.

Defendant took possession of the premises and machinery and tools pursuant to the leasing agreement and by the middle of 1950 had liquidated the major portion of the inventory parts through its manufacture and sale of hoists and compressors. With the advent of military operations in Korea, the properties occupied and used by defendant under its leases were enhanced in value. In July of 1950, plaintiff suggested it would like to "resume possession of the leased properties." Through its president, Frank W. Wells, defendant indicated it might move out if plaintiff sold it certain equipment. Accordingly, plaintiff gave defendant an option to buy this equipment for \$10,000 on condition that defendant relinquished its lease of the premises. In August, 1950, defendant informed plaintiff of its inability to accept this option because of the unavailability of other machinery it would need to continue in business. Mr. Wells testified he had never told plaintiff he was going to leave the premises and the machine tools at the expiration of the year 1950. On October 31, 1950, plaintiff served on defendant a 30-day notice of cancellation of the agreement unless defendant fulfilled its obligation to pay certain sums accruing thereunder. On November 30, 1950, Mr. Wells avoided such a cancellation by making a payment of \$1,960 to Mr. Hubbard, plaintiff's secretary. On this occasion Mr. Wells testi-

fied that "Mr. Hubbard said to me 'Obviously, after going to all the trouble to wire that money to me last night, you must be intending to stay' and I said, 'Yes, obviously.'"

On December 28, 1950, Mr. Wells wrote a letter to Mr. Hubbard, the material part of which reads: "We are continuing our lease in accordance with our lease contract for the year 1951 for the factory and the machinery and tools." The letter was delivered the following day. On January 2, 1951, plaintiff wrote a reply to the above letter reading in part as follows:

"You are hereby notified that your attempt to 'continue' the lease of our property under the agreement of June [sic] 12, 1949, is not accepted as an exercise of the option to renew the lease provisions of said contract, for the following reasons:

"I. You have failed to give timely, or any notice of your intention to exercise the option to renew the lease provisions of the Agreement of June 12, 1949. II. You have failed to perform the conditions precedent to your right to exercise the option to renew the lease provisions of the agreement.

* * * III. You are now, and have been continuously since December 10th, in default in complying with the terms of said contract. * * *" The letter set forth that the default consisted of delinquency in the payment of rentals, and concluded with a demand that defendant surrender the real property and restore to plaintiff possession of all the personal property owned by it.

On January 3, 1951, defendant's Mr. Wells wrote plaintiff, in part, in the following terms: "I wish to acknowledge receipt of your letter dated January 2, * * * in connection with my exercising our option for the factory and machinery and tools *for the coming year of 1951.*" (Italics added.) Thereafter defendant continued to occupy the premises and retained possession and use of the machinery, offering to pay plaintiff a mutually acceptable rental. At subsequent conferences between the parties plaintiff refused to accept defendant as its tenant, reiterating the reasons previously given.

Plaintiff brought an action for unlawful detainer of the real property in January, 1951, which resulted in a judgment for defendant, subsequently affirmed on appeal. *Hayward Lbr. & Inv. Co. v. Construction Products Co.*, 110 Cal.App.2d 1, 241 P.2d 1054. In that action, the court found that defendant had properly exercised its option to renew the lease pertaining to the real property, and it was found not to have breached any of its obligations under the contract.

In April, 1951, plaintiff instituted the present claim and delivery action, to which defendant answered by pleading its lawful possession under its lease. By amendment to its answer, defendant further alleged that it had renewed its lease by written notice on December 29, 1950, and entered a plea in abatement by virtue of its favorable judgment in the unlawful detainer action, in which an appeal was then pending. At the outset of the trial, the trial court received evidence concerning the plea in abatement and refused a continuance of the proceedings on the grounds that the adjudication of the issues in the unlawful detainer action were not determinative of the issues in the case at bar. In rendering a judgment in plaintiff's favor in this replevin action, the court found that on December 29, 1950, defendant made an ineffectual attempt to renew its lease for a period of one year from the date of its expiration and that this "attempted renewal was not in accordance with the terms of the agreement of July 12, 1949, and was promptly rejected by the plaintiff." The court further found that the agreement covering the personal property expired of its own force on December 31, 1950, and "that defendant did not validly exercise its option to renew said Agreement for an additional period of two years as provided therein; that there was no termination of said Agreement by plaintiff by reason of any default upon the part of the defendant."

[1, 2] Defendant contends that the court erred in its construction of the letter of December 28, 1950, as an attempt to renew the lease of personalty solely for the year 1951, and as such was an insufficient

exercise of the option contained therein, which provided for a renewal on a two-year basis. The disputed part of the letter reads: "We are continuing our lease in accordance with our lease contract for the year 1951 for the factory and the machinery and tools." Defendant argues that the reference to the year 1951 should be interpreted only as applying to the real property, which defendant was entitled to renew on a year to year basis; however, since there was but one option for a renewal covering the tools and machinery, it contends this option was properly taken up in the letter stating the lease was being continued "in accordance with our lease contract." Whatever plausibility this argument might have is greatly diminished by defendant's follow-up letter of January 3, 1951, in which Mr. Wells refers to the letter of December 28, 1950, as an exercise of "our option for the factory and machinery and tools *for the coming year of 1951.*" (Italics added.) The letter of January 3d clarifies whatever uncertainty existed in defendant's notice of December 28th and confirms defendant's *proposal* to renew the lease on the personal property for only a one year period rather than an *acceptance* of the option to extend it for two years. This later letter furnishes substantial support for the court's finding or, more accurately stated, conclusion that defendant's notice of renewal was "ineffectual." Therefore we cannot agree with defendant that there is no evidentiary basis for the court's finding or that its construction of the instrument referred to is wrong. This is particularly true where, as here, there is extrinsic evidence clarifying the crucial document and the inferences are conflicting. In such case, where the finding of the court is compatible with the evidence, it will not be disturbed on appeal. *Johnston v. Landucci*, 21 Cal.2d 63, 69, 130 P.2d 405, 148 A.L.R. 1355; *Davis v. Stulman*, 72 Cal. App.2d 255, 269, 164 P.2d 787.

[3] The determination that defendant's attempted exercise of the option was not in accordance with the agreement is consistent with the settled principle, "applicable to options as to other contracts, that the offer must be accepted in the terms in which

it is made, and the alteration of such terms * * * is tantamount to a rejection of the original offer and the making of a counter offer; * * *." *Alexander v. Bosworth*, 26 Cal.App. 589, 597, 147 P. 607, 611. A striking parallel is presented in the case of *Carney v. Heisch*, 67 Cal.App. 465, 227 P. 780, where the lease provided for a renewal "for a * * * period of two years". The lessee gave notice that he was exercising his option "for a further period of * * * one year". In rendering a judgment for the lessee, it was there stated, 67 Cal.App. at page 467, 227 P. at page 780: "A notice of an election to renew in order to be binding upon the lessor must state an intention to renew on such terms and for such a period as are specified in the lease. If the lessee has an option to renew for a period particularly specified * * * a notice by him that he will renew for a different period * * * is nugatory, and it may be ignored by the lessor. In fact, such a notice of an election to renew the lease on different terms is an offer, not to renew, but to make another lease, and it will be regarded by the law as an implied election not to renew the old lease." Plaintiff was justified, therefore, upon receipt of defendant's letter, in replying that defendant had "failed to give timely, or any," notice of intention to exercise the option. Defendant cannot complain that the court resolved the doubts arising from any ambiguity in the language chosen in the letter-notice against the author of that instrument. *Wilck v. Herbert*, 78 Cal.App.2d 392, 178 P.2d 25.

[4-7] Defendant urges that the evidence shows that at various times during 1950 it gave oral notice to plaintiff of its intention to renew the lease in question. An examination of the testimony referred to does not support this claim. To avail himself of an option of renewal given by a lease, a tenant must apprise the lessor in unequivocal terms of his unqualified intention to exercise his option in the precise terms permitted by the lease. 32 Am.Jr., sec. 979, p. 822. See *Braun v. Leo G. MacLaughlin Co.*, 93 Cal.App. 116, 120-121, 269 P. 191. The evidence cited by defendant relates to generalized and amorphous conversations be-

tween the parties regarding some immediate problem under discussion; there is no affirmative, well-defined expression on the part of the defendant showing a specific intention to exercise the option in the lease upon the terms available to it. Defendant failed to sustain its burden of showing an acceptance within the requirements of the rule above stated. See *Callisch v. Farnham*, 83 Cal.App.2d 427, 430, 188 P.2d 775. Defendant further argues that no notice of intention to exercise the option was required—that a mere holding over after December 31, 1950, constituted a valid acceptance of the offer, without more. But no authorities are cited, and we have found none, which support this proposition with respect to a lease of personal property. On the contrary, the rule has been stated that the hold-over doctrine of real estate leases does not apply to the hiring of personalty, 8 C.J. S., *Bailments*, § 41, p. 323, and that the mere act of retaining possession of personal property will not imply a renewal of a contract in the absence of an agreement thereto by the parties. 6 Am.Jr., sec. 334, p. 433.

[8-15] Defendant contends that under the facts and circumstances here present the trial court should have applied the equitable principle of relief against a forfeiture under section 3275 of the Civil Code. To this there are several answers. First, if defendant wished to raise this as an equitable defense, it should have been specially pleaded in its answer. The party relying upon an equitable defense must plead it with some particularity. *Swasey v. Adair*, 88 Cal. 179, 182, 25 P. 1119. Defendant's answer does not ask relief under section 3275, nor does his answer contain any averments suggesting relief from a forfeiture was sought. 21 Cal.Jur., p. 137. Second, "[s]ection 3275 presupposes that the party seeking relief is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application [citing cases]." *Barkis v. Scott*, 34 Cal.2d 116, 120, 208 P.2d 367, 370. The findings herein specifically declare "that there was no termination of the said Agreement by plaintiff by reason of any default on the part of the defendant." Third, there is scant analogy between the

present situation and the circumstances in the two decisions cited by defendant, *Kaliterna v. Wright*, 94 Cal.App.2d 926, 212 P.2d 32, and *Title Insurance & Guaranty Co. v. Hart*, 9 Cir., 160 F.2d 961, 970. In the *Kaliterna* case, the lessor contended that the lessee was not entitled to renew his lease, despite the lessor's previous waiver of minor breaches. The court held that plaintiff was not in default, and so had not forfeited his option to renew. The *Hart* case involved the similar problem of whether a lessee guilty of certain breaches and violations of covenants in a lease had forfeited his right to exercise an option to renew, notice of which was properly given. In both of the above cases, the court provided for relief against forfeiture by a liberal interpretation of forfeiture provisions in the lease itself, which is the sound and correct application of equitable principles. In the matter at bar, however, the judgment against defendant was based upon its failure to exercise the option as required by its particular terms. An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. Since the optionor is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option. See *Wightman v. Hall*, 62 Cal.App. 632, 634, 217 P. 580. By varying the terms of the option in his purported renewal, defendant in effect rejected the option, which became extinguished with the expiration of the term of the lease. Section 3275 is therefore inapplicable in these circumstances.

[16, 17] Defendant contends that the decision in its favor in the unlawful detainer action is *res judicata* of the issues in the current litigation. This is without merit. One of the principal requirements for the application of the doctrine of *res judicata* is: Was the issue decided in the previous action identical with the one presented in

the present suit? *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892. In *Stark v. Coker*, 20 Cal.2d 839, 843, 129 P.2d 390, 393, the court points out that only such matters are adjudicated in a prior judgment which appear upon its face to have been adjudicated or which were necessarily included therein, and that "when it affirmatively appears that an issue was not determined by the judgment, it obviously is not *res judicata* upon that issue." Likewise, the rule may not be invoked merely because the rights, claims or demands arise out of a subject matter involved in a prior litigation, so long as they constitute separate or distinct causes of action which were not placed in issue in the former case. *Title Guarantee & Tr. Co. v. Monson*, 11 Cal.2d 621, 631, 81 P.2d 944.

[18] It is thus apparent that defendant cannot properly call to his aid the principle of *res judicata*. The former action was concerned solely with the real estate, and the judgment settled the issue of defendant's right to renew its lease of the realty and the fact that it had given proper notice of renewal for a one year period. In the present proceeding, the issue related to whether defendant had exercised its option to renew its lease as to the personalty, which was contained in a separate clause of the agreement between the parties and was not involved in the former action. The causes of action in the two proceedings were thus separate and distinct, although arising out of the same subject matter. Hence, a judgment in the first proceeding creates no obstacle to this proceeding for the recovery of personal property, since no issue was tendered or adjudication had thereon in the former action. *Title Guar. & Tr. Co. v. Monson*, *supra*; *Daugherty v. Board of Trustees*, 111 Cal.App.2d 519, 522, 244 P.2d 950.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

PEOPLE v. JONES.*
Cr. 4911.

District Court of Appeal, Second District,
Division 1, California.

April 13, 1953.

Hearing Granted May 11, 1953.

Defendant was convicted of a violation of Penal Code, section 288, making it a felony to commit lewd or lascivious acts upon a child with specified intent, and from an order of the Superior Court of Los Angeles County, John J. Ford, J., denying motion for new trial, defendant appealed. The District Court of Appeal, Doran, J., held that whether accused was a sexual deviate or capable of having the necessary intent was not a proper subject for opinion evidence.

Order affirmed.

1. Criminal Law ⚖️469

Testimony of physician specializing in psychiatry that in his opinion accused was not a sexual deviate and was not capable of having the necessary intent to be lustful sexually was properly excluded in prosecution for committing lewd or lascivious acts upon a child. Pen.Code § 288.

2. Criminal Law ⚖️449(2), 469

Whether one accused of committing lewd or lascivious acts upon a child is a sexual deviate or is capable of having the necessary intent is not a proper subject for opinion evidence, either by an expert or layman. Pen.Code, § 288; Code Civ.Proc. § 1875.

3. Criminal Law ⚖️304(1)

Human nature is as much a law of nature as the law of gravitation within meaning of statutory provision for judicial notice of the laws of nature. Code Civ. Proc. § 1875.

4. Criminal Law ⚖️304(3)

It is common knowledge that sexual abnormality, in whatever form or manner it may be manifested, is the product and result of physical tendencies and not mental.

5. Criminal Law ⚖️304(3)

It is common knowledge that there is no cure for sex tendencies, whether normal or abnormal.

* Subsequent opinion 266 P.2d 38.

6. Criminal Law ⚖️20

The word "intent", as used in Penal Code, is a common word meaning design or purpose. Pen.Code, § 7, subd. 16, §§ 20, 21.

See publication Words and Phrases, for other judicial constructions and definitions of "Intent".

7. Infants ⚖️13

Statute making it a felony to commit lewd or lascivious acts upon a child with "intent" of arousing lust and passions uses quoted word as meaning commission of such acts for the purpose of arousing lust or passions. Pen.Code, § 7, subd. 16, §§ 20, 21, 288.

8. Criminal Law ⚖️1119(4)

Record on appeal from conviction of violation of statute making it a felony to commit lewd or lascivious acts upon a child with specified intent did not disclose any misconduct of district attorney. Pen. Code § 288.

Bertram H. Ross, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from an order denying a motion for a new trial.

Defendant was found guilty by a jury of violating section 288 of the Penal Code. The victim was a nine year old girl. It is unnecessary to relate the obnoxious details.

Appellant's brief recites, "We cannot complain that there was an insufficiency of the evidence to support the verdicts of the jury, but we are of the opinion that the testimony was so close in this case and the issue was in such sharp conflict that any errors in law occurring at the trial would justify a reversal."

It is appellant's contention, as pointed out in the brief on appeal that,

"For a reversal of this case we rely upon two errors committed by the Trial Court;

the first one relates to the offer of proof of appellant whereby appellant offered to produce Dr. James Solomon, a duly licensed physician and surgeon under the laws of the State of California, specializing in psychiatry * * *. Appellant offered to prove that if produced Dr. Solomon would testify that at the request of the attorney for appellant he examined appellant on two occasions; one without the use of drugs, and on the second occasion with the aid of a drug known as sodium pentathol; that as a result of these examinations he reached the conclusion and opinion that appellant was not a *sexual deviate* and he was not capable of having the *necessary intent* to be lustful either for himself or to satisfy the lust of a child of 9½ years of age, sexually." (Italics added.)

"This offer of proof was rejected by the court."

Appellant cites *People v. Camp*, 26 Cal. App. 385, 147 P. 95, 96. In the *Camp* case defendant was charged with a similar offense on a 14 year old boy. With reference to the argument advanced by appellant therein the Court commented as follows:

"The other objection of appellant relates to a question addressed to an expert as to what effect such acts charged against defendant would have in 'arousing the feelings or gratifying the lust or passions or sexual desires of the man in the case.' This *seems* to be a matter of expert testimony. A peculiar knowledge of the human system is requisite to answer the question intelligently. It would be a reflection upon the average and normal man to hold that such expert assistance is not needed. The normal man, it may be assumed, has no such knowledge nor experience as would qualify him to determine, without the aid of an expert, the neurotic or orgasmic effect of such indecent acts. On the contrary, if it should be conceded that the objection to the question addressed to the physician should have been sustained, it would follow that the error was without prejudice, for the reason that we must assume no other inference than the one embraced in said opinion can possibly be indulged. Whether a matter of

expert or of common knowledge, in other words, we must hold, there can be no dissent from the conclusion that such acts would have such effect upon the lustful desires of one bestial enough to be guilty of such conduct." (Italics added.)

Actually the *Camp* case is not decisive. The court does not hold that as a matter of law such "expert" testimony is proper. The court's comment is only that it "*seems*" to be.

Appellant also cites *People v. Sellers*, 103 Cal.App.2d 830, 230 P.2d 398, 399. The *Sellers* case is not held to appellant. Incidentally the court commented as follows:

"Defendant assigns as error the refusal of the court to permit a physician specializing in neurology and psychiatry to express an opinion as to whether, after having made a complete psychiatric examination, defendant was to any extent a homosexual. Defendant's argument is to the effect that by reason of the admissibility of evidence against a defendant of other sex crimes for the purpose of showing his tendency in that regard, he should be permitted to offer expert testimony that he is not a homosexual. He concedes that there are no authorities sustaining his position.

"The law does not make a distinction as to the type of person who may commit the act charged. It is a punishable offense whether the person is normal or abnormal."

[1, 2] The ruling of the trial judge was proper. Whether a defendant, in such circumstances, is a "sexual deviate" or is "capable of having the necessary intent" is not a subject for opinion evidence, either by a so-called expert or a layman. To hold otherwise would open the gates to a flood of worthless evidence that would result in a definite menace to law enforcement. It is the duty of the courts as well as law enforcement officials to enforce the laws. And this duty is especially important with relation to such offenses. Children, in particular, require protection.

[3-5] With relation to a consideration of the issue herein considered it should be emphasized that "courts take judicial no-

tice of * * * The laws of nature". Section 1875, C.C.P. In this connection it must be conceded that human nature is as much a law of nature as the law of gravitation. And inasmuch as all human conduct is the product of human nature it is to be expected that such offenses will occur in the future as they have in the past since the dawn of history. It is common knowledge that this sexual abnormality, in whatever form or manner it may be manifested, is the product and result of physical tendencies and not mental. Such tendencies and afflictions are evidenced by what the individual does and not by the answers to questions by a so-called psychiatrist. And it is common knowledge that there is no cure for sex tendencies, whether normal or abnormal. Those afflicted may be unfortunate, but they are fully conscious of such affliction and well aware that the manifestation thereof in most cases is a felony. To transfer the determination of the guilt or innocence of those charged with such offenses to the psychiatrists would be a definite menace to law enforcement and the protection of society.

Appellant also cites *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53. The Wells case does not support appellant's contention. In the Wells case the offense was alleged to have been committed with "malice aforethought". No plea of insanity was interposed. Evidence somewhat similar to the evidence offered in the within action was offered in the Wells case. It was excluded and the ruling was upheld. The Wells case includes a comprehensive review of the subject of intent as it relates to the issue herein.

Section 7 of the Penal Code, subd. 16, provides that "Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning".

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[6] The word intent is not a "technical" word, nor has it "acquired a peculiar and appropriate meaning". It is a common word which simply means design or purpose.

[7] The Penal Code further provides that, "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence". Section 20, P.C. In other words, there must be a joint operation of act and purpose. And section 21 of the Penal Code provides, "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." Thus the purpose and design is manifested as the law provides and not otherwise. There is nothing in the Penal Code that even suggests that the legislature contemplated a scientific, technical or particular mental limitation in the use of the word intent. Statutory construction and interpretation respects the rule as provided in section 7 of the Penal Code quoted above. For example burglary, which is defined as the entry of any house, room, etc., with intent to commit grand or petit theft, simply means entering for the *purpose* of committing such theft. And section 288 of the Penal Code which provides that any person who shall wilfully and lewdly, etc., commit the acts referred to therein with intent of arousing, etc., the lust and passions etc., simply means committing such acts for the *purpose* of arousing the lust or passions of the person upon whom such acts are committed. Such interpretation is in accordance with "the approved usage of the language".

[8] As to appellant's contention that the district attorney was guilty of misconduct, the record fails to support appellant's contention in this regard.

For the foregoing reasons, the order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

117 Cal.App.2d 322

ATHENS LODGE NO. 70 v. WILSON et al.

Civ. 15468.

District Court of Appeal, First District,
Division 1, California.

April 15, 1953.

Action by unincorporated fraternal association for injunctive relief against rival organization which allegedly was engaging in unfair competition and unfair, misleading and untrue advertising, and which allegedly was using plaintiff's name. The Superior Court, County of Alameda, Thomas J. Ledwich, J., entered decree granting the relief sought, and defendant appealed from the judgment roll. The District Court of Appeal, Bray, J., held, *inter alia*, that plaintiff could sue in its own name to enjoin such acts.

Affirmed.

1. Trade-Marks and Trade-Names and Unfair Competition ⚡88

Statutory definition of "persons" in subdivision 4 of statute relating to enjoining acts of unfair competition would not be restricted in application to only those subdivisions preceding subdivision four, in view of fact that subdivision 5, which authorizes a person acting for interests of itself, its members or the general public to bring action for injunction, would in part have no meaning unless statutory definition were applicable to subdivision 5. Civ.Code, § 3369, subs. 2, 4, 5.

2. Trade-Marks and Trade-Names and Unfair Competition ⚡88

Unincorporated fraternal association was such a "person" as could sue in its own name to enjoin unfair competition and unfair, untrue and misleading advertising by rival fraternal group under statute providing for enjoining of unfair competition. Civ.Code, § 3369.

See publication Words and Phrases, for other judicial constructions and definitions of "Person".

3. Trade-Marks and Trade-Names and Unfair Competition ⚡91

Statute authorizing suits to enjoin unfair competition authorizes unincorporated association to maintain such suit in its own name. Civ.Code, § 3369, subs. 2, 4, 5.

4. Trade-Marks and Trade-Names and Unfair Competition ⚡68(1.7)

The use of the phrase "shall mean and include" in statutory definitions of unfair competition contained in statute relating to enjoining of unfair competition showed that the definition was not restrictive or exclusive. Civ.Code, § 3369, subd. 3.

5. Trade-Marks and Trade-Names and Unfair Competition ⚡70(3)

Statute relating to enjoining of unfair competition is not limited to unfair business competition, but includes unfair competition against fraternal organization, and use of name of unassociated fraternal organization by rival organization was "unfair competition" within such statute. Civ. Code, § 3369, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Unfair Competition"

Robert C. Burnstein and Popper & Burnstein, Oakland, for appellants.

Edward D. Mabson, San Francisco, for respondent.

BRAY, Justice.

In an action for injunctive relief against the defendants' acts of unfair competition, plaintiff was granted a judgment finding that defendants are engaging in unfair competition and unfair, misleading and untrue advertising, and restraining them from using plaintiff's name and from doing any fraternal business or affairs in such name. It also ordered defendants to return to plaintiff certain personal property. Defendants appeal on the judgment roll alone. No contention is made that the findings do not support the judgment.

Sole Question.

Does section 3369, Civil Code, provide that an unincorporated fraternal association may sue in its name to enjoin unfair competition and unfair, untrue and misleading advertising by a rival fraternal group?

Plaintiff brought this proceeding pursuant to that section. Plaintiff is an unincorporated fraternal organization some 40 years old having a membership of 125 per-

sons. Throughout this proceeding defendants have continually raised the question of plaintiff's legal capacity to sue. On this appeal they raise no other question.

Is Plaintiff a Jural Entity?

Both parties agree that at common law and under general California law an unincorporated association is not a jural entity, and, therefore, may not sue in its name. See *Case v. Kadota Fig Ass'n*, 35 Cal.2d 596, 220 P.2d 912; *Juneau, etc., Corp. v. Int'l Longshoremen*, 37 Cal.2d 760, 235 P.2d 607; and 39 Cal.Law Rev. 264. None of these authorities discuss the section upon which this suit is based. Plaintiff contended and the trial court held that section 3369, Civil Code, provides that an action under that section may be brought by an unincorporated association in its name. That section provides, in part: "2. Any person performing or proposing to perform *an act of unfair competition* within this State may be enjoined in any court of competent jurisdiction. 3. As used in this section, unfair competition *shall mean and include* unfair or fraudulent business practice and unfair, untrue or *misleading advertising* * * *. 4. As used in this section, the term *person shall mean and include* natural persons, corporations, firms, partnerships, joint stock companies, *associations and other organizations of persons*. 5. *Actions for injunction under this section may be prosecuted* by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association *or by any person* acting for the interests of *itself, its members* or the general public."¹

[1,2] It will be noted that subdivision 4 expressly states that the term "person" includes in addition to natural persons, practically all known entities including "associations and other organizations * * *." Defendants contend, first, that the definition of "persons" in subdivision 4 refers only to persons mentioned in subdivision 2 which subdivision refers only to

persons who can be sued. No reason is given for the proposition that a definition appearing in a code section without limitation refers only to the subdivisions preceding it. Likewise, such contention ignores the fact that subdivision 5 refers to a "person acting for the interests of itself, its members * * *." If, as defendants contend, "person" in subdivision 5 is not "person" as defined in subdivision 4, the language "acting for the interests of itself, its members * * *" has no meaning, for, of course, a natural person acts for himself and has no members.

[3] Defendants' second contention is that section 3369 merely grants to an association a substantive right, namely, that of suing for injunctive relief, and gives it no procedural right to sue in its name. This, again, ignores the provision in subdivision 5 that a person (i. e., an association) may act for the interests of itself or its members.

The fact that section 382, Code of Civil Procedure, see *Florence v. Helms*, 136 Cal. 613, 69 P. 429, would have permitted a member of plaintiff to bring this type of action in his representative capacity in no wise detracts from the conclusion that the language of section 3369 shows that the Legislature intended to make an exception to the general rule in cases brought under that section.

Sections 2466-2468, Civil Code, concerning fictitious names, do not apply, as plaintiff is not "transacting business in this state" in the sense there required. See *Warman Steel Casting Co. v. Redondo Beach C. of C.*, 34 Cal.App. 37, 166 P. 856, holding that the Redondo Beach Chamber of Commerce was not engaged in "any business" referred to in section 388, Code of Civil Procedure; *Security-First Nat. Bank of Los Angeles v. Cooper*, 62 Cal.App. 2d 653, 145 P.2d 722; and *Herald v. Glendale Lodge No. 1289*, 46 Cal.App. 325, 189 P. 329, holding that the respective Elks lodges are not business concerns.

There is nothing in the rules concerning statutory construction cited by defend-

1. Unless otherwise noted, all emphasis added.

ants which is out of harmony with our construction of section 3369. Thus the rule in *Whitney v. Dodge*, 105 Cal. 192, 38 P. 636, and *In re Marquez*, 3 Cal.2d 625, 45 P.2d 342, and other cases cited by defendants, that all statutes must be construed with reference to well-known principles and rules of law existing at the time of enactment; in *Chilson v. Jerome*, 102 Cal.App. 635, 283 P. 862, that a statute should be construed so as to harmonize and give effect to the whole system of the law of which it forms a part, and also that a statute having a special application controls a general one—all these rules support the conclusion that in section 3369 the Legislature was making an exception to the general rule, and, for the purpose of actions under that section, was creating the concept that an association was a person.

Unfair Fraternal Competition.

[4,5] Defendants contend that section 3369 is limited to unfair business competition and does not include unfair competition against a fraternal organization. Subdivision 2 provides that any person performing "an act of unfair competition" may be enjoined. Subdivision 3 states that "unfair competition" shall "mean *and include* unfair or fraudulent business practice *and unfair, untrue or misleading advertising* and" acts denounced by certain sections of the Penal Code making certain types of false advertising misdemeanors. While defendants' construction is a possible one it is not a compelling one. In subdivision 3 there is no limitation of "unfair, untrue or misleading advertising" to business advertising. Moreover, the very language in that subdivision, "unfair competition" "shall mean *and include*" the situations thereafter set forth, shows that the definition is not restrictive or exclusive. Nor is the fact that, as we stated in *Most Worshipful Lodge v. Sons, etc., Lodge*, 94 Cal.App.2d 25, 210 P.2d 34, it is well established that a fraternal association may enjoin the use of their name by a rival organization (the question of bringing action in the name of such association was not

considered) any indication that the Legislature intended section 3369 to be limited to business practices and organizations.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



116 Cal.App.2d Supp. 925

HELGESON et al. v. FARMERS INS. EXCHANGE et al.

No. 2243.

Appellate Department, Superior Court,
City and County of San Francisco,
California.

March 6, 1953.

Action involving question as to whether an attorney who had been employed by plaintiffs who were involved in accident with an insured person was authorized to endorse plaintiffs' names on settlement checks payable to plaintiffs and himself as attorney. The trial court entered a judgment adverse to the defendants and the defendants appealed. The Superior Court, Appellate Department, Molkenbuhr, J., held that attorney was not authorized to endorse plaintiffs' names on settlement checks.

Judgment affirmed.

1. Principal and Agent ⇐109(4)

Test as to whether an agent has authority to endorse a negotiable instrument is whether agent can perform duties of agency without exercise of such authority.

2. Attorney and Client ⇐99, 101(1)

Although plaintiffs, involved in accident with an insured person, employed attorney to represent them in impending litigation and authorized attorney to negotiate for settlement of plaintiffs' claims, such attorney was not authorized to endorse plaintiffs' names on settlement checks payable to plaintiffs and himself as attorney.

Hoberg & Finger, San Francisco, for plaintiffs and respondents.

Belcher & Koller, Oakland, for defendants and appellants.

MOLKENBUHR, Judge.

In this case, plaintiffs were involved in an accident with one Donald Akar, who was insured by the defendant carrier. Thereafter plaintiffs employed an attorney to represent them. Subsequently an agent of the defendant called upon plaintiffs with reference to their claim, but was told to see their attorney who had been employed to represent them in the impending litigation and who was authorized to enter into negotiations for a settlement of their claims. Thereafter an offer of settlement in the sum of \$1,250 was made to settle both claims to the attorney by the defendant; said settlement was approved by plaintiffs. Thereafter defendant delivered to the attorney releases and two checks in settlement of the respective claims, payable in each instance to the claimant and the attorney. Though plaintiffs signed the releases, they never endorsed nor saw the checks, because the attorney forged the names of the claimants on each check and, after placing his own signature on each of the checks, deposited them to his own credit in the bank; the attorney absconded with the proceeds of the two checks. Plaintiffs seek to recover the sum of \$1,250; defendant contends that the attorney had authority to endorse the checks by signing his client's name.

Query: Under the circumstances, did the attorney have ostensible authority to write or forge the names of his clients on the checks and deposit them to his personal account? In our opinion he did not. Not having the authority to so endorse, de-

fendant must now pay to plaintiffs the amount of the settlement.

[1, 2] The test, apparently, for ascertaining the question of an agent's authority to endorse a negotiable instrument is this: Can the agent perform the duties of his agency without the exercise of such authority? In our opinion, the attorney in the present case could have performed without his signing the names of his clients on the checks. Though there are some authorities which appear to hold to the contrary, we are of the opinion that the majority and better rule is that where an attorney is hired to perform the kind of services he was to perform for the plaintiffs here, he was not authorized to endorse the names of his clients on checks payable to the clients and himself, as attorney. 7 C.J.S., Attorney and Client, § 104, p. 928; Berlowitz v. Horowitz, 250 App.Div. 728, 293 N.Y.S. 450; Central Trust v. Hahn-Jacobsen Co., Ohio App., 33 N.E.2d 388; Holloway v. Barbee, 203 N.C. 713, 166 S.E. 895; Crahe v. Mercantile Trust & Svgs. Bank, 295 Ill. 375, 129 N.E. 120, 12 A.L.R. 92; Rosacker v. Commercial State Bank, 191 Minn. 553, 254 N.W. 824, 94 A.L.R. 551; Jennings v. President and Directors of Manhattan Co., 203 App.Div. 802, 197 N.Y.S. 401.

While the defendant, in drawing the checks to the order of the attorney as well as the claimants did so in good faith, it unintentionally assisted the attorney to violate his duty in appropriating the money to his own use, and the responsibility must fall on the defendant. Berlowitz v. Horowitz, supra.

Judgment is affirmed.

KAUFMAN, P. J., and DEVINE, J., concur.

**Guardianship of SMITH et al.
HOWES v. COHEN.***

L. A. 22209.

Supreme Court of California, in Bank.

April 17, 1953.

Rehearing Granted May 14, 1953.

Proceeding in the matter of the estate and guardianship of minor children. From an order of the Superior Court, Los Angeles County, appointing daughter of children's deceased mother guardian of the persons of the minors, their father appealed. The Supreme Court, Carter, J., held that natural father, provided he was a fit and proper person for such purpose, was entitled to appointment as guardian of illegitimate minor children in preference to daughter of children's deceased mother.

Order reversed.

Schauer and Edmonds, JJ., and Gibson, C. J., dissented.

For prior opinion, see, Cal.App., 246 P.2d 147.

I. Bastards ⇐15

While the best interests of illegitimate minor child constitute the important factor in determining custody of child, parents have a superior claim as against the world to custody of child, if they are fit and proper persons to have such custody. Civ.Code, §§ 138, 196, 196a, 200; Probate Code, §§ 1406, 1407(1-4).

2. Guardian and Ward ⇐10

Natural father, provided he was a fit and proper person for such purpose, was entitled to appointment as guardian of the persons of his illegitimate minor children, following death of their mother, in preference to older daughter of children's deceased mother. Civ.Code, §§ 196, 196a, 200, 230; Probate Code, §§ 1406, 1407(1-4).

Hahn, Ross & Saunders and Saul Ross, Los Angeles, for appellant.

Clore Warne and Maxwell E. Greenberg, Los Angeles, as amici curae on behalf of appellant.

Juaneita M. Veron, Huntington Park, for respondent.

CARTER, Justice.

Frieda Howes petitioned to be appointed the guardian of the persons of Leland Smith, a minor of eight, and Sharon Smith, a minor of six, brother and sister. She alleged that she is the sister of the minors; their mother is dead; their father is Harry Cohen and all reside in Los Angeles, California; that the minors are now under her care and she has supplied and cared for them since the death of their mother; their "natural" father, Cohen, has "remarried" and has a family of the second marriage; that the only relatives of the minors are their father, petitioner, and a brother, Paul Smith, who lives with petitioner; that they have no estate. Cohen filed objections to the appointment and requested that he be appointed guardian stating that he is the "natural" father of the minors, they being the illegitimate children of Cohen and Marguerite Smith, deceased, their mother.

The court found all of the allegations of both Frieda and Cohen are true; that both Frieda and Cohen are "fit and proper" persons to be the guardians of the minors and have their custody and control; and that it is "to the best interest and welfare" of the minors that Frieda be appointed guardian. It was so ordered and Cohen appeals. He asserts that being the father of the children, although they are illegitimate, he has preference in the selection of their guardian, he being a fit and proper person.

[1] When the mother and father of an illegitimate child are both alive and he has not been legitimated, the mother is entitled to his custody, services and earnings to the exclusion of the father. Civ.Code, § 200; In re Gille, 65 Cal.App. 617, 224 P. 784; Strong v. Owens, 91 Cal.App.2d 336, 205 P.2d 48; Pierce v. Jeffries, 103 W.Va. 410, 137 S.E. 651, 51 A.L.R. 1507. Both the mother and the father are responsible for his support. Civ.Code, §§ 196a, 196; Schumm v. Berg, 37 Cal.2d 174, 231 P.2d 39, 21 A.L.R.2d 1051; Reed v. Hayward, 23 Cal.2d 336, 144 P.2d 561. On the death of the mother the natural father is entitled to the custody of an illegitimate child if he

is a fit person. See *Commonwealth ex rel. Harper v. Fuller*, 142 Pa.Super. 98, 15 A.2d 518; *Hayes v. Strauss*, 151 Va. 136, 144 S. E. 432; *Aycock v. Hampton*, 84 Miss. 204, 36 So. 245, 65 L.R.A. 689; *Moritz v. Garnhart*, 7 Watts (Pa.) 302, 32 Am.Dec. 762; *People ex rel. Meredith v. Meredith*, 272 App.Div. 79, 69 N.Y.S.2d 462, affirmed 297 N.Y. 692, 77 N.E.2d 8. It has been held repeatedly that, while the best interests of an illegitimate child is the important factor, the parents of such a child have a superior claim as against the world to his custody if they are fit and proper. *Armstrong v. Price*, Mo.App., 292 S.W. 447, mother; *Jensen v. Earley*, 63 Utah 604, 228 P. 217, mother; *In re Gille*, supra, 65 Cal.App. 617, 224 P. 784, mother; *Ex parte Wallace*, 26 N.M. 181, 190 P. 1020, father; *Garrett v. Mahaley*, 199 Ala. 606, 75 So. 10, father; *Lewis v. Crowell*, 210 Ala. 199, 97 So. 691, father; *People ex rel. Meredith v. Meredith*, supra, 272 App.Div. 79, 69 N.Y.S.2d 462, affirmed 297 N.Y. 692, 77 N.E.2d 8; *State v. Nestaval*, 72 Minn. 415, 75 N.W. 725; *Jackson v. Luckie*, 205 Ga. 100, 52 S. E.2d 588; *Ex parte Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294; *Ex parte Malley*, 131 N.J.Eq. 404, 25 A.2d 630; *French v. Catholic Community League*, 69 Ohio App. 442, 44 N.E.2d 113; *Com. ex rel. Human v. Hyman*, 164 Pa.Super. 64, 63 A.2d 447; *Templeton v. Walker*, Tex.Civ.App., 179 S.W.2d 811; *Henderson v. Henderson*, 187 Va. 121, 46 S.E.2d 10; *Petition of Dickholtz*, 341 Ill. App. 400, 94 N.E.2d 89; 7 Am.Jur., Bastards, §§ 61-66; 10 C.J.S., Bastards, § 17; *Pierce v. Jeffries*, 103 W.Va. 410, 137 S.E. 651, 51 A.L.R. 1507. The same rule has been applied with respect to the custody of legitimate children. Civ.Code, § 197; *Roche v. Roche*, 25 Cal.2d 141, 152 P.2d 999; *Stever v. Stever*, 6 Cal.2d 166, 56 P. 2d 1229; cases cited 13 Cal.Jur. 153-5. It is further held in those cases that as between a parent and a stranger the custody cannot be awarded to the latter unless the parent is found to be unfit and improper as custodian. This is in line with the principle that "The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion", *Lerner v. Superior Court*, 38 Cal.2d 676, 681, 242 P.2d 321, 323, and "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter", *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645, and "For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 627, 67 L.Ed. 1042. Hence extreme caution must be observed in depriving a parent of the custody of his child. If he is fit, the child should not be taken from him by vague applications of the concept that the best interests of the child come first. Otherwise there is no limit to the extent courts may go. They may base parental deprivation of custody on what they consider better financial or social standing, educational background, nation-

ality, race, or religion, etc., although the fitness of the parent is apparent. Merely because some other person may be more fit should not be a basis for defeating the parent's natural right. If without finding the parent unfit the general conclusion is reached that the best interests of the child require that a stranger be his custodian, the necessary hypothesis is that although the parent was fit, the court decided someone else was more fit. That means that the state acting through its courts may completely eliminate all parental rights. The next step would be for the state to assume complete and arbitrary power over children contrary to the principles enunciated in the Lerner, Prince and Meyer cases, *supra*. Our conclusion does not mean that the child is a chattel belonging to the parent nor that the state does not have a vital concern in the welfare of the child and the right to make regulations in that field. Rather it gives protection to the parent's right of custody which is founded upon the importance of the family relationship in this country.

It is suggested however that the cases cited *supra* Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999; Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, for the proposition that if the parent is a fit person he is entitled to the custody as against a stranger, are based upon *In re Campbell*, 130 Cal. 380, 62 P. 613, and cases following it which in turn was based upon code provisions relating to guardianship and custody of children which were changed in 1931 when the probate code was adopted. There has been, however, no substantial change in the statutory law. When the Campbell case was decided in 1900, § 246 of the Civil Code provided that in awarding the custody of or appointing a guardian for a minor the court is to be guided by what is for the best interests of the child, Civ.Code, § 246(1), and of two persons "equally" entitled to the custody in "other respects," preference is to be given first to "a parent" Civ.Code, § 246(3) (1). Section 1751 of the Code of Civil Procedure provided that the father or mother of a child under fourteen years if found by the court to be competent as a guardian is "entitled" to be appointed guardian of the

child "in preference to any other person." In the Campbell case it was said that the right of the parent existed at common law and under § 1751. "* * * it is made the duty of the court to appoint the father or mother of the minor, 'if found by the court competent to discharge the duties of guardianship.' But under this provision, and under the general law, the *prima facie* presumption is that the parent is competent; and hence the court is not authorized to appoint another as guardian, unless it finds to the contrary. Hence the section is to be construed as if it read that the father or mother is to be appointed 'if not found by the court incompetent,' etc. The fact of the competency or incompetency of the father was therefore the controlling question in this case, and, as there is no finding on the point, the findings must be regarded as insufficient to support the order appealed from." *In re Campbell*, *supra*, 130 Cal. 380, 383, 62 P. 613, 614. When the probate code was adopted in 1931 the provisions for guardians were placed therein. Section 1406 of the Probate Code then provided and still does that in appointing a guardian of a child the court is to be guided by what is for the best interests of the child, substantially the same as former section 246 (1) of the Civil Code, *supra*. Section 1407 of the Probate Code provided that: "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows:

"(1) To a parent;

"(2) To one who was indicated by the wishes of a deceased parent;

"(3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;

"(4) To a relative".

And it is the same at present except for the addition of a subdivision not here pertinent. It is substantially the same as former section 246(3) of the Civil Code and section 1751 of the Code of Civil Procedure. The former section 1751 said that a parent is "entitled" to custody if competent in preference to any other person but section 1407 of the Probate Code means substantially the same thing. When it

says of the persons equally entitled in other respects, that is, fitness, preference shall be given first to a parent. That means that the parent has the first right. At least the change is not sufficient to indicate that the Legislature intended to change a long and almost universally established rule which is based upon sound policy. Moreover section 197 of the Civil Code still remains the same in providing that the father and mother of a legitimate child are equally *entitled* to his custody. Similar remarks are applicable to the amendment to section 138 of the Civil Code, Stats.1931, p. 1928. Prior to 1931 it had been provided that in divorce actions the court may award the custody of children as may seem proper. The amendment added, that in awarding the custody the court is guided by what appears for the best interest of the child and states the order of preference as between parents. Yet section 197 which specifically provides that the parents are equally entitled to custody was not changed. It does not appear therefore that the firmly established rule of preference for parents over strangers was intended to be changed.

[2] Hence we believe it is clear that under the present statutes and authorities a parent if fit is entitled to the custody of his child, legitimate or illegitimate, and the court cannot award him to a stranger merely because it deems the latter more fit.

There is an additional factor in the instant case. As far as appears the minors have not been legitimated. By awarding their custody to the father they are more likely to be legitimated because "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Civ. Code, § 230. Unless the father has the right to custody it is not probable that he will receive the minors into his home and thus legitimate them.

The order is reversed.

SHENK and SPENCE, JJ., concur.

TRAYNOR, Justice (concurring).

I concur in the judgment.

[1, 2] Before the enactment of the Probate Code in 1931, it was settled that as between a parent and a stranger the former was entitled to the custody of his child unless found to be unfit. In *re* Campbell, 130 Cal. 380, 383, 62 P. 613; *Estate of Akers*, 184 Cal. 514, 522-523, 194 P. 706; In *re* Mathews, 174 Cal. 679, 683, 164 P. 8; *Newby v. Newby*, 55 Cal.App. 114, 116, 202 P. 891. The cases so holding relied among other things on the provision in the former Code of Civil Procedure section 1751 that "The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person." Although section 1751 was repealed when the Probate Code was enacted and the quoted provision was not included therein, the old rule has repeatedly been followed. *Stever v. Stever*, 6 Cal.2d 166, 170, 56 P.2d 1229; *Roche v. Roche*, 25 Cal. 2d 141, 143-144, 152 P.2d 999; *Eddlemon v. Eddlemon*, 27 Cal.App.2d 343, 344, 80 P.2d 1009; *Guardianship of De Ruff*, 38 Cal.App.2d 529, 530, 101 P.2d 521; *Guardianship of McCoy*, 46 Cal.App.2d 494, 498, 116 P.2d 103; In *re* White, 54 Cal.App.2d 637, 640, 129 P.2d 706; *Guardianship of Case*, 57 Cal.App.2d 844, 848, 135 P.2d 681; *Heinz v. Heinz*, 68 Cal.App.2d 713, 714-715, 157 P.2d 660; *Guardianship of Slood*, 92 Cal.App.2d 296, 297-298, 206 P.2d 862; *Becker v. Becker*, 94 Cal.App.2d 830, 833, 211 P.2d 598; *Wilkinson v. Wilkinson*, 105 Cal.App.2d 392, 400, 233 P.2d 639.

This rule has been criticized on the ground that it subordinates the interests of the child to those of the parent by requiring the court to award custody to a fit parent even though it may have found that the best interests of the child would be served by awarding custody to a stranger. *Shea v. Shea*, 100 Cal.App.2d 60, 66-67, 223 P. 2d 32; *Guardianship of Casad*, 106 Cal. App.2d 134, 151, 234 P.2d 647; 33 Calif.L.

Rev. 306; 19 So.Cal.L.Rev. 72. It may reasonably be contended that by omitting the quoted provision of section 1751 from the Probate Code, the Legislature intended to abrogate the theretofore established rule. Such a contention finds support in the provisions of section 138(1) ¹ of the Civil Code and section 1406 ² of the Probate Code that stress the relevance of the best interests of the child in awarding custody or appointing a guardian. On the other hand, section 1407 ³ of the Probate Code recognizes the preferred position of the parent, and section 197 of the Civil Code provides that the parents "of a legitimate unmarried minor child are equally entitled to its custody" and that if either is "dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings."

The objection to the rule that custody must be awarded to the parent unless he is unfit carries the harsh implication that the interests of the child are subordinated to those of the parent when the trial court has found that the best interests of the child would be served by giving his custody to another. The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child. The rule requiring that custody be awarded to such a parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent; it merely serves to define the area of the parent's responsibility for the welfare of the child. The court's

statutory duty to be "guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare". Probate Code § 1406 encompasses the view that the child's welfare is part of the responsibility of a fit parent.

One gains perspective by recalling that families are ordinarily allowed to function without outside interference though their wisdom in the upbringing of children may vary as widely as the physical heritage or economic advantages they give their children. Unless the upbringing of the child is so defective as to call for action by the juvenile court, it is unlikely that an outsider will challenge the parental custody or seek by legal process to prove that the child's welfare would best be served elsewhere. It is generally understood that the stability of established family units would be jeopardized by outside interference.

It is only when the family is dissolved by death, divorce or separation that conflicting claims to custody are likely to arise. If the parents are divorced and no third parties are involved, the court of necessity arbitrates whatever conflicting claims the parents may have to the custody of the children. If one parent dies, however, or upon divorce is unable or unfit to have custody of a child, outsiders may enter the picture and attack the competence of the other parent to have custody or contend that the child would be better off with them. The problem may also arise if the parent awarded custody at the time of divorce dies or for other reasons is no longer able to care for the child, or if one or both parents have through necessity been unable for a time to care for the child themselves, but thereafter seek to regain custody from outsiders whose assistance they had solicited in the interim.

1. "In awarding the custody the court is to be guided by the following considerations:

"(1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare * * *."

2. "In appointing a general guardian of a minor, the court is to be guided by what

appears to be for the best interest of the child in respect to its temporal and mental and moral welfare * * *."

3. "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows:

"(1) To a parent * * *."

Ordinarily in any of these circumstances the determination of what course will best serve the interests of the child will involve the consideration of numerous imponderables. All things being equal, it is clear that the parent should have custody. All things are ordinarily not equal, however. The outsider may be able to offer the child greater material advantages. In the case of the death of the parent having custody after divorce, the child may be on more intimate terms with relatives or a new spouse of the deceased parent than with the other parent who has not had custody. If the child has not been in the custody of either parent he may have been successfully integrated into the home of the person who has been caring for him. The parent seeking custody may have remarried so that if custody is awarded to him, the child will be faced with the problem of adjusting to a stepparent. On the other hand, the importance of preserving the relationship between a natural parent and his child cannot be gainsaid. Even in a case where the foster parent treats the child as his own, the child may still suffer from the lack of a natural parent in the eyes of his playmates, or natural children or other relatives of his foster parent may discriminate against him. If he gets into trouble, members of his foster family may be tempted to point out that he is not really one of them. Moreover, even if the child is required to make some sacrifice to be with his natural parent or adjust to a new environment, it does not necessarily follow that his welfare will be correspondingly impaired. It may not be to the best interest of the child to have every advantage. He may derive benefits by subordinating his immediate interests to the development of a new family relationship with his own parent, by giving as well as receiving. Thus, although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.

The facts of the present case aptly illustrate the problem. The two children lived with their mother and half sister until their mother's death. At that time they were eight and six years of age. Their

home was disrupted by their mother's death, and both their half sister and their father now seek their custody. The trial court has found that both are fit and proper persons. It may be assumed that the children wish to stay with their sister and that their lives will be less disrupted at this time if they are allowed to remain with the relative they know best. On the other hand, unless custody is given to their father they will remain to all intents and purposes orphans. If their friends inquire about their father they will either have to fabricate a story or admit their illegitimacy. If their sister marries, her husband might be unwilling to have them in his home. If the children are awarded to their father, they will become legitimate. Civil Code § 230. They will be placed in a normal home environment with one natural parent and will suffer social embarrassment only to the extent that their past may become known to their friends. In all likelihood the care and support they will receive from their father will be greater if they move into his home than if they remain essentially strangers to him. There are thus many considerations that support the conclusion that their best interests would be served by awarding custody to their father. There are also considerations that support the contrary conclusion of the trial court.

Psychology is not an exact science. If expert testimony were introduced in cases such as this in all probability it would be in conflict. The ordinary judge as well as the ordinary parent lacks the omniscience accurately to evaluate all of the various considerations that may enter into a custody problem. "The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion." *Lerner v. Superior Court*, 38 Cal.2d 676, 681, 242 P.2d 321, 323. If a parent is fit he will be vitally concerned with the best interests of his child. By leaving to him the responsibility as to how those interests will be best served the court simply recognizes that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the

state can neither supply nor hinder. *Pierce v. Society of Sisters*, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645.

Cases may arise in which the child's interests would be seriously prejudiced by awarding custody to his parent. In such cases, however, the parent's insistence on his right to custody despite the harm that would clearly result to his child will itself be evidence of his unfitness. In *re Bensfield*, 102 Cal.App. 445, 449, 283 P. 112; *Guardianship of Casad*, 106 Cal.App.2d 134, 152, 234 P.2d 647.

In the present case the appeal is upon the judgment roll alone, and for the purposes of this decision we must accept the finding of the trial court that the father is a fit and proper person to be appointed guardian of the children. It bears emphasis, however, that the father of an illegitimate child comes before the court in at best a questionable light. Although past indiscretions do not necessarily demonstrate present unfitness, *Prouty v. Prouty*, 16 Cal. 2d 190, 193-194, 105 P.2d 295; In *re Green*, 192 Cal. 714, 721, 221 P. 903; see also, *Clarke v. Clarke*, 35 Cal.2d 259, 261-262, 217 P.2d 401, such a father should be required to explain why he has not legitimated his child. A father who has the power to do so but does not, demonstrates his unfitness by his willingness to inflict upon his child the status of illegitimacy. Such a father must not be allowed to bargain with the court by offering to exercise his power to legitimate in exchange for custody. On the other hand, a desire to secure custody may be the outgrowth of a moral rehabilitation reflected in an effort to undo a past wrong by legitimating the child.

A father may legitimate his child by marrying the mother, Civil Code § 215, or "by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child". Civil Code § 230. On the record before us we must assume that

the father did not legitimate his children because he was unable to do so. At the present time the father is married. To legitimate the children now he must have the consent of his wife to receive the children into his family. Civil Code § 230. There is no express finding that his wife is willing to receive the children into the family. On retrial the father must establish that the children will be legitimated as a minimum prerequisite to establishing his fitness for appointment as guardian.

SCHAUER, Justice, dissenting to opinion of CARTER, J.

I dissent.

Upon this appeal, which appellant has chosen to prosecute on the judgment roll alone, he makes no contention that it would be to his children's best interest and welfare to be under his custody and control. On the naked legal ground that he is the natural father and that the court has not found him "unfit," he seeks reversal of the order appointing as guardian of the children their sister (perhaps half-sister), respondent herein, Frieda Howes, who has supported and cared for them since the death of their mother.

Appellant does not even aver that he desires custody and control of the children. He did not initiate proceedings seeking to be appointed guardian of these children and he does not allege that he ever has had them in his custody, or heretofore sought their custody, or that he ever has supported them. He appears only in response to the petition of Frieda and has contented himself with filing a document entitled "Objections to Appointment of Guardian and Counter-Petition for Appointment of Guardian" wherein he merely "objects to the appointment of said Frieda Howes as the Guardian of said children and desires that *if it is deemed by the Court necessary* that a Guardian be appointed, that he be appointed Guardian of said children." (Italics added.) It is also noted that in Frieda's petition for appointment as guardian the word "illegitimate" does not appear; the name of the mother does not appear; the fact of non-marriage is not alleged; the pertinent and sufficient

averments in respect to the mother are the simple words "Mother deceased." How different are appellant's sensibilities! In his objections to Frieda's appointment he bluntly avers "That said minor children are the illegitimate children of petitioner and their mother, Marguerite Smith, now deceased."

How eloquently it thus appears on the face of the judgment roll that even though appellant has not been adjudicated "unfit," and has rather been decreed legally "fit," whatever that may mean, he continues now to be as indifferent to the welfare of the children as, from the fact that they were born out of wedlock and that he does not claim to have ever had their custody,¹ it may be presumed he has been from the beginning. Could it be that the real ground for appellant's objections to having the children's adult sister appointed their guardian is a fear that in the interests of these minors she might seek to compel this man to contribute suitably to their support?

And there is still further affirmative evidence in this record, mere judgment roll though it be, of appellant's lack of concern for these children. Appellant asserts in his brief (and respondent concurs in this statement) that the hearing on the guardianship matter "was extremely brief and was based principally upon the report of the Probation Officer and upon an interview in Chambers between the trial judge and the two minor children." The substance of the interview is not shown in the record and the preference expressed by the children does not specifically appear, but appellant urges that such preference "*is immaterial.*" (Italics added.) Can we doubt what that preference is?

Appellant argues further that "it is still the law of this State that a parent has a superior right to the custody of his minor

children, provided only he is fit and proper to have such custody and *regardless of whether or not it would be better for such children to be with a stranger.*" (Italics added.) Therefore, concludes appellant, the trial court "in awarding the guardianship of the children * * * to a stranger [their sister or half-sister who was caring for and supporting them] against the wishes of the father who was a fit and proper person to have their custody, abused its discretion." It seems to me that on this record it is this court which abuses its discretion in reversing the order of the trial court and condemning these children to a custody inimical to their "best interest and welfare."

Let us look further at this record. Nowhere therein nor in his briefs does appellant come forth with a clear and unequivocal declaration that he is willing to support his children, that he desires their personal custody, that he loves them and that he wants to best serve their welfare, and on that account wants to be their guardian; likewise, he does not even state that he wishes to receive them into his family and otherwise treat them as if they were legitimate, either in order that they may thereby become legitimated as provided by the Civil Code (§ 230), or in order to see to it that their best interest and welfare are subserved in other respects as well. Rather, the whole tenor of appellant's pleadings, briefs, and arguments indicates that he is stepping carefully around an assertion that he now wishes to assume full responsibility for the children, instead suggests that his chief interest is that no one else be placed in a position to assert rights of the children as against him, and that any authority he may have over the children not be lost, as would result from the appointment of another as their guard-

1. So far as the record on appeals shows appellant does not claim to have supported the children or even to have made any contribution toward their support. However, on the oral argument before us, one of the justices, going outside the record, asked counsel for appellant "Did he ever support the children?", and counsel replied "Yes." The inquiring justice also asked counsel for the respondent the

question "The father did support these children?" and counsel responded "The father contributed somewhat to their support, yes." There was no stipulation that the record should be augmented by adding all or any part of the quoted questions and unsworn answers, or that any of such "evidence" was before the trial court.

ian (Civil Code, § 204, subd. 1.). The entire record tends to confirm the conclusion of the trial court that the best interest and welfare of the children lie with their sister, respondent herein, rather than with appellant.

This case appears to me to again illustrate the poignant undesirability, which I pointed out in my dissent in *Roche v. Roche* (1944), 25 Cal.2d 141, 144-149, 152 P.2d 999, of requiring the trial court to find a parent to be "unfit" before it can confide the custody of a child to another person, even when the child's best interests are found to be with the other. Who can say what "fit" or "unfit" may mean to different judges? If the term be cheapened to mean less fit by comparison—and there are those who argue that such interpretation should be given to it—then the finding that the best interests of the children require that they be placed with one person rather than with another is in effect a finding that, by comparison, the one is unfit. But why should these children, already bearing the burden of having illegitimate parents (which, as noted hereinabove, their father in this record has unnecessarily alleged and has evidenced no concern about removing) be further burdened with a finding that their natural father is "unfit" to be their guardian? The statute does not require it. The children are both less than ten years of age and it may well be that at some future time changed circumstances and changed attitudes of the father, and perhaps the wishes of the children themselves, will indicate that it would thereafter serve their best interest and welfare to be with the father.

As declared in the dissent in the *Roche* case, it is my view that we should have confidence in trial judges and in the processes of the law which enable them to view and hear at first hand the children, the parents and other claimants, and that their discretion in the premises should not be so rigidly limited as is done by the rule followed by the majority here. To require a trial court to find a parent "unfit" in order that it may accord the children their right to have their best interest and welfare promoted appears

to me to be harsh, legalistic, unfair to both the children and the parent, and in contravention of the legislative intent.

Regardless of differences of opinion as to the desirability of the rule as applied in the *Roche* case it is quite unnecessary to apply it here. For this holding today there is neither statute nor precedent which requires it. The holdings of *In re Campbell* (1900), 130 Cal. 380, 62 P. 613, and *In re Mathews* (1917), 174 Cal. 679, 164 P. 8 (see also *Estate of Wise* (1918), 179 Cal. 423, 426, 177 P. 277; *In re Green* (1923), 192 Cal. 714, 721, 221 P. 903) that a parent of a minor child under fourteen years of age, if found by the court to be "competent to discharge the duties of guardianship" was entitled to be appointed guardian in preference to a non-parent, regardless of the best interest of the child, are both based upon the specific language of the first sentence of former section 1751 of the Code of Civil Procedure. That sentence was, however, repealed in 1931, and not reenacted, although the other provisions of the section were reenacted as sections 1406 and 1410 of the Probate Code. It thus appears that the Legislature, in recognition of what seems to me to be the protest expressed by this court in *In re Mathews*, supra, and *Estate of Wise*, supra, against statutes construed to require that the property right of a parent in a child be considered superior to the best interest and welfare of the child, wisely decided to, and did, remove such requirement from the law of this state.

In the *Mathews* case, decided in 1917, the court pointed out (page 683 of 174 Cal. 164 P. 8), that "It is argued with great force that the trend of modern decisions is to regard as of primary importance the welfare of the minor himself. This is most true. The decisions to this effect are made either under the permission of the law, which contains no such restriction as that found [in 1917] in our section 1751, or else are given under the command of the law which, in effect, declares that over and above all else the controlling consideration shall be the welfare of the child. If we were thus at liberty to act, it might well be that the custody of this child, under the

findings of the court, would be given to [the non-parent with whom the child had been living for some ten years] * * *."

It is therefore my view that the courts of this state are no longer required by statute to arbitrarily disregard the welfare of the child whenever a legally "fit" parent is making claim, and need no longer adhere to the view expressed in *In re Campbell* (1900), supra, 130 Cal. 380, 382, 62 P. 613, that the right of the parent in the child is similar to that of the owner of property in his chattel and must "be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property * * *." To place this property right conception of a parent's claim to children over and above the welfare of the children seems to me to be a throwback of generations if not of centuries. The mandate of our Legislature as expressed in section 1406 of the Probate Code is that "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question * * *." These provisions, when construed with the provision of section 1407 of the same code, that "Of persons equally entitled *in other respects* to the guardianship of a minor, preference is to be given as follows: (1) To a parent; * * *" (italics added), appear to me to require that the first concern of the court should be directed toward determining "what appears to be for the best interest of the child in respect to its temporal *and* mental *and* moral welfare" (italics added) as specified by section 1406, and that only when the sum of all of these aspects of the child's welfare will be subserved equally well by having the parent as guardian will the parent's right be held as a matter of law superior.

I am further of the view that such a philosophy, rather than tending toward the weakening of family relationships and the assumption of arbitrary state control over children, will work towards the contrary result. Where, as here, although the parent

is found legally "fit," it does not appear that as between parent and child there ever has been a family relationship, and where the parent's concern for his children's welfare and his wish to serve their best interests are unestablished and appear to be highly questionable, how can it be considered that any family relationship that might be established with him would be more desirable than that heretofore and presently enjoyed by the children with their sister, respondent herein who, it seems, has cared for them as a labor of love? Is it not more likely that they will grow to mature, responsible, adulthood, to take a useful place in society, when living in the home in which the trial court found their best interest resides, rather than being compelled to leave that home for such abode, if any, as the father may be inclined to designate? Although I believe there is no question but that in the vast majority of cases the best interest of the child will lie with the natural parent and that trial judges surely can be depended on to so find, it nevertheless seems to me that this case points up and again emphasizes the necessity, the justice, and the rightness, of permitting trial judges the exercise of a wise discretion in deciding problems of custody and guardianship of children. There are many things in this record which, in the interests of the children, seem to cry aloud for support of the trial court's order, yet none of those things suggests that the trial judge should have found the father to be "unfit" to have custody of children. Indeed it would have been a cruel and unnecessary act (almost as cruel and unnecessary as the act of this court today) for the trial court to have found the father "unfit" to have custody of children, for there is another finding in the record. It is that this "Natural father is remarried and has a family of the second marriage." To this second family appellant well may be not only a legitimate husband and father but in truth a "natural" and a kindly, considerate one. Yet however fit he is in a legalistic sense, he may be the last one who, for the interests of the children, should be appointed their guardian.

The findings establish that the children have no estate. Such findings also estab-

lish, directly or impliedly, that the appellant is the one person who is primarily liable for the support of the children and against whom the guardian should assert rights on behalf of the children. But this court holds that as a matter of law, since appellant is not legally "unfit," the welfare of the children cannot even be considered, let alone given effect.

It should be mentioned that there are some assumptions in the majority opinion, and many in the concurring opinion of Justice TRAYNOR, which appear to be inconsistent with the trial court's findings, and to be indulged to the end of supporting a reversal rather than an affirmance. The concurring opinion also speaks of a new trial. There is no occasion for a new trial. On the majority holding appellant is, as a matter of law, entitled to guardianship papers.

Also demanding mention is the concurring opinion's statement that "On retrial the father must establish that the children will be legitimated as a minimum prerequisite to establishing his fitness for appointment as guardian." This statement, if there were to be a new trial and it was accepted by the trial court, might well work a manifest injustice to the appellant father, and to his wife, and occasion unnecessary suffering both to these children and to the presently legitimate children of appellant and his wife. It may be, or it may not be, to the best interests of the children involved here that they be taken into the home and family of appellant. There might develop a quite natural resentment on the part of the legitimate children of the established family to what they could consider to be an intrusion. Their remarks to neighborhood children could lead to cruelties and griefs which only the sensitive can fully understand and which only the callous would willfully inflict. There can be far more sinister influences on the life of a child than the legal status of illegitimacy. If the appellant here has all the virtues which the concurring opinion assumes for him, then his good faith determination that the welfare of these children will best be served by not taking

them into his household should be respected. In any event it is to me unthinkable that a trial court should find the appellant father here, if he is a good husband and father to his present family, to be "unfit" to have the custody of the children whose welfare is here at stake. However, in the interests of materiality, it should again be pointed out that the record in this case contains no suggestion that the appellant wants the personal custody of the children; his only expressed and pleaded concern is that the sister be *not* appointed guardian and only "if it is deemed by the Court necessary that a Guardian be appointed, that he be appointed Guardian of said children."

Although I have not discussed the question of illegitimacy as bearing upon any right of the father (except as it may be relevant before the trial court in determining what is for their best interest), it may be noted that while under the provisions of section 1403 of the Probate Code the consent of both parents, if living and capable of consent, is required for the appointment by will or deed of a guardian of a child, nevertheless the mother alone may make such appointment if the child is illegitimate. Also, section 1405 of the same code provides that the court may appoint a guardian "when no guardian has been appointed * * * by will or by deed * * *." These sections would appear to me to cast further doubt upon the absolute legal right here sought to be asserted by appellant-father. (See *In re Britt* (1917), 176 Cal. 177, 167 P. 863; *In re Imperatrice* (1920), 182 Cal. 355, 358, 188 P. 48.)

I would affirm the order appealed from.

GIBSON, C. J., concurs.

EDMONDS, Justice (dissenting).

The trial court found that for "the best interest and welfare" of the minor children whose custody is in controversy, Frieda Howes should be appointed guardian of their persons. The record fully supports and justifies that determination and I would affirm the order based upon it.

**EDMONDS et al. v. LOS ANGELES
COUNTY et al.
L. A. 21915.**

Supreme Court of California, in Bank.

April 14, 1953.

Rehearing Denied May 14, 1953.

Petition seeking declaration of plaintiffs' claimed right under zoning ordinance to maintain trailer court as a nonconforming use of their residentially zoned property. The Superior Court, Los Angeles County, entered judgment that plaintiffs could continue their operations of a trailer court to the extent of twenty trailers, and from that portion of the judgment defendants appealed. The Supreme Court, Spence, J., held that the evidence showed that plaintiffs had accepted the exception which permitted them to have thirty additional trailers on the property for three years and which permitted them to construct additional sanitary facilities upon condition that at the end of three years, since expired, the entire nonconforming use would be abandoned.

Portion of judgment appealed from reversed.

Edmonds, Carter and Schauer, JJ., dissented.

Prior opinion 236 P.2d 650.

1. Declaratory Judgment ⇨345

In proceeding seeking declaration of plaintiffs' claimed right under zoning ordinance to maintain trailer court as nonconforming use of their residentially zoned property, evidence showed that plaintiffs had accepted exception granted by board of supervisors for additional trailers and sanitary facilities upon condition that at end of three years, since expired, plaintiffs would abandon entire nonconforming use.

2. Counties ⇨21½

Failure of persons seeking exception to zoning ordinance so as to maintain expanded nonconforming use to execute written agreement or to file faithful performance bond as required by county board of supervisors which granted exception upon condition that nonconforming use be entirely abandoned at end of three years did not alter binding effect of such persons' verbal acceptance of conditional exception.

3. Counties ⇨21½

Where operators of trailer court, which constituted nonconforming use of residentially zoned property, accepted all benefits bestowed on them by exception granted by county board of supervisors for additional trailers and sanitary facilities upon condition that entire nonconforming use would be abandoned at end of three years and secured their state and local permits on basis of such exception, they would not, upon expiration of three-year period, be allowed to challenge effectiveness of the conditional exception.

4. Municipal Corporations ⇨601(23)

The rights of users of property as those rights existed at time of adoption of zoning ordinance will be protected.

5. Municipal Corporations ⇨601(23)

A continued nonconforming use must be similar to the use existing at the time the zoning ordinance became effective, and in determining whether the nonconforming use was the same before and after passage of zoning ordinance, each case must stand on its own facts.

6. Counties ⇨21½

The spirit underlying county zoning ordinance which allowed continuance of particular existing use for prescribed period was to restrict, rather than to increase, nonconforming uses.

7. Counties ⇨21½

Enlargement of trailer court, which had consisted of 20 trailers at time county area was zoned for residential purposes, to accommodate 30 more trailers, was a different use of the property from that contemplated by ordinance which allowed continuance of particular existing use for prescribed period.

8. Counties ⇨21½

Alleged fact that public welfare would not be endangered by added number of trailers on property being used for trailer court as nonconforming use was without significance in determining whether such addition would make the use different from that existing at time county ordinance became effective.

9. Municipal Corporations Ⓒ601(25)

A nonconforming use does not entitle owner of property to increase size of his permanent building.

10. Counties Ⓒ21½

Where county zoning ordinance prohibited increase in number of trailers on property being used for trailer court and prohibited any increase in size of buildings on the property, trailer court operators, in absence of exception, could not construct additional sanitary facilities.

11. Estoppel Ⓒ85

Where operators of trailer court, which consisted of 20 trailers and sanitary facilities, and which constituted nonconforming use, had accepted for three years benefits of exception which permitted them to have 30 additional trailers on the property and which permitted them to construct additional sanitary facilities upon condition that at end of three years entire nonconforming use would be abandoned, and such operators had orally agreed to abide by such condition, operators were bound thereby under theory of promissory estoppel. Civ.Code, § 3521.

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Richard Richards, Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff sought a declaration of their claimed right under a zoning ordinance to maintain a trailer court as a nonconforming use of their residentially zoned property. The trial court held that they were entitled to continue with their operation of a trailer court to the extent of twenty trailers, and from the portion of the judgment so declaring, defendants appeal. It is defendants' contention that plaintiffs' right to make any use of their property for trailer court purposes no longer exists as the result of the parties' agreement limiting such use to a three-year period, which has long since expired. The record sustains defendants' position.

Prior to November 9, 1945, plaintiffs maintained a trailer court for twenty trailers on their property, consisting of five lots in an area zoned as C-3, wherein trailer courts were permitted. They first started their trailer court operations on two lots and then expanded their business to include three more lots, all conducted as a single unit in accommodating twenty trailers under permits from the state and licenses from the county. On the mentioned date the property was rezoned to R-4, restricting it to residential use only. The rezoning had no retroactive effect upon plaintiffs' business or property, and they were expressly entitled thereunder to twenty years within which to liquidate their "particular existing use"—a twenty-trailer court operating on five lots.

Plaintiffs' business increased during the post-war period, and by mid-July, 1946, they had forty-eight trailers on their five lots, despite the fact that they had permits and sanitary facilities for only twenty. In short, as of that time, plaintiffs were maintaining their trailer court in flagrant disregard of both local and state laws: violating the local zoning ordinance in exceeding the permitted nonconforming use of their property; and violating the state law in operating with more than twice the number of trailer spaces permitted by their existing state permits and without the required increased sanitary facilities. Plaintiffs then undertook to legalize their illegal operation, and they applied to the Division of Housing of the State Department of Industrial Relations for a permit for thirty additional trailers. They were informed that they would have to secure a clearance from the local zoning authorities. They then went to the Regional Planning Commission with a "Petition for Zone Exception," seeking an outright exception for a trailer camp without mention of any limitation as to number of authorized trailer spaces, and applying for permission to install certain plumbing fixtures. In their petition it is stated: "This property has been continuously used as a trailer camp for over four years. It now becomes necessary to construct certain sanitary facilities to comply with the state law for housing

and this zoning exception is sought for the purpose of bringing an existing, non-conforming installation within the scope of the regulation governing the same."

The previously obtained state permits, one in 1941 and one in 1942, authorized respectively the operation of "ten camp spaces" and "ten additional camp spaces." These permits made particular reference to the sanitary facilities required by state law, Health and Safety Code, sec. 18460 et seq., but actual building permits were required from the local authorities. However, what plaintiffs were seeking in their 1946 applications to the authorities was not a mere incidental permit to construct additional sanitary facilities, but rather a permit from the state to maintain a larger trailer court and an exception from the local planning commission to permit them to operate with more trailer spaces than were involved in the permitted pre-existing use under the zoning ordinance.

[1] In response to plaintiffs' petition, the Regional Planning Commission recommended a one-year exception, provided that plaintiffs would abandon the entire non-conforming use at the end of that time. Plaintiffs were dissatisfied and took an appeal to the Board of Supervisors. The latter, after a controversial hearing on October 15, 1946, granted plaintiffs an exception on condition that they abandon the entire nonconforming use of their property for trailer court purposes at the end of three years. The trial court found that plaintiffs did not accept this condition but the undisputed facts show that this finding is not supported by the evidence.

The conditional exception was granted at a public meeting of the board. Plaintiff Francis Edmonds was present in person and by his counsel. When the matter was first considered, the inclination of the board was to grant the exception subject to the one-year limitation as recommended by the planning commission. Plaintiffs' counsel

then suggested a three-year conditional exception and urged Edmonds to accept it if the board would indicate a willingness to agree thereto. But Edmonds refused, claiming that a five-year exception was necessary in order to permit time for the completion of his planned construction of multiple residential units on the property in conformity with existing zoning regulations. However, at one place in his argument Edmonds said: "I would be willing to take whatever conditions are necessary," After considerable discussion of the debated point, the board offered the exception subject to a three-year limitation. It was emphasized that at the end of that time the entire nonconforming use would have to be abandoned. Edmonds again refused. Thereupon it was explained to him that if he persisted in his refusal, he would be granted no exception and would be limited to twenty trailers. He was urged to "reconsider" as a "last chance" and he replied: "I would reconsider on my attorney's advice." Apparently some of the members of the audience attending the meeting had not understood the whole proceeding, and the situation was summarized by one of the board members as follows: "Mr. Edmonds has said on advice of his attorney he would reconsider and comply with the provisions as we have made them. Is that right, Mr. Edmonds?" The latter's reply was: "That is right." Another member of the board further clarified the situation by immediately restating the main condition of the exception in these words: "That all that property be cleared of trailers three years from today." Thereupon a vote was taken on the motion to grant the conditional exception; and in the presence of Edmonds and his counsel, it was passed by the board three to one. A partial transcript of the hearing was introduced in evidence as an exhibit and is quoted below.¹

Formal notification of the board's action was transmitted to plaintiffs by letter from the Regional Planning Commission. In so

1. "Synopsis No. 107 October 15, 1946
Excerpt from Long Public Hearing
in Zoning Case No. 1678

"There were present Supervisors Leonard J. Roach, John Anson Ford, Raymond V. Darby and Roger W. Jessup.

"Supervisor Roach was Chairman pro tem. in the absence of Chairman Wm. A. Smith

* * * after about an hour of hearing * * *

"Mr. John L. Richerson (RPC spokes-

noting approval of plaintiffs' application for a zone exception and the main condition that plaintiffs cease the use of their property as a trailer court after three years, the commission referred to the board's further proviso that a faithful performance bond be filed and that an agreement to comply

be executed. Plaintiffs failed to fulfill these latter two conditions, and apparently because of such failure the trial court found that the exception was never accepted.

Shortly after the granting of the conditional exception by the local authorities, plaintiffs again applied to the Division

man): He can stay under the present circumstances for a period of twenty years, that is correct. However, the Regional Planning Commission in their recommendation stated that if the exception were granted that Mr. Edmonds agree in writing to eliminate the existing nonconforming trailer court at the end of one year."

"Mr. Hal Slane [Plaintiffs' Counsel]: He would be giving up a 20-year right to maintain a trailer park on two lots for a temporary extension and I think it should be a minimum of three years on the other three lots. I feel sure that at the end of the three years his building situation will be such that he can reasonably expect to complete his multiple dwelling units. He intends to start building those as soon as he can, but you know how difficult it is to get started, and as fast as they are built he will remove the trailers as he goes down the line. I know that my clients will not agree to forfeit their 20-year right unless they are given an adequate time in order to complete the whole project.

"Mr. Jessup: Mr. Chairman, I know that you suggested two years from January first, which makes 26 months, but I feel there would be a better feeling here with the operator of the trailer court if it were made three years, and so I make a motion that an extension of three years time be granted to the applicant.

"Mr. Darby: One of the provisions which is also required by the Regional Planning Commission is that Mr. Edmonds properly landscape and keep the property up and those of you who are interested, help him do it.

"Mr. Ford: Mr. Chairman, I would like to say at this time I think three years is really too much, but if the Chairman is willing to go along on three years I will defer to his judgment because he knows the situation better than I do, but in the light of the record and the manner in which this operator has proceeded, I don't like this type of evasion of the law and an attempt like a camel to get his head in the tent and then think he can get it legalized after he gets the whole camel in, and I think that there should be added to this a bond that this operator will do

certain things within a certain period of time, namely that he should put acceptable shrubbery that will meet the approval of the Planning Commission; that he shall install the necessary toilets and any other conditions that the Regional Planning Commission might suggest and I think that is not an unreasonable request in the light of his own record and at the proper time I will make that as an amendment to the motion. A bond of what amount would be a reasonable bond?

"Acting Chairman Roach: \$2000.00 would cover it.

"Mr. Jessup: I will include that in my motion.

"Acting Chairman Roach: The motion is to extend for three years—

"Mr. Slane: Mr. Edmonds would like to make a brief statement if you will permit him to do it.

"Acting Chairman Roach: The motion is that the extension be granted for three years period providing you deposit a bond of \$2000 to guarantee faithful performance of the provisions as outlined by the Regional Planning Commission.

"Mr. Slane: That would be the landscaping plus the additional toilet facilities as required by the State law.

"Mr. W. K. Judd: The State law provides for the additional toilets.

"Mr. Slane: They are already on their toes.

"Mr. Jessup: My motion would include the shrubbery which is not a part of the State law.

"Mr. Slane: One point of information and I think this will clarify it—that would be with the understanding that he would abandon the entire project at the end of the three years?

"Mr. Darby: That is right.

"Mr. Slane: In other words, by that time he would have either completed his multiple dwelling units or else move all the rest of the trailers?

"Mr. Darby: That is right.

"Mr. Slane: I want to be sure so he would understand, because he has one thing he wants to say.

"Mr. Edmonds: I don't feel that would be sufficient time for me and I would be unable to agree to it. I would be willing

of Housing for a permit to increase their trailer court by thirty spaces. Their application was granted but only after checking plaintiffs' clearance with the Planning

Commission. Plaintiffs also applied to the Department of Building and Safety for a permit to construct the necessary sanitary facilities, and approval of that application

to take whatever conditions are necessary. I feel that five years would be the very minimum that I would consider in order to abolish the entire camp.

"Mr. Roach: Then what do you want to do?

"Mr. Jessup: We make it three years and if he isn't off at the end of the three years, then of course the County will take what steps are legally necessary.

"Mr. Darby: I think you are making a mistake, Mr. Edmonds. You are making a mistake to make such a statement. I am in favor of voting for the motion.

"Mr. S. D. Ponti: May I say something? I think the man made application for an extension of time and now he withdraws and how can you grant it?

"Mr. Jessup: He is going to get three years and that is all and if he isn't off in three years—

"Mr. Ponti: He doesn't want three years.

"Mr. Darby: If he can't comply, that is up to him.

"Mr. Ponti: You are going to give the three years whether he wants it or not?

"Mr. Richerson: Mr. Chairman, I might clarify the fact that if Mr. Edmonds does not agree to abandon this use on the two southerly lots, he cannot be forced off of there until twenty years. If he agrees to the exception under those terms, then he can.

"Mr. Darby: He can be forced off the north three immediately.

"Mr. Jessup: We are going to drive a bargain with you right now. You are going to agree to this three years or I am going to change my motion.

"Mr. Edmonds: No.

"Mr. Jessup: I am going to change my motion right now.

"Mr. Ford: And make it one year?

"Mr. Darby: Make it nothing, out right now.

"Mr. Jessup: Or nothing and out completely.

"Mr. Edmonds: That is a considerable investment and I would rather take the consequences.

"Mr. Ford: What is your income? You get \$12 a month on how many trailers?

"Mr. Edmonds: There are 49 trailers, 48 of which are paying.

"Mr. Jessup: You have the right on two lots?

"Mr. Edmonds: That is right.

"Mr. Jessup: How many trailers on the two lots?

"Mr. Edmonds: Approximately 30.

"A Woman Speaker: The original permit was for 20 trailers.

"Mr. Jessup: I make a motion that Mr. Edmonds' request be denied.

"Acting Chairman Roach: The motion is to sustain the Planning Commission?

"Mr. Jessup: Yes.

"Acting Chairman Roach: If no objection, so ordered.

"Mr. Ford: Are you sure you don't want to consider that proposition on the three years?

"Mr. Darby: This is your last chance.

"Acting Chairman Roach: It is all over.

"Mr. Edmonds: I would reconsider on my attorney's advice.

"Mr. Darby: I move that we reconsider.

"Mr. Jessup: Then my original motion.

"Mr. Darby: Now vote on my motion to reconsider.

"Acting Chairman Roach: If no objection, so ordered.

"Mr. Jessup: Now I will renew my original motion.

"Acting Chairman Roach: Roll Call.

"Mr. Ford: Is it clear to the citizens who are here?

"(Calls of "no" from the floor.)

"Mr. Ford: Mr. Edmonds has said on advice of his attorney he would reconsider and comply with the provisions as we have made them. Is that right, Mr. Edmonds?

"Mr. Edmonds: That is right.

"Mr. Jessup: That all that property be cleared of trailers three years from today.

"Mr. Darby: From the first of November?

"Mr. Jessup: Yes.

"Mr. Roach: That involves the two lots that you already have.

"Mr. Jessup: That is right.

"Mr. Roach: The two lots in addition?

"Mr. Jessup: All the lots, everything is to be cleared off. This is final.

"Mr. Darby: This is it.

"Mr. Jessup: Now I am asking a vote on my motion.

"Roll call

"Mr. Ford: Aye.

"Mr. Darby: Aye.

"Mr. Jessup: Aye.

"Acting Chairman Roach: No.

"The motion carried."

likewise followed the department's ascertainment that the conditional exception had been granted. Plaintiffs do not dispute the uncontradicted evidence showing that neither of these permits would have been issued in the absence of the granting of the above mentioned conditional exception.

[2] Plaintiffs contend that they never accepted the conditional exception offered by the board, but a reading of the quoted transcript of the hearing negatives the force of their position. The only construction which can reasonably be placed upon Edmonds' action at those proceedings is that he finally expressed a willingness to follow the advice of his counsel and that he orally accepted the three-year conditional exception so as to obtain the board's favorable action on his application. Any possible ambiguity in any single statement becomes entirely clear by reading such statement in context. Edmonds' failure to execute a written agreement or to file a faithful performance bond could not alter the binding effect of Edmonds' verbal acceptance of the conditional exception in the proceedings before the board. See *Thompson v. Schurman*, 65 Cal.App.2d 432, 440, 150 P.2d 509.

[3] Nor is there merit to plaintiffs' further contention that throughout they have acted in conformity with their belief that they are unlimited as to the number of trailers which they may maintain in their trailer court. At no time prior to the commencement of this action were any agents of defendants informed of any such claim by plaintiffs. Never once during the entire proceedings culminating in the granting of the conditional exception did plaintiffs assert a claim to a nonconforming use unrestricted as to the number of trailers. On the contrary, it undeniably appears that plaintiffs throughout have acted in entire conformity with the conditional exception. They accepted all benefits bestowed on them, securing their state and local permits on the basis of the exception. Had they believed that they were entitled to maintain more than twenty trailers on their property under the existing nonconforming use, they would have so claimed, and in the face of administrative opposition, they would have

relied on the courts for vindication. Instead they proceeded as if they claimed no right, in the absence of the granting of the exception, to have more than twenty trailers on their property. In these circumstances plaintiffs should not now be allowed to challenge the effectiveness of the three-year conditional exception under which they have obtained definite advantages to which they were not otherwise entitled.

It may be conceded that if plaintiffs' right to the nonconforming use were unlimited in the number of trailers which might be placed on the property, it would continue for the twenty-year period created by the zoning ordinance regardless of the conditions attached to the exception. The exception would then have been unnecessary. In this connection, it should be noted that plaintiffs have not appealed from the judgment in this case which limits their trailer court to twenty trailers. However, they have appealed from the judgment in the companion case, *Edmonds v. Board of Supervisors*, Cal.Sup., 255 P.2d 781, which raises the issue of the number of trailers which may be placed on the property under the nonconforming use. In order to harmonize the result of the two cases which concern similar issues, the question of the number of trailers permitted by the nonconforming use will therefore be considered here.

[4,5] The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected. *Yokley*, *Zoning Law and Practice*, § 132, p. 255. Accordingly, a provision which exempts existing nonconforming uses is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses. *County of San Diego v. McClurken*, 37 Cal.2d 683, 686, 234 P.2d 972. However, the continued nonconforming use must be similar to the use existing at the time the zoning ordinance became effective, see *Rehfeld v. City and County of San Francisco*, 218 Cal. 83, 21 P.2d 419; *City of Yuba City v. Cherniavsky*, 117 Cal.App. 568, 4 P.2d 299, and in determining whether the

nonconforming use was the same before and after the passage of a zoning ordinance, each case must stand on its own facts. Yokley, *Zoning Law and Practice*, § 135, p. 261.

[6-8] The enlargement of plaintiffs' trailer court to accommodate thirty more trailers is clearly a different use of their property from that contemplated by the ordinance's allowance of the continuance of the "*particular* existing use" for a prescribed period, especially in view of the fact that plaintiffs were required to make significant increase in the size of their so-called "utility house" in order to provide the additional sanitary facilities required by the Health and Safety Code. Sections 18460 et seq. The spirit underlying the ordinance is to restrict rather than to increase the nonconforming use; and if trailers could be added to plaintiffs' trailer park as they saw fit during the twenty-year period of the automatic exception granted by the ordinance, it would be akin to legalizing the addition of new buildings in connection with the nonconforming use in defeat of the zoning purpose. Cf. *Wilbur v. City of Newton*, 302 Mass. 38, 18 N.E.2d 365, 368. There is no significance to plaintiffs' argument that it does not appear that the public welfare would be endangered by the added number of trailers on plaintiffs' property. As was said in *Rehfeld v. City and County of San Francisco*, supra, 218 Cal. 83, at page 85, 21 P.2d 419, at page 420: "* * * the whole value of zoning lies in the establishment of more or less permanent districts, well planned and arranged * * * [and if] * * * the courts are to re-examine each instance of inclusion or exclusion of property from a district, solely with regard to the dangerous or nondangerous character of the particular structure, and irrespective of the general scheme of the ordinance, then there is, of course, no possibility of ever achieving successful zoning."

The purpose of zoning in effecting the crystallization of present conditions and the constructive control of future development was recognized in the case of *City of Yuba City v. Cherniavsky*, supra, 117 Cal.App. 568, at page 573, 4 P.2d 299, at

page 301, where it was stated: "If there is no limitation upon the character or location of a nonconforming business, so long as it is located on the same lot where it formerly existed, then one may abandon an inexpensive notions counter which was maintained prior to the adoption of a zoning ordinance, and construct in lieu thereof an elaborate mercantile establishment at the opposite end of the same lot, at an unlimited expense, and thus circumvent and destroy the very purpose of the ordinance."

There is little difference in principle between enlarging a grocery business through relocation on a different part of the same property, as was the situation in the cited *Yuba City* case, and enlarging a trailer court business through the addition of trailer units for the housing of more people. In either situation the enlargement of the nonconforming business would involve a detrimental effect on surrounding property values in a residential area, as well as conflict with the purpose of zoning to restrict rather than extend the "existing" nonconforming use. In *Pisicchio v. Board of Appeals of Village of Freeport*, 165 Misc. 156, 300 N.Y.S. 368, at pages 369-370, it was appropriately said: "Unless owners of nonconforming uses in zoning areas are required to adhere to the excepted use in volume of trade as well as character of business, zoning laws will be rendered ineffectual and such favored parcels of property will assume great values based not upon a natural growth, but upon the right of the owner to extend and enlarge the existing nonconforming use."

The cases cited by plaintiffs permitting an extension of a nonconforming use under specified standards in the applicable zoning regulation, *People ex rel. Wohl v. Leo*, 109 Misc. 448, 178 N.Y.S. 851; *Cochran v. Roemer*, 287 Mass. 500, 192 N.E. 58, or involving the review of a board's exercise of discretion in granting a proposed variance, *Syrian Orthodox Charitable Society v. Zoning Board of Review*, 53 R.I. 232, 165 A. 778; *Amero v. Board of Appeal of City of Gloucester*, 283 Mass. 45, 186 N.E. 61; cf. *DeFelice v. Zoning Board of Appeals*, 130 Conn. 156, 32 A.2d 635, 147 A. L.R. 161, are distinguishable and do not

affect the problem here presented involving as it does plaintiffs' "right to enlarge" their trailer court business beyond its established limits at the effective date of the zoning ordinance. *Rehfeld v. City and County of San Francisco*, supra, 218 Cal. 83, 84, 21 P.2d 419.

[9, 10] In addition to prohibiting the increase in the number of trailers on the property, the zoning ordinance prohibited any increase in the size of the buildings on the property, for it is well settled that a nonconforming use does not entitle the owner of the property to increase the size of his permanent buildings. *Rehfeld v. City and County of San Francisco*, supra, 218 Cal. 83, 85, 21 P.2d 419; *City of Yuba City v. Cherniavsky*, supra, 117 Cal.App. 568, 572-573, 4 P.2d 299. In order to accommodate thirty additional trailers plaintiffs had, however, to construct additional sanitary facilities. This they could do only by enlarging the existing utility house, and it was necessary to secure a building permit to do so. Thus, in addition to the benefits secured them by being allowed to have thirty additional trailers on the property for three years, they were permitted to increase an existing structure which they could legally do only after having been granted the exception.

[11] Having taken the benefits of the exception, plaintiffs may not now attack their manner of acceptance. Civ.Code, sec. 3521. That they made an oral acceptance cannot be questioned in the light of the undisputed evidence, and everyone present at the board meeting so understood. The fact that a written acceptance was never made cannot now be successfully advanced. For a period of three years plaintiffs made a use of their property to which they were not entitled under the law in the absence of the granting of the conditional exception. By their conduct they led everyone to believe that the exception had been accepted. Plaintiffs made an oral promise on which defendants relied to their detriment, and justice can be done only by the enforcement of the promise. The situation presented is therefore the ordinary one of promissory estoppel. *Restatement of Contracts*, § 90; *Banning v. Kreiter*, 153 Cal.

33, 36, 94 P. 246; *Fried v. Fisher*, 328 Pa. 497, 196 A. 39, 41-42, 115 A.L.R. 147.

The portion of the judgment appealed from is reversed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

EDMONDS, Justice (dissenting).

The record in this case shows substantial evidence from which the inference reasonably may be drawn that the action of the board of supervisors amounted only to an offer of a limited term zone variance providing the petitioners agreed in writing to certain conditions which were imposed upon them, and filed a faithful performance bond. They complied with neither condition and the trial court found that the variance had not been accepted. Under these circumstances, an appellate court should not substitute its conclusion as to the effect of the evidence for that of the trier of fact. This is particularly true here because in the companion case, *Edmonds v. Board of Supervisors*, Cal.Sup., 255 P.2d 781, the parties agreed in a statement of facts that the exception granted by the board of supervisors in 1946 "was not accepted by the plaintiff in writing, as its terms required".

The sole authority relied upon for the holding that "Edmonds' failure to execute a written agreement or to file a * * * bond could not alter the binding effect of Edmonds' verbal acceptance of the conditional exception in the proceedings before the board" is *Thompson v. Schurman*, 65 Cal.App.2d 432, 440, 150 P.2d 509. But in that case the court said: "The question as to whether an oral agreement, including all the essential terms and conditions thereof, which according to the mutual understanding of the parties is to be subsequently reduced to writing, shall take effect forthwith as a completed contract *depends on the intention of the parties*, to be determined by the surrounding facts and circumstances of a particular case. [Citations.] In the present case there is substantial evidence to support the determination of the trial judge that the terms and conditions of the oral contract agreed upon by the respec-

tive parties * * * 'were definite and certain; there was a complete meeting of their minds.'" 65 Cal.App.2d at page 440, 150 P.2d at page 513. But the judgment allowing Francis Edmonds and his wife to continue to maintain 20 trailers as a non-conforming use is based upon a finding that there was no acceptance of the exception as proposed in the meeting of the board of supervisors.

Unquestionably, in reaching his conclusion the trial judge took into consideration all of "the surrounding facts and circumstances" in order to ascertain "the intention of the parties". For this court to say that "the undisputed facts show that this finding is not supported by the evidence" is to weigh the evidence presented to the trial judge and draw from it different inferences. Moreover, the Thompson case presented only the question as to the effect of an oral agreement which, contrary to the promise to do so, was not reduced to writing. Here, specific conditions were imposed upon the petitioners as a condition for granting the permit.

The first motion made by Supervisor Jessup was "that an extension of three years be granted to the applicant". Supervisor Ford then stated "that there should be added to this a bond that this operator will do certain things within a certain period of time, namely that he should put acceptable shrubbery that will meet the approval of the Planning Commission; that he shall install the necessary toilets and any other conditions that the Regional Planning Commission might suggest. * * *" Mr. Ford concluded by asking, "what amount would be a reasonable bond?" Acting Chairman Roach suggested \$2,000. Supervisor Jessup said: "I will include that in my motion."

The proposed action was summarized by the chairman as follows: "The motion is that the extension be granted for three years providing you deposit a bond of \$2,000 to guarantee faithful performance of the provisions as outlined by the Regional Planning Commission." After considerable discussion, Supervisor Jessup said: "Now

I will renew my original motion" and it carried by a vote of three to one.

A reasonable conclusion as to the intention of the parties which may be drawn from this record is that the variance was not to take effect until the petitioners complied with the conditions laid down by the board. Unquestionably, the Planning Commission so construed the motion for in a letter written to Francis Edmonds shortly after the meeting of the board, he was advised that, to obtain the exception he must "agree in writing" that after a period of three years "the use of the entire property including the present non-conforming trailer court shall be abandoned and the use of the property shall revert to the use permitted in the zone existing at that time". A further requirement mentioned by the commission was that "the petitioner furnish a bond in the amount of \$2,000 to insure the faithful performance of all the above conditions". The letter closed with:

"Your exception will not be effective until such time as the Regional Planning Commission has received a letter from you agreeing to all of the conditions mentioned above, accompanied by your bond in the amount of \$2,000."

Because the petitioners continued the same use of their property as they had made of it before the hearing of their application by the board of supervisors, the majority opinion concludes that they "led everyone to believe that the exception had been accepted". But the failure to comply with the specific conditions required by the board and the commission is a matter of record with those agencies. In effect, the motion of the board, and the confirming letter of the commission, constituted an offer to grant an exception which was not accepted. By its terms, the exception was ineffective if its conditions were not met.

I would, therefore, affirm the portions of the judgment from which the appeal is taken.

CARTER and SCHAUER, JJ., concur.

Rehearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.

**Francis EDMONDS, Plaintiff and Appellant,
v. BOARD OF SUPERVISORS, LOS ANGELES COUNTY, California, Defendant
and Respondent.**

L. A. 21807.

Supreme Court of California, in Bank.

April 14, 1953.

Rehearing Denied May 14, 1953.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Prior opinion, 236 P.2d 646.

Richard Richards, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff sought a writ of review to annul an order of defendant board of supervisors revoking his license to operate a trailer court in a residential area. The trial court sustained the action of the board, and plaintiff appeals.

This action is a companion case to *Edmonds v. County of Los Angeles*, Cal.Sup., 255 P.2d 772, this day decided. Consistent with the views expressed therein, the judgment is affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

EDMONDS, Justice (dissenting).

The principal question presented in this proceeding is whether the board of supervisors had the authority to revoke the petitioner's license to operate a trailer court because he continued his business with 48 units for more than three years after the date of the order made upon his application for a zone variance. The board relies upon the judgment in *Edmonds v. County of Los Angeles*, supra, as authority for revoking the permit.

The appeal is presented upon an agreed statement of facts which states that, following the adoption of a zoning ordinance, Edmonds applied for an exception to it. Thereafter, the board of supervisors granted an exception. "This exception was not

accepted by the plaintiff in writing, as its terms required, and the plaintiff proceeded to operate the trailer court without compliance with [the conditions specified in the letter of the Regional Planning Commission of the county of Los Angeles dated October 18, 1946] and under his alleged rights of pre-existing use, subject to change in zoning." The essential provisions of this letter are quoted by me in the companion case.

The trial court assumed that a violation of the zoning ordinance permitted revocation of the license per se. The licensing ordinance provides that the board may revoke a license if the licensee "has violated * * * any other ordinance * * * regulating the occupation or business for which such license is issued". Only if the zoning ordinance may be said to be an ordinance regulating the occupation or business of operating a trailer court may the license be revoked for its violation. Such a construction is unwarranted.

A zoning ordinance does not regulate the business of conducting a trailer court. It regulates only the use to which designated land may be put. No control of the operation of a business is contemplated by the zoning ordinance, except as it may indirectly affect expansion or the creation of new businesses in the area. Therefore, violation of the zoning ordinance is not a ground for revocation of the business license.

The proper remedy for violation of a zoning ordinance is by injunction, which was granted in the action for declaratory relief, or by criminal sanctions, not by revocation of license. For the reasons stated by me in the companion case, in my opinion the petitioners have a right under the zoning ordinance to continue their non-conforming use of the land for a 20-trailer court. Of course, if they fail to comply with applicable health and safety statutes and ordinances their license to operate that business could be revoked. But they should not be deprived of the right to conduct a business, which is guaranteed to them for 20 years by the zoning ordinance, by revoking their license for a violation of that ordinance. That would be achieving by an

improper remedy what cannot be accomplished by injunction or criminal penalties.

For these reasons, I would reverse the judgment with directions to the trial court to enter a judgment annulling the order of the board.

CARTER and SCHAUER, JJ., concur.

Rehearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.



40 Cal.2d 745

Ex parte ROBERTS.

Cr. 5401.

Supreme Court of California, In Bank.

April 24, 1953.

Original proceeding in habeas corpus to obtain release from prison. The Supreme Court, Gibson, C. J., held that petitioner had been deprived of his constitutional right to representation by counsel at time of pronouncement of judgment and sentence.

Petitioner discharged from custody of prison warden and committed to custody of county sheriff.

1. Criminal Law ◉982

Statute requiring that probationer be sentenced within thirty days after notice of his commitment for another offense applies only to a probationer who is subsequently committed to prison following conviction on another charge, and state court which had placed defendant on probation following plea of guilty to charge of forgery and admission of prior conviction of automobile theft was not deprived of jurisdiction to sentence him on forgery charge by failure to impose such sentence within thirty days after receipt of notice that probationer had been arrested and placed in county jail pending trial on charge of violation of National Motor Vehicle Theft Act. Pen. Code, § 1203.2a; Vehicle Code, § 503; 18 U.S.C.A. §§ 2311-2313.

2. Attorney General ◉6

Attorney General of the United States has power to surrender a prisoner to state officers.

3. Evidence ◉83(1)

In habeas corpus proceeding to obtain release from prison under a sentence imposed by state court upon revocation of probation following arrest on charge of violating federal statute, it could be presumed, in absence of proof to the contrary, that probationer had been surrendered to state officers by United States Attorney General in discharge of official duty. Code Civ.Proc. § 1963, subs. 15, 33.

4. Habeas Corpus ◉30(3)

In absence of proof to overcome presumption that probationer arrested on charge of violating federal statute had been surrendered to state officers by United States Attorney General in discharge of official duty, former probationer was not entitled to release from prison on ground that state court lacked jurisdiction to pronounce sentence on prior plea of guilty to state charge on theory that probationer had been unlawfully removed from county jail where he was being held under federal authority and brought before state court for sentence. Code Civ.Proc. § 1963, subs. 15, 33.

5. Criminal Law ◉988

Probationer was entitled to representation by counsel when judgment was pronounced and sentence imposed on charge of forgery following revocation of probation. Const. art. 1, § 13.

6. Habeas Corpus ◉30(3)

Where defendant was not represented by counsel at time judgment and sentence were pronounced on charge of forgery following revocation of probation, judgment must be set aside on habeas corpus and matter remitted for proper arraignment of defendant, in absence of showing that defendant had been informed of his right to counsel or knew of such right and that right was expressly waived. Const. art. 1, § 13.

7. Criminal Law ◉64(1)

Waiver of constitutional right of defendant in criminal case to representation by counsel may not be implied. Const. art. 1, § 13.

8. Criminal Law ¶1216(1)

"Concurrent sentences" run together during the time that the periods of such sentences overlap. Pen.Code, § 669.

See publication Words and Phrases, for other judicial constructions and definitions of "Concurrent Sentence".

9. Criminal Law ¶1216(1)

Imposition of concurrent sentences is permitted by statute when defendant is convicted of two or more crimes in the same proceedings and court or in different proceedings or courts, and statute contemplates having a second sentence run concurrently where defendant has already served part of term imposed for prior conviction, but expiration of first term does not operate to terminate or reduce second or subsequent term. Pen.Code, § 669.

Carroll Eugene Roberts, in pro. per., and Albert S. Friedlander, Los Angeles, under appointment by the Supreme Court, for petitioner.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

In June 1950 Roberts was arraigned before the Superior Court of Los Angeles County on an information containing three counts of forgery and a charge of prior conviction for theft of an automobile in violation of section 503 of the Vehicle Code. Two of the counts were dismissed after Roberts pleaded guilty to the third count and admitted the prior conviction. The Court suspended proceedings without pronouncing judgment and put Roberts on probation for five years. Thereafter he was arrested for violation of the National Motor Vehicle Theft Act, 18 U.S.C.A. §§ 2311-2313, and was placed in the Los Angeles County Jail to await trial on the federal charge. On June 25, 1951, after revocation of probation, Roberts was taken before the superior court, which pronounced judgment on the forgery charge and sentenced him for the term prescribed by law. Although Roberts was represented by an attorney at all prior proceedings, he

was without counsel when judgment and sentence were pronounced.

By this proceeding in habeas corpus Roberts seeks his release from San Quentin, where he is now confined, contending that the trial court was without jurisdiction to pronounce judgment on the forgery charge because it failed to act within thirty days after being notified that he had been placed in jail on the federal charge, that he was unlawfully taken from the jail where he was being held under federal authority and brought before the Superior Court of Los Angeles County, and that he was deprived of counsel at the time judgment and sentence were pronounced.

[1] Roberts asserts that the superior court was notified on May 20, 1951, that he had been put in jail by the federal authorities pending trial for violation of the National Motor Vehicle Theft Act, and that since he had been granted probation on the forgery charge and no sentence had been previously imposed, section 1203.2a of the Penal Code required the court to pronounce judgment within thirty days after receipt of such notice. Section 1203.2a provides that the court which has released a defendant on probation must sentence him within thirty days after receiving notice of his commitment for another offense or be deprived of any jurisdiction over him in the case in which he was granted probation. The section, however, applies only to a probationer who is subsequently "committed to a prison" following conviction on another charge, and it does not require a court to act within the specified time where, as here, there has been merely an arrest and detention of the probationer pending trial. See *People v. Williams*, 24 Cal.2d 848, 853, 151 P.2d 244; *In re Klein*, 75 Cal.App.2d 600, 602, 171 P.2d 471.

[2-4] There is no merit in Roberts' claim that the superior court had no jurisdiction because he was unlawfully removed from the county jail where he was being held under federal authority. The Attorney General of the United States has power to surrender a prisoner to state officers, see *United States ex rel. Buchalter v. Lowenthal*, 2 Cir., 108 F.2d 863; *Application of*

Buchalter, D.C.N.Y., 54 F.Supp. 444, affirmed United States ex rel. Buchalter v. Warden of Sing Sing Prison, 2 Cir., 141 F.2d 259, certiorari denied 321 U.S. 780, 64 S.Ct. 633, 88 L.Ed. 1072, and in the absence of proof to the contrary we may presume that official duty was done and that such consent was given. Code Civ.Proc. § 1963, subds. 15, 33.

[5-7] It seems clear, however, that Roberts was entitled to counsel when judgment was pronounced and sentence imposed on the forgery charge and that he was deprived of that right in violation of article I, section 13, of our Constitution. See *In re Levi*, 39 Cal.2d 41, 45-46, 244 P.2d 403; *People v. Fields*, 88 Cal.App.2d 30, 33, 198 P.2d 104; Cf. *In re Davis*, 37 Cal.2d 872, 875, 236 P.2d 579. There is nothing in the record to indicate that Roberts was ever informed of his right to counsel or that he knew he was entitled to the aid of an attorney. There was no express waiver of the right, and we are of the opinion that none may be implied. See *In re Levi*, 39 Cal.2d 41, 46-47, 244 P.2d 403. The judgment must therefore be set aside and the matter remanded to permit Roberts to be arraigned with counsel.

[8,9] The record indicates that the sentence imposed on Roberts under the prior conviction expired in November, 1952, but it does not follow that he is entitled to his liberty. As stated in *In re Levi*, 39 Cal.2d 41, 47, 244 P.2d 403, 406, "The delay since revocation of probation has not caused the trial court to lose jurisdiction to pronounce a valid judgment. See *People v. Williams*, 24 Cal.2d 848, 854, 151 P.2d 244. If petitioner should again be sentenced to prison, his confinement based upon the invalid judgment will be credited upon the new commitment. Pen.Code, § 2900.1." In this connection, Roberts asserts that he is entitled to his release on the theory that any sentence for the offense of forgery must be held to have run concurrently with the earlier sentence. See Pen.Code, § 669. His argument is that the word concurrent means not only that the sentences are to run together, but that they are to start and end together, and hence

that the new term necessarily terminated at the same time as the prior one. It would seem clear, however, that sentences may be concurrent, i. e., may run together, without either starting together or ending together. What is meant is that they run together during the time that the periods overlap. Section 669 of the Penal Code permits the imposition of concurrent sentences when a defendant is convicted of two or more crimes in the same proceeding and court or in different proceedings or courts, and it contemplates having a second sentence run concurrently where, as here, the defendant has already served part of the term imposed for the prior conviction, but there is no provision that the first term operates to terminate or reduce the second or subsequent term.

The petitioner is discharged from the custody of the warden at San Quentin and committed to the custody of the sheriff of Los Angeles County.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



40 Cal.2d 749

PEOPLE v. ROBERTS.

Cr. 5404.

Supreme Court of California, in Bank.

April 24, 1953.

Petition for writ of error coram nobis to review judgment entered on plea of guilty to charge of forgery. The Superior Court, Los Angeles County, Harry J. Borde, J., pro tem., entered an order denying the petition, and petitioner appealed. The Supreme Court, Gibson, C. J., held that notice of appeal was filed too late and that appeal had been rendered moot by decision of Supreme Court in habeas corpus proceeding setting aside the judgment.

Appeal dismissed.

1. Criminal Law ⇨1081

Appeal from order denying petition for writ of error coram nobis should be dismissed for failure to file notice of appeal within ten days after making of order as required by Rules on Appeal. Rules on Appeal, rule 31.

2. Criminal Law ⇨1131(4)

Appeal from order denying petition for writ of error coram nobis to review judgment entered on plea of guilty to charge of forgery was rendered moot by Supreme Court decision in habeas corpus proceeding setting aside the judgment.

Carroll Eugene Roberts, in pro. per., and Albert S. Friedlander, Los Angeles, under appointment by the Supreme Court, for petitioner.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant, acting in propria persona, sought a writ of error coram nobis claiming that he was not guilty and had been induced, by fraud and promises of lenient treatment, to plead guilty to a charge of forgery. His petition was denied by a minute order entered under date of May 19, 1952, and his notice of appeal, dated June 26, was filed on June 30. The prosecution has moved to dismiss the appeal on the ground that the notice was not filed within 10 days after the making of the order as required by rule 31 of the Rules on Appeal. 36 Cal.2d 26.

[1,2] It appears from the face of the notice of appeal that it was filed too late and that the appeal should be dismissed. *People v. Behrmann*, 34 Cal.2d 459, 461-462, 211 P.2d 575; *In re Horowitz*, 33 Cal.2d 534, 537, 203 P.2d 513. The appeal must also be dismissed for the further reason that it has become moot by reason of our decision in the companion case of *In re Roberts*, Cal.Sup., 255 P.2d 769, wherein we set aside the judgment which Roberts attacked herein.

The appeal is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, J., concurs on the ground that the appeal is moot.



40 Cal.2d 614

**DANIELS et al. v. CITY AND COUNTY
OF SAN FRANCISCO et al.
S. F. 18701.**

Supreme Court of California, in Bank.
April 9, 1953.

Rehearing Denied May 7, 1953.

Action for personal injuries and property damage sustained in a collision between an automobile driven by one of plaintiffs and defendant municipal corporation's bus operated by codefendant. From a judgment of the Superior Court, San Francisco County, on a verdict for defendants, plaintiffs appealed. The Supreme Court, Spence, J., held that the question whether defendant bus driver had a last clear chance to avoid the collision by exercising ordinary care was for the jury to determine on conflicting evidence.

Judgment reversed.

Schauer and Edmonds, JJ., dissented.

Prior opinion, Cal.App., 246 P.2d 125.

1. Appeal and Error ⇨110

An order denying a motion for new trial is nonappealable, and appeal therefrom must be dismissed. Code Civ.Proc. § 963.

2. Appeal and Error ⇨928(1)

In determining propriety of trial court's refusal to instruct jury on last clear chance doctrine, Supreme Court, on appeal from judgment on verdict for defendants, must view evidence in light most favorable to application of doctrine and indulge every reasonable inference in support thereof.

3. Negligence ⇨83.1, 136(32)

The question whether last clear chance doctrine applies in particular case is con-

trolled by factual circumstances and must ordinarily be resolved by fact-finder.

4. Negligence ⚡138(4)

In negligence action, evidence of plaintiff's negligence placing him in position of danger from which he could not escape by exercising ordinary care, whether because of physical impossibility or his total unawareness of danger, and evidence that defendant knew of plaintiff's dangerous situation and knew or, in exercise of ordinary care, should have known that plaintiff could not escape therefrom, that defendant had last clear chance to avoid accident by exercising such care, but failed to do so, and that plaintiff was injured as proximate result of such failure, justifies instruction stating last clear chance doctrine.

5. Automobiles ⚡245(91)

Whether retardation of automobile as it rolled slowly into boulevard from intersecting street after driver of bus, approaching on boulevard, saw automobile slowing up, until it stopped directly in path of bus, was sufficient to alert reasonable man as to automobile driver's perilous situation or inability to escape therefrom was a factual consideration for jury in action for injuries to such driver as result of collision between bus and automobile at intersection.

6. Automobiles ⚡227(1)

To render last clear chance doctrine applicable against driver of bus colliding with automobile at street intersection, such driver's actual knowledge that accident was inevitable if he failed to exercise care was unnecessary, but his knowledge of circumstances which would convey to reasonably prudent man's mind a question as to whether automobile driver would be able to escape collision was sufficient.

7. Automobiles ⚡245(91), 246(58)

In action for injuries sustained in collision between automobile driven by one of plaintiffs and defendant municipal corporation's bus at street intersection, whether co-defendant bus driver had last clear chance to avoid accident by exercising ordinary care after seeing automobile slow-

ly enter boulevard, on which bus was traveling, until automobile stopped in bus's traffic lane, was for jury to determine on conflicting evidence, so as to entitle plaintiffs to instruction on last clear chance doctrine. Vehicle Code, § 543.

8. Appeal and Error ⚡1067

Trial ⚡260(8)

In action for injuries sustained in collision between automobile driven by one of plaintiffs and defendant municipal corporation's bus at street intersection, court's erroneous refusal to instruct jury on last clear chance doctrine was prejudicial to plaintiffs as against contention that such doctrine was covered by court's instructions, which were directed only to co-defendant bus driver's duty to use reasonable prudence in analyzing situation confronting him so as to avoid collision and charged jury that plaintiff's negligence would bar recovery, and contention that jury's general verdict for defendants imported findings in their favor on all material issues.

9. Trial ⚡203(1)

The trial court owes duty to instruct jury on every theory of case finding support in evidence.

10. Appeal and Error ⚡930(4)

The ordinary rule on appeal that jury's general verdict, supported by evidence on one of several issues, will be sustained, is inapplicable on appeal from judgment on general verdict for defendants, where plaintiffs' theory of recovery under last clear chance doctrine was not presented to jury as issue affecting plaintiffs right of recovery.

11. Appeal and Error ⚡1170(1)

An erroneous ruling of trial court constitutes miscarriage of justice, requiring reversal of judgment on jury's verdict, if different verdict cannot be said to have been improbable in absence of such error. Const. art. 6, § 4½.

12. Automobiles ⚡11

Signposting of a highway is essential for application of lower prima facie speed

limits fixed by statute. Vehicle Code, § 511.

13. Automobiles Ⓒ246(56)

In action for injuries sustained in collision between automobile driven by plaintiff and defendant municipal corporation's east-bound bus at street intersection with boulevard on which bus was traveling, where only evidence regarding reduced speed limits under applicable highway signs was testimony of defendant's witness that a 25-mile limit sign, marking entrance into residence district, was posted for west-bound traffic on boulevard at point two or three blocks west of intersection, and defendant introduced in evidence diagrams showing that boulevard lacked requisite dwelling-house density for residence district, instruction to jury that *prima facie* speed limit for defendants at intersection was 55 miles per hour was not erroneous. Vehicle Code, §§ 90, 90.1, 511.

14. Trial Ⓒ236(3)

In personal injury suit, instruction to jury that testimony of defendant called by plaintiffs as adverse witness must receive same consideration in determining facts as any other testimony and will sustain verdict against plaintiffs, if believed by jury and otherwise sufficient, was proper as against plaintiff's objection that instruction should have explained that such testimony should weigh for plaintiffs in so far as favorable to them but should be disregarded in so far as unfavorable to them, where case was submitted to jury on merits. Code Civ. Proc. § 2055.

15. Negligence Ⓒ93(8)

A guest of automobile driver is chargeable with negligence only by reason of guest's own conduct, not that of driver.

16. Automobiles Ⓒ224(4)

Ordinarily, a guest of automobile driver is not charged with responsibility for observing condition of traffic on highway.

17. Automobiles Ⓒ246(58)

In action for injuries to driver of and guest in automobile struck by defendant municipal corporation's bus at street intersection, where plaintiff's evidence showed that guest undertook to observe condi-

tion of traffic on highway and actively participated with driver in decision that boulevard, on which approaching bus was traveling, was clear before starting to cross it, instruction to jury that guest was guilty of negligence, if she did not look carefully for traffic on boulevard and told driver that boulevard looked clear when bus was approaching so closely as to constitute immediate hazard, properly stated considerations affecting jury's determination of question whether guest exercised reasonable care for her own safety.

Tobriner & Lazarus and Leland J. Lazarus, San Francisco, for appellants.

Dion R. Holm, City Attorney and George E. Baglin, Deputy City Attorney, San Francisco, for respondents.

SPENCE, Justice.

[1] Plaintiffs sought to recover for personal injuries and property damage sustained as the result of an intersection collision between an automobile driven by plaintiff Laura E. Daniels and a municipal bus operated by defendant Myron Urdahl. The verdict was for defendants. From the judgment thereupon entered and an order denying their motion for a new trial, plaintiffs have appealed. As the latter order is nonappealable, Code Civ.Proc., § 963; 20 Cal.Jur. 213, the appeal therefrom must be dismissed.

[2] The jury was given the customary instructions on the issues of negligence and contributory negligence. However, the court refused to instruct on the doctrine of last clear chance. The propriety of such refusal is the principal point in dispute. The form of the proposed instruction is not in question. BAJI 205, p. 310; Root v. Pacific Greyhound Lines, 84 Cal.App.2d 135, 137, 190 P.2d 48; Alberding v. Pritchard, 97 Cal.App.2d 443, 444-445, 217 P.2d 1012. Viewing the evidence in the light most favorable to the application of the doctrine and indulging every reasonable inference in support thereof, Bonebrake v. McCormick, 35 Cal.2d 16, 19, 215 P.2d 728; Selinsky v. Olsen, 38 Cal.2d 102, 103, 237

P.2d 645; *Hopkins v. Carter*, 109 Cal.App. 2d 912, 913, 241 P.2d 1063, we have concluded that plaintiffs were entitled to the requested instruction.

The accident occurred on March 5, 1949, about 5:30 p. m. at the intersection of Alemany Boulevard and Congdon Street in San Francisco. Alemany Boulevard, a six-lane signposted "through highway" Veh. Code, §§ 82.5, 552, 577, runs in a general easterly-westerly direction. It is quite winding, and long concrete "islands" divide the boulevard into two three-lane roadways for opposite travel. Each roadway is 38 feet wide, with the outer lane 17 feet 6 inches wide, the middle lane 10 feet wide, and the inner lane 10 feet 6 inches wide. Congdon Street runs north-south and slopes a little downhill as it ends at the boulevard. Mrs. Daniels was driving her automobile in a northerly direction along Congdon Street and approaching the boulevard intersection, which was protected by an arterial stop sign. She intended to cross the boulevard's eastbound lanes and turn to her left onto the westbound roadway. The view of eastbound boulevard traffic approaching from her left was partially obscured by a large billboard on the southwest corner of the intersection and the curving line of the boulevard. At that time defendants' gasoline-propelled bus was traveling easterly in the boulevard's middle lane, having just made a stop at the Mission Street viaduct, which crosses the boulevard 750 feet west of Congdon Street. The driver, defendant Urdahl, then had a fleeting view of plaintiffs' automobile as it proceeded down Congdon Street and passed an opening between the corner billboard and the last house on the street.

Meanwhile Mrs. Daniels drove slowly into the boulevard's eastbound roadway and when defendant Urdahl next saw it, it had stopped momentarily in the middle lane some 180 to 200 feet in front of the bus. At that point Mrs. Daniels testified that she first saw the approaching bus, which she estimated to be traveling at a speed between 50 and 60 miles per hour. The bus driver testified to this sequence of events as he saw plaintiffs' automobile

ahead on the boulevard: that he was then proceeding at the rate of 35 miles per hour; that he immediately applied his brakes for about 30 or 40 feet, slackening his speed to 15 or 20 miles an hour; that he then released the brakes, accelerated the bus and steered toward the inside lane in an effort to pass in front of plaintiffs' automobile; and that finally, when a collision seemed inevitable, he again applied his brakes. Mrs. Daniels testified that upon seeing the bus to the left bearing down on her as she was driving about 5 miles an hour, she accelerated her speed in an attempt to complete her crossing of the boulevard's eastbound roadway and avert a collision. However, the left front of the bus struck the left rear of her automobile just forward of its rear bumper, and spun it around so that it came to rest in the boulevard's three-lane roadway for westbound traffic. The last braking of the bus left 72 feet of skidmarks to the point of collision, and there were 24 feet of "brush" marks made by the tires of plaintiffs' automobile while it was being pushed along the pavement. Mrs. Daniels was thrown from her automobile by the impact and injured. Mrs. Smith, who was riding beside her, was less seriously hurt.

[3, 4] Whether or not the doctrine of last clear chance applies in a particular case depends entirely upon the existence or nonexistence of the elements necessary to bring it into play. Such question is controlled by factual circumstances and must ordinarily be resolved by the fact-finder. *Girdner v. Union Oil Co.*, 216 Cal. 197, 199, 13 P.2d 915; *Hopkins v. Carter*, supra, 109 Cal.App.2d 912, 915, 241 P.2d 1063. An instruction stating the doctrine is proper when there is evidence showing: "[1] That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; [2] that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that

plaintiff cannot escape from such situation, and [3] has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." *Girdner v. Union Oil Co.*, supra, 216 Cal. at page 202, 13 P.2d at page 917; also *Selinsky v. Olsen*, supra, 38 Cal.2d 102, 104, 237 P.2d 645; *Peterson v. Burkhalter*, 38 Cal.2d 107, 109-110, 237 P.2d 977.

The first element is not lacking under the evidence—that plaintiff Laura Daniels by reason of her own negligence found herself in a position of danger from which she could not escape by the exercise of ordinary care. While there is a conflict as to whether plaintiffs' automobile stopped at the arterial stop sign before entering the boulevard, the defense witnesses agreed that Mrs. Daniels did not make the required stop, but merely "slowed down" her automobile as she approached the intersection, and that she came to a complete stop only as she was crossing the boulevard's middle lane for eastbound traffic. At that point she first became aware of defendants' bus as it was traveling toward her in the center eastbound lane, and it was then that she accelerated her automobile in an effort to escape from its path.

[5,6] Nor is the evidence lacking in support of the second element, upon defendants' claim that there is no showing that Urdahl, the bus driver, was aware of Mrs. Daniels' perilous situation or knew that she could not escape therefrom. Urdahl testified that he first saw plaintiffs' automobile in the brief interval when it passed between the corner billboard and the last house on Congdon Street, and next when it proceeded into the boulevard. He kept his eyes on it and saw it "slowing up" until it came to a complete stop directly in his path in the boulevard's center lane. He could not then know what was the cause for the retardation of plaintiffs' automobile as it rolled slowly into his lane of travel, and whether or not such procedure was sufficient to alert a reasonable man was a factual consideration for the jury. As stated in *Cady v. Sanford*, 57 Cal.App. 218, 226, Cal.Rep. 255-256 P.2d—15

207 P. 45, 48: "It was not necessary that appellant should actually know that an accident was inevitable if he failed to exercise care. It is enough if the circumstances of which he had knowledge were such as to convey to the mind of a reasonably prudent man a question as to whether respondent would be able to escape a collision." *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 111, 237 P.2d 977; see, also, *Jones v. Yuma Motor F. Terminal Co.*, 45 Cal.App.2d 497, 501-502, 114 P.2d 438; *Alberding v. Pritchard*, supra, 97 Cal.App.2d 443, 445, 217 P.2d 1012.

Defendants argue that plaintiffs' automobile was not in a "position of danger" until it "jumped forward" from a standing position in the middle lane into the path of the bus as Urdahl veered to the inside lane in an attempt to avoid a collision. But such argument makes no allowance for Urdahl's admitted awareness of plaintiffs' automobile before it even stopped and while he saw it reducing its speed as it came into his path. From this aspect of the evidence it becomes unnecessary to consider decisions upon which defendants rely to the effect that the last clear chance doctrine cannot apply until a position from which the plaintiff cannot escape danger has been reached. *Young v. Southern Pacific Co.*, 189 Cal. 746, 753, 210 P. 259; *Rodabaugh v. Tekus*, 39 Cal.2d 290, 246 P.2d 663. It would be a disregard of the realities of the situation to hold that under no view of the record could it be said that Urdahl's observation of the slackening speed of plaintiffs' automobile until it finally came to rest in his lane of travel on the 55-mile per hour highway might not reasonably constitute sufficient warning of the imminently perilous position created in front of him. Such consideration distinguishes cases where there was no evidence that would sustain a finding of knowledge by defendant of the plaintiff's danger. *Johnson v. Southwestern Eng. Co.*, 41 Cal.App.2d 623, 628, 107 P.2d 417.

Likewise the record is not lacking in support of the third element of the doctrine bearing on Urdahl's possession of the last clear chance to avoid the collision

through the exercise of ordinary care. Both Mrs. Daniels and Mrs. Smith testified that when they *first* saw defendants' bus approaching in the boulevard's middle lane, it was about 200 feet to their left. Mrs. Daniels estimated its speed at between 50 and 60 miles per hour. Urdahl testified that he was then traveling about 35 miles per hour and that he saw plaintiffs' automobile at the stated distance in front of him "slowing down" to a "complete stop," at which time he gave his bus 30 or 40 feet of "pretty heavy * * * braking" so as to reduce his speed to about 15 or 20 miles per hour. Then he put his foot on the gas throttle and when plaintiffs' automobile was still some 50 feet distant, he turned his bus toward the inner lane in an effort to pass in front of it but instead its left rear end was caught by the bus. Defendants argue that Mrs. Daniels admittedly entering into the boulevard at the slow rate of 5 miles per hour, rather than Urdahl driving the rapidly moving bus, had the better chance to avoid the accident; that traveling at 5 miles per hour, she estimated that she could have stopped within one foot, so that until she reached that distance from the projected path of the bus she was only "*approaching* but * * * not actually *in* a position of danger," *Dalley v. Williams*, 73 Cal.App.2d 427, 435, 166 P.2d 595, 599; that having come to a stop in the boulevard's middle lane, she could have remained there in a "place of safety" until defendants' bus passed in front of her automobile via the inner lane, *Gore v. Market Street Ry. Co.*, 4 Cal.2d 154, 157, 48 P.2d 2, 3; or she could have accelerated the speed of her automobile sufficiently to have cleared the path of the bus instead of being hit at the left rear bumper. Cf. *Young v. Southern Pacific Co.*, 182 Cal. 369, 380, 190 P. 36. Defendants further argue that having come to a stop, Mrs. Daniels, to all appearances, was yielding the right of way to Urdahl and inviting him to swing to the left or inner lane in front of her; and that as he accordingly changed his course, he could not anticipate that she would create a second emergency by "jumping" her auto-

mobile ahead into the inner lane, when it was not possible for the bus to stop in time to avoid a collision. *Gimeno v. Martin*, 64 Cal.App. 154, 157, 220 P. 1076. To this point defendants cite Vehicle Code, section 543, which provides: "No person shall start a vehicle stopped * * * on a highway * * * unless and until such movement can be made with reasonable safety." Plaintiffs, on the other hand, contend that their automobile was not in a "place of safety" standing in the boulevard's middle lane with defendants' bus 200 feet to the left and continuing to travel directly ahead toward plaintiffs' automobile without deviation; that Urdahl's partial braking so as to reduce the speed of the bus to 15 or 20 miles per hour might reasonably be construed as an invitation for Mrs. Daniels to accelerate her automobile forward and escape from the perilous position in the center lane; and that without warning or signal of any kind to indicate his intent to change his course, Urdahl stepped on the accelerator of the bus to swing into the inner lane as plaintiffs' automobile was but 50 feet ahead, and the two vehicles collided.

[7] In the light of these opposing factual considerations, it was for the jury to determine whether Urdahl had a last clear chance to avoid the accident by exercising ordinary care. *Root v. Pacific Greyhound Lines*, supra, 84 Cal.App.2d 135, 137, 190 P.2d 48; *Bragg v. Smith*, 87 Cal.App.2d 11, 14, 195 P.2d 546; *Hopkins v. Carter*, supra, 109 Cal.App.2d 912, 916, 241 P.2d 1063. There is no showing in the record that the operation of either vehicle was hindered by the presence of other automobiles in the immediate vicinity. The fact that it could be inferred from the evidence that Urdahl should have foreseen that Mrs. Daniels might proceed forward in response to his slowing down his bus in the middle lane distinguishes such cases as *McHugh v. Market St. Ry. Co.*, 29 Cal.App.2d 737, 85 P.2d 467, and *Jones v. Heinrich*, 49 Cal. App.2d 702, 122 P.2d 304, relied on by defendants. Likewise not in point are cases involving collisions between two fast-moving vehicles at a street intersection, Pon-

cino v. Reid-Murdock & Co., 136 Cal.App. 223, 232, 28 P.2d 932; Dalley v. Williams, supra, 73 Cal.App.2d 427, 436, 166 P.2d 595; Allin v. Snavelly, 100 Cal.App.2d 411, 415, 224 P.2d 113, or between a fast-moving vehicle and a train at a railroad crossing, Johnson v. Sacramento Northern Ry., 54 Cal.App.2d 528, 532, 129 P.2d 503, where the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party may be said to have had thereafter a last clear chance to avoid the consequences. Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 246 P.2d 663. The relative time, speed and distance factors in the cases where the evidence was held insufficient as a matter of law to permit the application of the doctrine were quite different from those before us.

[8-11] As the present record has been here reviewed, it cannot be said as a matter of law that the evidence was insufficient to justify the application of the last clear chance doctrine. Defendants submit that even though the court erroneously refused to instruct on the last clear chance doctrine, nevertheless no prejudice resulted to plaintiffs because (1) the doctrine was covered by other instructions given by the court and (2) the general verdict of the jury imports findings in favor of defendants on all material issues so as to preclude plaintiffs from raising an objection based on that theory of recovery. Neither point is well taken.

The instructions cited by defendants in nowise purported to include the elements of the last clear chance doctrine. Rather they were directed only to the duty of the bus driver to "use reasonable prudence in analyzing the * * * situation" confronting him so as to avoid colliding with plaintiffs' automobile. Moreover, the court in its other instructions plainly refuted any application of the last clear chance doctrine by charging the jury that any negligence on the part of either Mrs. Daniels or her guest, Mrs. Smith, would bar a recovery, though a necessary tenet of the doctrine is the presence of the plaintiff's negligence. Girdner v. Union Oil Co., su-

pra, 216 Cal. 197, 201-204, 13 P.2d 915; Selinsky v. Olsen, supra, 38 Cal.2d 102, 105, 237 P.2d 645. It is the duty of the court to instruct on every theory of the case finding support in the evidence. Emery v. Los Angeles Ry. Corp., 61 Cal. App.2d 455, 462-463, 143 P.2d 112; Ferula v. Santa Fe Bus Lines, 83 Cal.App. 2d 416, 420, 189 P.2d 294; Stickel v. Durfee, 88 Cal.App.2d 402, 406-407, 199 P.2d 16. The ordinary rules on appeal sustaining a general verdict which the evidence on one of several issues upholds (2 Cal.Jur. sec. 612, pp. 1028-1029; 24 Cal.Jur. sec. 134, p. 885) has no application here where plaintiffs' theory of recovery was not even presented to the jury as an issue affecting their right of recovery. Bonebrake v. McCormick, supra, 35 Cal.2d 16, 19, 215 P.2d 728; Selinsky v. Olsen, supra, 38 Cal.2d 102, 103, 237 P.2d 645. In determining, from a consideration of the entire record, whether the error prejudiced plaintiffs' rights, Const., Art. VI, sec. 4½, the rule is no different from that applicable in a criminal case and stated as follows: "If it cannot be said that, in the absence of the error complained of, a different verdict would have been improbable, the erroneous ruling constitutes a miscarriage of justice, within the meaning of the constitutional provision." People v. Newson, 37 Cal.2d 34, 45, 230 P.2d 618, 624; see, also, People v. Hamilton, 33 Cal.2d 45, 51, 198 P.2d 873. It so appears here.

Certain other points raised by plaintiffs with regard to the instructions will be briefly discussed.

[12, 13] The first point is plaintiffs' attack upon the court's charge that as a matter of law the prima facie speed limit for defendants at the intersection in question was 55 miles per hour, and that accordingly Mrs. Daniels, upon driving into the boulevard, should exercise an amount of care commensurate with such travel conditions. Plaintiffs argue that the jury was thereby misinformed as to the authorized prima facie speed limit and that whether the area was a residence district with a 25-mile limit, Veh. Code, § 511 "would be a jury question and not one for

judicial notice." But the signposting of a highway is absolutely essential for the application of the lower prima facie speed limits. Section 511, after excepting certain types of areas where lower speed limits apply, expressly prescribes a 55-mile limit "under all other conditions unless a different speed is established as provided in this code and signs are in place giving notice thereof." (Emphasis added.) Accordingly, "no area has the prima facie speed limit of a * * * residence district unless it is signposted." *Reynolds v. Filomeo*, 38 Cal.2d 5, 13, 236 P.2d 801, 806; *Guerra v. Brooks*, 38 Cal.2d 16, 19-20, 236 P.2d 807. A witness for defendants testified that a 25-mile sign was posted for westbound Alemany traffic "right at the edge of the viaduct," which was "about two or three blocks" west of the intersection, and that while not sure, he did not believe that in the area in question there were any speed limit signs posted for eastbound boulevard traffic. No other evidence was adduced with regard to reduced speed limits under applicable signs. Defendants introduced in evidence diagrams showing that the boulevard lacked the requisite dwelling-house density for a "residence district." Veh. Code, secs. 90, 90.1. Manifestly, the mentioned 25-mile sign "right at the edge of the viaduct" directed to westbound traffic marked the entrance of boulevard traffic into a business or residence district extending to the west thereof and had no relevancy to speed for travel eastward of it on either side of the boulevard. In such state of the record the court did not err in giving the challenged instruction.

[14] The second point is plaintiffs' contention that the court gave an erroneous and misleading instruction on the effect of section 2055, Code of Civil Procedure. Defendant Urdahl was called by plaintiffs as an "adverse witness" and questioned at some length. In this regard the court charged: "I instruct you that testimony given under section 2055 * * * is just as much evidence in the case as any other testimony properly received. Such testimony is to receive the same consideration

from the jury in determining the facts as any other testimony. Such testimony, if believed by the jury and if otherwise sufficient, will sustain a verdict against the plaintiffs in this case." Plaintiffs maintain that "the instruction should have explained that any such testimony elicited by the plaintiffs should weigh for them in so far as it was favorable, *but that it should be disregarded in so far as it was unfavorable*, if the matters to which it referred were not satisfactorily established by other evidence." (Emphasis added.) But plaintiffs are relying upon authorities involving rulings upon a motion either for a nonsuit, *Marchetti v. Southern Pac. Co.*, 204 Cal. 679, 686, 269 P. 529; *Dempsey v. Star House Movers, Inc.*, 2 Cal.App.2d 720, 722, 38 P.2d 825, or for a directed verdict, *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 556, 299 P. 529; *People v. Mahoney*, 13 Cal.2d 729, 736, 91 P.2d 1029. The rules therein stated have no application upon submission of the case for a determination of the factual issues on the merits. *Figari v. Olcese*, 184 Cal. 775, 782, 195 P. 425, 15 A.L.R. 192; *Dorn v. Pichinino*, 105 Cal.App.2d 796, 800, 234 P.2d 307. The distinction is noted in the *Smellie* case, where, after a full discussion, it is stated that testimony elicited under section 2055 "is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury." 212 Cal. 559, 299 P. 537; see, also *Green v. Newmark*, 136 Cal.App. 32, 37-38, 28 P.2d 395; *Balasco v. Chick*, 84 Cal.App.2d 802, 808, 192 P.2d 76. Since this case was submitted to the jury on the merits, the assailed instruction was proper. *Joseph v. Vogt*, 35 Cal. App.2d 439, 441, 95 P.2d 947; *Cloud v. Market Street Ry. Co.*, 74 Cal.App.2d 92, 96, 168 P.2d 191.

[15-17] The final point is plaintiffs' contention that since there "was not the slightest evidence * * * upon which to base a finding of contributory negligence on the part of [plaintiff] Kathaleen Smith," the instruction submitting that issue as to her was contrary to both the law and the

evidence. They cite as particularly objectionable the following charge: "If you find that the plaintiff Kathaleen Smith did not look carefully for traffic eastbound on Alemany Boulevard, and that she told Mrs. Daniels that Alemany Boulevard looked clear in fact the bus was approaching so closely as to constitute an immediate hazard, the plaintiff Kathaleen Smith was in such case guilty of negligence." But the quoted instruction does not appear to have been improper in view of the record.

As the guest of Mrs. Daniels, Mrs. Smith could only be chargeable with negligence by reason of her own conduct rather than that of Mrs. Daniels. Mrs. Smith testified that as plaintiffs' automobile came to a stop at the boulevard intersection, she "glanced both ways" for traffic, that she "saw nothing coming," and that she agreed with Mrs. Daniels when the latter said that "it all looked clear and we might just as well go across." The record also shows that at the intersection a billboard obstructed the view looking to the left down the boulevard for eastbound traffic, so that defendants' bus did not come into the range of vision of Mrs. Daniels and Mrs. Smith until after the former started to drive across the boulevard. While ordinarily "a guest" is "not charged with the responsibility for observing the condition of the traffic upon the highway". *Murphy v. National Ice Cream Co.*, 114 Cal.App. 482, 489, 300 P. 91, 94; see, also, *Martinelli v. Poley*, 210 Cal. 450, 458, 292 P. 451, plaintiffs' evidence here shows that Mrs. Smith did undertake to make such observation and that she actively participated with Mrs. Daniels in their joint decision that the boulevard "was clear." Under these circumstances the quoted instruction properly stated considerations affecting the jury's determination of whether Mrs. Smith exercised "reasonable care for [her] own safety". *Miller v. Peters*, 37 Cal.2d 89, 94, 230 P.2d 803, 806.

In view of the above discussion relative to the applicability of the last clear chance doctrine in the determination of this case and the court's refusal to instruct thereon, plaintiffs are entitled to a retrial.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is reversed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

EDMONDS, J., dissents.

CARTER, Justice (concurring).

I concur in the judgment of reversal because I think it is obvious that reasonable minds might differ on whether or not defendant had a last clear chance to avoid the accident here involved. This is the one and only test which may be applied in determining whether a case comes within the last clear chance doctrine. There was a conflict in the evidence and the trier of fact might well have found that plaintiff Daniels was negligent in placing herself and Mrs. Smith in a position of peril which was perceived by defendant in time to avoid a collision if he had exercised ordinary care; that plaintiff was unable, by the exercise of ordinary care, to extricate herself and Mrs. Smith from such peril; and that defendant's failure to exercise ordinary care was therefore the proximate cause of the accident. The facts as disclosed by the record justify but do not compel this conclusion.

The last clear chance doctrine has been applied in numerous cases by the courts of this state. As a legal theory it is well understood by the legal profession. It is in the application of the doctrine to a particular case where conflicts arise. (See excellent article by Myron L. Garon, member of Los Angeles Bar, entitled *Recent Developments in California's Last Clear Chance Doctrine*, Volume 40, Cal.L.Rev., pp. 404-411.) There can be no doubt that the doctrine has been manna for injured plaintiffs who have themselves been negligent. In my opinion it is a salutary doctrine evolved by great liberal-minded jurists to ameliorate the injustice which resulted from a rigid application of the plea of contributory negligence as a complete defense in an action for personal injuries. Like all other liberal doctrines it has met with op-

position. Those opposed have generally rejected it as inapplicable to the factual situation presented in a particular case—holding the doctrine inapplicable as a matter of law. This conclusion being reached regardless of whether reasonable minds might differ as to the factual situation presented. Such cases as *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 P. 36; *Rodabaugh v. Tekus*, 39 Cal.2d 290, 246 P.2d 663; *Johnson v. Southwestern Engineering Co.*, 41 Cal.App.2d 623, 107 P.2d 417; *Dalley v. Williams*, 73 Cal.App.2d 427, 166 P.2d 595; *Gore v. Market Street Ry. Co.*, 4 Cal.2d 154, 48 P.2d 2; and *Johnson v. Sacramento Northern Ry.*, 54 Cal.App.2d 528, 129 P.2d 503 fall in this category.

There are, of course, many cases in which the doctrine is inapplicable. There are also borderline cases. The problem is first for the trial court to determine. If it submits the issue to the jury on proper instructions and the jury finds liability, I do not think it can then be said that reasonable minds cannot differ as to the applicability of the doctrine, because, to so hold, is to say that the trial judge and members of the jury do not have reasonable minds. If the trial judge refuses to submit the issue to the jury, the same situation arises as when a nonsuit, directed verdict or motion for judgment notwithstanding the verdict is granted. The question for the appellate court to determine in such a case is whether there was any substantial evidence in the record on which a trier of fact could reach a contrary conclusion. Of course, if the appellate court holds that such evidence exists, the reasonable minds doctrine comes into play and the case goes back to the trial court where the issues of fact are determined. This is and should be the law, because it is the product of reason, logic and common sense. If it were applied by the courts of this state, it would remove a tremendous burden from this Court and the District Courts of Appeal as well as our superior courts. This is manifest when we consider that many of the cases now before this Court and the District Courts of Appeal involve only factual questions which have been determined by the trial

courts and the question we are asked to decide is whether the issues of fact were correctly determined. This is not the function of this Court or of the District Courts of Appeal, and if the members of this Court would come to this realization, we would have more time to consider questions of law and dispose of cases more expeditiously. To demonstrate the truth of the foregoing statement, I wish to call attention to the fact that we now have twelve cases pending before this Court which involve only factual questions. Most of these cases, including the case at bar, were correctly decided by the District Court of Appeal, see *Daniels v. City and County of San Francisco*, Cal.App., 246 P.2d 125, but these cases are before this Court because a hearing was granted for the sole purpose of reconsidering questions of fact. I shall have more to say on this subject when the decisions in these cases are announced.

I also disagree with that part of the majority opinion which holds that the trial court properly submitted to the jury the issue of contributory negligence on the part of Kathaleen Smith. The uncontradicted evidence shows that Mrs. Smith was a guest in defendant Daniels' automobile, had no control over its operation and there is no basis whatsoever for an inference that any negligence on her part in anywise contributed to the accident. In this respect I am in full accord with the views expressed by the District Court of Appeal in its decision, *supra*, on this subject.

SCHAUER, Justice (dissenting).

I would affirm the judgment. Here again, in my opinion, is a case in which application of the last clear chance doctrine has been extended past reasonable bounds and the doctrine has become not one of last *clear* chance but one of last *possible* chance. See *Peterson v. Burkhalter* (1951), 38 Cal.2d 107, at page 114, 237 P.2d 977, and my dissent; *Rodabaugh v. Tekus* (1952), 39 Cal.2d 290, at page 297, 246 P.2d 663, and my concurrence.

Viewing the evidence must favorable to the application of the last clear chance doctrine, there is here a plaintiff who, having negligently placed herself in a position

of peril (she disregarded the defendants' arterial right of way, drove at five miles an hour into the path of the bus, stopped, and then started up again, slowly), endeavors to escape therefrom and a defendant who is charged with negligence in failing to anticipate correctly, within a matter of seconds or fractions of seconds, what course plaintiff will take in the endeavor to escape the position of peril. Plaintiff was driving a relatively light and maneuverable automobile; defendant driver was operating a heavy and unwieldy bus. If plaintiff had either remained standing in the middle lane or had started her slow progress forward from such middle lane to the inner lane, then at once halted, and the bus had followed the course which it actually did follow, the collision would have been avoided. If plaintiff had progressed a little more rapidly the collision would have been avoided. If the bus driver had elected to take the outer lane the collision would have been avoided. To state that the bus driver, required to make such rapid and nice anticipations of plaintiff's possible conduct and such nice calculations of what his own conduct should be, and to translate his conduct into control of the heavy and rapidly moving bus, had a *clear* chance to avoid the accident is, in my opinion, unrealistic and inaccurate. Where, as here, plaintiff has at least as much chance to avoid a collision as does defendant, I find no field for application of the last clear chance doctrine.

Decisions of this kind suggest a need for legislative study of the several facets of the problems involved. In this state, what is the annual toll of, and loss from, traffic accidents not industrially incurred? Can our society devise a better method for protecting or compensating the injured and their families than the common law tort action? If so, who should bear the primary burden of such protection? How far should it be spread? And in what forum enforced?

The above are but queries for future solution. The judgment here, on the present recognized concepts of law, should be affirmed.

Rehearing denied; EDMONDS and SCHAUER, JJ., dissenting.

**SILLS v. LOS ANGELES TRANSIT
LINES et al.
L. A. 22524.**

Supreme Court of California, in Bank.
April 9, 1953.

Action for injuries suffered when an automobile driven by plaintiff was struck by defendant's street car operated by co-defendant. From a judgment of the Superior Court, Los Angeles County, on a verdict for defendants, plaintiff appealed. The Supreme Court, Spence, J., held that the evidence was sufficient to take to the jury the questions whether defendant motorman had a last clear chance to avoid the collision by exercising ordinary care after seeing the automobile stopped on the track and whether the collision resulted from his failure to avail himself of such opportunity.

Judgment reversed.

Schauer and Edmonds, JJ., dissented.

Prior opinion, Cal.App., 246 P.2d 65.

1. Trial ⇨203(1)

Each party to action is entitled to have his theory of case submitted to jury in accordance with pleadings and proof.

2. Trial ⇨203(2)

The trial court must instruct jury of all vital issues involved in case.

3. Negligence ⇨138(4)

Plaintiff is entitled to instruction on last clear chance doctrine, if evidence, viewed in light most favorable to contention that such doctrine applies, establishes elements thereof.

4. Street Railroads ⇨117(35)

In action for injuries to driver of automobile stopped on street car track when struck by defendant's street car, questions whether plaintiff was aware of his dangerous position and could have saved himself by exercising ordinary care, whether street car motorman knew of plaintiff's position of peril or circumstances were such that he should have realized impending danger, and whether he had last clear chance to avoid accident by exercising ordinary care, involved factual considerations, where evi-

dence most favorable to plaintiff's theory, if believed by jury, would have warranted application of last clear chance doctrine.

5. Street Railroads ⚡217(35)

In action for injuries to driver of automobile, stopped on street car track in position of danger as result of his own negligence when struck by defendant's street car, weight of various witnesses' testimony as to street car's distance from automobile when it stopped, duration of such stop, and existence of reasonable means of escape from plaintiff's perilous predicament by backing off track, was question for jury, which was bound to reconcile, if possible, any inconsistencies in witnesses' time, speed and distance estimates.

6. Negligence ⚡72

A person in impending peril, where immediate action is necessary to avoid it, is not required to exercise all presence of mind normally exacted of careful and prudent person under ordinary circumstances, nor to show that his inability to escape from threatened danger was physical impossibility, in order to recover damages from tort-feasor for resulting injuries.

7. Street Railroads ⚡117(35)

In action for injuries to driver of automobile stopped on street car track when struck by defendant's street car, conflicting testimony as to duration of stop and position of oncoming street car when plaintiff stopped were matters for jury to consider in determining reasonableness of plaintiff's conduct in failing to back automobile off track.

8. Street Railroads ⚡117(35)

In action for injuries to driver of automobile struck by defendant's street car after plaintiff, who had started left turn at street intersection, stopped automobile on track in front of such street car to permit another street car, approaching from opposite direction, to proceed through intersection, whether circumstances known to street car motorman were such as would have alerted reasonable man as to danger of plaintiff's predicament and his probable inability to escape therefrom was question for jury.

9. Negligence ⚡83.7

A person seeing another in dangerous position may not rely on dullness as excuse for not realizing danger and must use reasonable diligence in analyzing dangerous situation; knowledge of danger being imputed where circumstances are such as to convey to mind of reasonable man fact that another is in position of peril.

10. Street Railroads ⚡117(35)

Whether street car motorman applied brakes immediately after seeing automobile on track ahead, as he testified, or failed to reduce speed of street car at any time before collision with automobile, as driver thereof testified, was question for jury in driver's action against street railway company for resulting injuries.

11. Street Railroads ⚡117(34, 35)

Whether street car motorman had last clear chance to avoid collision by exercising ordinary care after seeing automobile stopped on track ahead of street car and whether collision with automobile resulted from motorman's failure to avail himself of such opportunity were questions for jury in action against street railway company for resulting injuries to automobile driver.

12. Trial ⚡261

In personal injury suit, plaintiff's requested instruction, correctly stating essential elements required for application of last clear chance doctrine, or some other acceptable instruction thereon should have been given jury, though requested instruction was not in precise form ordinarily adopted in listing necessary elements for operation of such doctrine.

13. Negligence ⚡141(9)

In personal injury suit, instruction to jury that plaintiff's negligence did not necessarily preclude him from recovering damages, though accident would not have occurred but for such negligence, and stating circumstances which would bring last clear chance doctrine into operation in following explanatory sentence, introduced by word "thus" and twice referring to defendant's liability being contingent on finding that defendant's employee's negligence

was proximate cause of accident, correctly stated law for application of such doctrine.

14. Negligence $\hookrightarrow$ 83.8

A plaintiff's negligence, without which accident would not have happened and which continued up to very moment of accident, does not bar him from recovering damages for resulting injuries, if defendant had last clear chance to avoid accident.

15. Trial $\hookrightarrow$ 260(8)

In action for injuries to driver of automobile struck by defendant's street car at street intersection, refusal of plaintiff's requested instruction on last clear chance doctrine was prejudicial error as against defendant's contention that every major element of such doctrine was covered by other instructions, one of which referred to law violation as of no consequence, unless it way at intersection and duty to exercise another declared law relating to right of way at intersection and duty to exercise ordinary care to avoid collision.

16. Appeal and Error $\hookrightarrow$ 843(1)

Alleged errors not likely to occur on retrial need not be discussed by Supreme Court on reversal of judgment appealed from.

Francis J. Gabel and Henry F. Walker, Los Angeles, for appellant.

Melvin L. R. Harris and Trippet, Newcomer, Yoakum & Thomas, Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff sought damages for injuries suffered when an automobile which he was driving was struck by a streetcar owned by the defendant transit company and operated by defendant Parker. The complaint alleged that the proximate cause of the collision was the negligent operation of the streetcar by defendants. Such charge of negligence was denied by defendants in their respective answers, and each specifically pleaded contributory negligence. The jury returned a verdict in favor of defendants. From the judgment accordingly entered, plaintiff appeals.

[1-3] The principal question presented is whether the trial court erred in refusing an instruction on the doctrine of the last clear chance. Each party is entitled to have his theory of the case submitted to the jury in accordance with the pleadings and proof, *Cole v. Ridings*, 95 Cal.App.2d 136, 144, 212 P.2d 597, and it is incumbent upon the trial court to instruct on all vital issues involved. *Jaeger v. Chapman*, 95 Cal.App.2d 520, 525, 213 P.2d 404. Viewing the evidence in the light "most favorable to the contention that the [last clear chance] doctrine is applicable * * * since plaintiff is entitled to an instruction thereon if the evidence so viewed could establish the elements of the doctrine." *Selinsky v. Olsen*, 38 Cal.2d 102, 103, 237 P.2d 645, 646; *Hopkins v. Carter*, 109 Cal.App.2d 912, 913, 241 P.2d 1063, we have concluded that the requested instruction should have been given, and that its refusal constituted prejudicial error.

The accident occurred on October 17, 1949, about 6:30 p. m. at the intersection of Pacific Boulevard and 52nd Street in Huntington Park. Pacific Boulevard runs north-south and 52nd Street, running east-west, crosses it at right angles. North of the intersection Pacific Boulevard is divided into three sections: an unpaved private right of way in the center where the streetcar tracks are laid; and pavement running parallel on either side for vehicular travel, the east side for northbound traffic and the west side for southbound traffic. The private right of way ceases at 52nd Street, and south thereof Pacific Boulevard is paved from curb to curb with streetcar tracks in the center.

Plaintiff was driving his automobile southerly on Pacific Boulevard in the lane nearest the private right of way. As he neared 52nd Street, he started to make a left turn, eastward in the intersection. There was a northbound streetcar approaching the intersection at a speed of about 30 miles per hour. Plaintiff made a partial turn, stopping on the southbound track, with his automobile facing in a southeasterly direction and leaving the northbound track open. As plaintiff's automobile was

so stopped awaiting the passage of the northbound streetcar, a southbound streetcar struck plaintiff's automobile at the left front door. The force of the impact knocked plaintiff's automobile about 60 feet from the point of collision and turned it in a southwesterly direction as it came to rest against the west curb of Pacific Boulevard some 20 feet south of 52nd Street.

Prior to the collision, the southbound streetcar had made its last stop about four blocks or some 1500 feet north of 52nd Street, and the motorman did not expect to make a stop at the latter crossing. The motorman testified that the streetcar was traveling about 20 miles per hour as he first observed plaintiff's automobile about 85 feet away starting to make its turn at the intersection, and that it was about 75 feet away when it stopped on the track. He further testified that upon seeing plaintiff's automobile turn, he applied the brakes and began ringing the streetcar bell. The street lights were burning, as were the lights on both plaintiff's automobile and the streetcar.

A passenger on the streetcar testified that she was seated on the right-hand side about three or four seats from the middle door; that she heard the motorman ring his bell extensively; that when he applied his brakes she looked to the front and saw the automobile stopped on the track; that the streetcar was about 75 or 80 feet north of the intersection and the stopped automobile was about 10 feet to the south thereof, or a total distance of some 85 to 90 feet from the streetcar. She further testified that the clanging of the bell was long and loud; that after hearing it, she leaned to the left, shifted her position to see past the people in front, and then saw the stopped automobile at the above-mentioned distance.

Plaintiff testified that as he started to turn left he looked to the north and saw the southbound streetcar about four blocks away. He then looked to the south and saw the northbound streetcar at a distance variously estimated from a half block to a block and a half away, and traveling about 30 miles per hour. He stopped to permit the northbound streetcar to pass. He continued looking from left to right.

The next time he looked left he saw the southbound streetcar about one block away—"going terribly fast." He thought of moving forward but was afraid he could not clear the track ahead of the approaching northbound streetcar, which was then only 15 or 20 feet away. He thought of moving backward and getting out but by that time the southbound streetcar was only 6 or 7 feet away, and then it struck him. He stated that there was no change in the speed of the southbound streetcar from the time he saw it until the impact. While he estimated that he was stopped on the track "maybe 25 or 30 seconds" before the collision, he "didn't clock it." He could not state definitely whether there were automobiles behind him when he looked back, except that he did recall two lights, but "where they were" he didn't know. As he finally looked to the left, seeing the "big headlight" and the "big front" of the southbound streetcar bearing down on him a few feet away, he knew that he had no time to get off the track and so he tried to slide across the seat but was caught in the impact.

[4] The parties are agreed on the necessary elements which must be present in order to warrant the application of the last clear chance doctrine. These elements were stated in *Daniels v. City and County of San Francisco*, this day filed, Cal., 255 P.2d 785. But the question to be determined here is whether there is substantial evidence to meet the essential requirements for invocation of that doctrine. Defendants contend that the necessary evidentiary support is lacking for these reasons: that plaintiff was aware of his dangerous position on the streetcar track and could have saved himself by the exercise of ordinary care; that prior to the collision the motorman neither had knowledge of plaintiff's position of peril nor were the circumstances such that he should have realized the impending danger; and finally, that the motorman had no last clear chance to avoid the accident by the exercise of ordinary care. However, the record shows that these matters involve factual considerations, as the evidence most favorable to plaintiff's theory, if believed by the jury, would have warranted the appli-

cation of the last clear chance doctrine. *Girdner v. Union Oil Co.*, 216 Cal. 197, 199, 13 P.2d 915; *Hopkins v. Carter*, supra, 109 Cal.App.2d 912, 915, 241 P.2d 1063; also *Galbraith v. Thompson*, 108 Cal.App. 2d 617, 622-623, 239 P.2d 468.

[5] Concededly, plaintiff by reason of his own negligence found himself in a position of danger on the track in front of the approaching streetcar, but there arises the question of his ability to escape from his perilous predicament. Defendants cite plaintiff's testimony that the streetcar was four blocks away as he stopped on the track and remained there 25 to 30 seconds prior to the collision, that the motor of his automobile was running as it stood in second gear, and that a reasonable means of escape was then open to him by simply backing off the track. However, plaintiff was clearly only hazarding a guess as to the duration of his stop, and other testimony indicated a considerably shorter time interval. It was for the jury to determine the weight to be accorded to the testimony of the various witnesses and to reconcile, if possible, any inconsistencies in the time, speed and distance estimates in their factual accounts. *Kuhn v. Gottfried*, 103 Cal. App.2d 80, 84, 229 P.2d 137.

[6,7] As to the suggested avenue of escape through backing his automobile off of the track, plaintiff could not state definitely whether there was any traffic behind him which would have precluded such move but he did testify that as he thought of "backing and getting out," he saw the oncoming streetcar only 6 or 7 feet away, and then it struck him. As has been said: "It is always easy after an accident to see how it could have been avoided, but a man's duty before the calamity is not measured by such *ex post facto* information." *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 521, 74 P. 15, 17, 63 L.R.A. 238. A person in impending peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind which is normally exacted of a careful and prudent person under ordinary circumstances, nor to show that his inability to escape from the threatened danger was a physical impossibility. Here the

conflicting testimony relating to the duration of plaintiff's stop and the conflicting testimony relating to the position of the oncoming streetcar at the time that plaintiff made the stop were matters for the jury to consider in determining the reasonableness of plaintiff's conduct. *Selinsky v. Olsen*, supra, 38 Cal.2d 102, 105, 237 P.2d 645.

[8,9] Turning to the question of the motorman's awareness of plaintiff's dangerous position on the track, his own testimony attests to such knowledge. He saw plaintiff start the turn at the lighted intersection and bring his automobile to a stop on the southbound track in front of his oncoming streetcar. He too had noticed the approaching northbound streetcar which caused plaintiff to stop so as to permit it to proceed through the intersection. It was for the jury to determine whether the circumstances were such as would alert a reasonable man as to the danger of plaintiff's predicament and plaintiff's probable inability to escape therefrom. *Peterson v. Burkhalter*, 38 Cal.2d 107, 111, 237 P.2d 977. So it was aptly said in *Nicolai v. Pacific Electric Ry. Co.*, 92 Cal.App. 100, at pages 105-106, 267 P. 758, at page 761: "As held in a number of cases, where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position (*Basham v. Southern Pacific Co.*, 176 Cal. 320, 168 P. 359); and if he sees the dangerous situation he must use reasonable diligence in analyzing the same (*Starck v. Pacific Electric Ry. Co.*, 172 Cal. 277, 156 P. 51, L.R.A. 1916E, 58), knowledge of danger being imputed where the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril (*Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85)." See, also, *Paulos v. Market Street Ry. Co.*, 136 Cal.App. 163, 170, 28 P.2d 94; *Gillette v. City and County of San Francisco*, 58 Cal.App.2d 434, 444, 136 P.2d 611.

[10,11] There now remains the matter of whether the motorman had a last clear

chance to avoid the collision by exercising ordinary care but failed to do so. As above noted, the streetcar was traveling about 20 miles per hour. The passenger on the streetcar placed plaintiff's stopped automobile about 85 to 90 feet ahead on the track when she first observed it after she heard the motorman's initial clanging of the warning bell and then maneuvered into position so as to see in front of the streetcar—a shift of movement which might reasonably have required two or more seconds. From such considerations the jury could have found that the streetcar was some 125 feet or more from plaintiff's automobile when the motorman first saw it and commenced ringing the bell. An expert on traffic controls and speed conditions testified that a streetcar traveling at 20 miles an hour could be stopped in 66.6 feet braking time, and that 21.5 feet should be allowed for reaction time, or a total distance of 88.1 feet. There was testimony indicating that there was no change in the speed of the oncoming streetcar from the time the motorman first observed plaintiff's automobile starting a left turn in the intersection until the impact. Thus, while the motorman testified that he immediately applied his brakes when he saw the automobile on the track ahead, the jury might have disbelieved him and accepted plaintiff's statement that there was no decrease in the speed of the approaching streetcar at any time prior to the impact. *Bechtold v. Bishop & Co., Inc.*, 16 Cal.2d 285, 291, 105 P.2d 984; also *Hansen v. Bear Film Company, Inc.*, 28 Cal.2d 154, 184, 168 P.2d 946; *Estate of Durham*, 108 Cal.App.2d 154, 155, 238 P.2d 1061. The speed of the streetcar at the instant of collision was such as to knock the automobile about 60 feet and turn it against the curb. In these circumstances the jury could have found that after seeing plaintiff's automobile stopped on the track, the motorman had a last clear chance to avoid the collision by the exercise of ordinary care, and that the collision resulted from his failure to avail himself of that opportunity. *Selinsky v. Olsen*, supra, 38 Cal.2d 102, 105-106, 237 P.2d 645.

[12] Defendants next challenge the form of plaintiff's requested instruction on the last clear chance doctrine. It is true that the instruction was not in the precise form ordinarily adopted for listing the necessary elements for operation of the last clear chance doctrine, *Cole v. Ridings*, supra, 95 Cal.App.2d 136, 142, 212 P.2d 597, but it did correctly state the essential elements required for its application. Therefore, it or some other acceptable instruction embodying that theory of recovery should have been given. *Wright v. Los Angeles Ry. Corp.*, 14 Cal.2d 168, 179, 93 P.2d 135.

[13, 14] The opening sentence, which is the main subject of defendants' criticism, declared that "negligence on the part of a plaintiff does not necessarily preclude such plaintiff from recovering damages even though the accident would not have occurred but for such negligence." (Emphasis added.) There then followed an explanatory sentence introduced by the word "Thus" and setting forth the circumstances which would bring into operation the last clear chance doctrine. *Girdner v. Union Oil Co.*, supra, 216 Cal. 197, 202, 13 P.2d 915. Taken as a whole, the instruction correctly stated the law for application of the doctrine. The opening sentence merely served as an introductory statement calling attention to the fact that contrary to the ordinary rule, the negligence of the plaintiff would not necessarily preclude his recovery. Such observation coincided with the settled principle that negligence of a plaintiff, without which the accident would not have happened and which continues in existence up to the very moment of the impact or accident, "does not bar him from obtaining a judgment against the person who had the last clear chance to avoid the accident." *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 111, 237 P.2d 977, 979; *Galbraith v. Thompson*, supra, 108 Cal.App.2d 617, 623, 239 P.2d 468; see, also, *Harrington v. Los Angeles Ry. Co.*, supra, 140 Cal. 514, 522, 74 P. 15, 63 L.R.A. 238; *Selinsky v. Olsen*, supra, 38 Cal.2d 102, 104-105, 237 P.2d 645; 40 Cal.Law Rev. 404. The next sentence, in the manifest course of qualify-

ing the exception to the general contributory negligence rule, twice refers to defendants' liability being contingent on a finding that the motorman's negligence was the proximate cause of the collision. In such circumstances, there is no basis for defendants' argument that the instruction authorized plaintiff's recovery under any other condition.

[15] Defendants finally contend that even though it was improper for the trial court to have refused the requested instruction on the last clear chance doctrine, such refusal was not prejudicial error. In support of their position, defendants urge that every major element of that doctrine was covered by other instructions. Two of the cited instructions concerned proximate cause, one being the usual definition thereof and the other referring to a "violation of law" as "of no consequence unless it was a proximate cause" of the injury. The third cited instruction was a lengthy declaration of the law relating to the right-of-way at an intersection, and the duty to exercise ordinary care so as to avoid a collision. Manifestly, such instructions did not purport to deal with the last clear chance doctrine and cannot be deemed adequate for submitting to the jury the question of defendants' liability upon that theory. Moreover, at defendants' request the jury was expressly charged, without qualification, that contributory negligence would bar a recovery, and no declaration was made covering plaintiff's theory of his right to prevail under the last clear chance doctrine. *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 111, 237 P.2d 977. In these circumstances defendants unavailingly argue the proposition that the erroneously refused instruction should not be deemed prejudicial because the principle therein stated was fully and fairly covered in other instructions to the jury. *McMahon v. Marshall*, 111 Cal.App.2d 248, 251, 244 P.2d 481. Rather here, as the rule is stated in *Daniels v. City and County of San Francisco*, Cal.Sup., 255 P.2d 785, the refusal of the court to instruct on the last clear chance doctrine prejudiced plaintiff's rights and constitutes ground for reversal of the judgment.

[16] Other points raised by plaintiff are not likely to occur on a retrial and need not be here discussed.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

EDMONDS, J., dissents.

SCHAUER, Justice, dissenting.

I would affirm the judgment. As in *Daniels v. City and County of San Francisco*, Cal.Sup., 255 P.2d 785, the doctrine of "last clear chance" as applied here in effect substitutes the word "possible" for "clear." The evidence tends to show clearly that the plaintiff was negligent and that the plaintiff may have had a last clear chance to escape after he had driven upon the south-bound track, but it fails to show that the motorman of a vehicle of the size and weight of the streetcar, confined to its tracks on its right of way, had such an opportunity to avoid the collision as would make it reasonable to conclude that he had a clear chance.

The argument advanced in the majority opinion as an answer to defendants' contention in respect to the continuing negligence of plaintiff and the nonapplicability of the doctrine of last clear chance not only fails to constitute an adequate answer but tends affirmatively to support defendants' contention. The majority say (p. 6 [255 P.2d 799]), "Defendants cite plaintiff's testimony that the streetcar was four blocks away as he stopped on the track and remained there 25 to 30 seconds prior to the collision, that the motor of his automobile was running as it stood in second gear, and that a reasonable means of escape was then open to him by simply backing off the track. However, plaintiff was clearly only hazarding a guess as to the duration of his stop, and other testimony indicated a considerably shorter time interval. It was for the jury to determine the weight to be accorded to the testimony of the various witnesses and to reconcile, if possible, any inconsistencies in the time, speed and distance estimates in their factual accounts."

The proposition that plaintiff stopped on the car tracks while the streetcar was four blocks away and remained there, after having seen the car approaching, for 25 or 30 seconds prior to the collision, is quite different from the alternative proposition suggested in the second quoted sentence, to the effect that plaintiff was "only hazarding a guess" and that "other testimony indicated a considerably shorter time interval." If the facts are as first suggested then it would seem that plaintiff had a clear and abundant opportunity to remove himself from his position of peril and that it was his own negligence which continued him (while he was neither helpless nor unaware) in that position. The answer advanced by the majority in an attempt to escape such conclusion—the possibility of a factual determination that there was "a considerably shorter time interval"—answers too much. If such time interval was short enough to excuse the plaintiff from not having extricated himself from his position of peril, then it inevitably exculpates defendants from liability under the last clear chance doctrine because certainly plaintiff's automobile could have been removed from its position much more expeditiously than defendants' far heavier, moving, track-bound vehicle could have been stopped.

The decision in this case, together with the holdings in *Daniels v. City and County of San Francisco*, Cal.Sup., 255 P.2d 785, and in *Peterson v. Burkhalter* (1951), 38 Cal.2d 107, 237 P.2d 977, demonstrate that the transition of the doctrine from "clear" to "possible" chance application is an accomplished fact, but possibly not yet a dependable one. (See *Rodabaugh v. Tekus* (1952), 39 Cal.2d 290, 246 P.2d 663.) The character of the transition and the uncertainty of its application serve to emphasize the need for legislative or constitutional study and amendment, rather than mere judicial extension, of the concepts and vehicles of the law. But until the law has been amended by orthodox processes and we no longer have to call the basic principle the doctrine of last clear chance I think that we should refrain from applying it to facts which on any reasonable view of the evidence give the party charged no more than a slight or possible chance.

**BROOKS et al. v. E. J. WILLIG
TRUCK TRANSP. CO. et al.
S. F. 18646.**

Supreme Court of California, in Bank.
April 14, 1953.

Rehearing Denied May 7, 1953.

Action was brought against driver and owner of truck to recover for death of pedestrian who was run over by truck at night while attempting to cross highway at place other than crosswalk. The Superior Court of San Francisco County, Frank T. Deasy, J., entered judgment adverse to truck driver and owner, and they appealed. The Supreme Court, Gibson, C. J., held that evidence sustained judgment.

Judgment affirmed.

Prior opinion 110 Cal.App.2d 571, 243 P.2d 84.

1. Automobiles ⇨244(6)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, evidence sustained judgment against driver and owner of truck.

2. Witnesses ⇨347

Where it did not appear that when arresting officer discussed accident with district attorney and when he testified at Naval inquiry and at preliminary hearing on criminal charge, and he had been specifically questioned as to whether he had discussed drinking with truck driver who ran over deceased, and officer was not asked on those occasions to state all reasons given by truck driver for failure to stop after accident, court properly refused to permit truck driver and owner in death action against them to impeach testimony of officer by showing that on such prior occasions officer had not mentioned driver's statement that he had not stopped after the accident because he had had two beers and that he was afraid that Highway Patrol would "crucify" him if he stopped to report accident.

3. Witnesses ⇨351

Witness may not be impeached by showing that he omitted to state a fact or stated it less fully at prior proceeding, unless his attention was called to matter at that time and he was then asked to testify

concerning the very facts embraced in questions propounded at the trial.

4. Automobiles ⇨246(4)

Trial ⇨296(3)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, instruction providing that operator of motor vehicle must keep it under such control as will enable him to avoid a collision was erroneous because not phrased in terms of duty to use ordinary care, but such error was not reversible in view of other instructions imposing duty only of exercising care of person of ordinary prudence and caution.

5. Trial ⇨235(6)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, instruction that conduct of truck driver in driving away from scene of accident might be considered as circumstance showing consciousness of responsibility for accident, and that weight to be given such circumstance was for jury, was proper.

6. Evidence ⇨263(1)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, inference that conduct of truck driver in leaving scene of accident showed consciousness of responsibility for accident could be refuted and truck driver was entitled to explain his conduct.

7. Appeal and Error ⇨1058(2)

Evidence ⇨263(1)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, wherein jury was instructed that conduct of truck driver in leaving scene of accident showed consciousness of responsibility for accident, court erred in sustaining objection when truck driver was asked by his attorney why he did not stop after accident, but such error was not prejudicial in view of truck driver's explanation elsewhere in evidence concerning his failure to stop.

8. Automobiles ⇨246(31)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, instruction that pedestrian's conduct was governed by statute requiring pedestrians, who cross highway at place other than crosswalk to yield right of way to vehicles, but that it was not contributory negligence as a matter of law for pedestrian to cross highway at place where he was struck, and that law presumed that he yielded right of way, was not subject to objection that it told jury that pedestrian did not violate statute and was not guilty of contributory negligence. Vehicle Code, § 562.

9. Appeal and Error ⇨1067

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, wherein court instructed that if jury believed from preponderance of evidence that pedestrian was intoxicated and that his intoxication caused him to conduct himself otherwise than would a person of ordinary prudence, then jury should find pedestrian negligent, it was not reversible error to refuse requested instruction of truck driver and owner that statute provides that it shall be unlawful for any pedestrian who is intoxicated to such extent as to create a hazard to himself or others to walk or be on any roadway. Vehicle Code, § 565.

10. Automobiles ⇨246(58)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, evidence authorized giving of last clear chance doctrine instruction.

11. Automobiles ⇨246(22, 38)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, instruction that truck driver, knowing that pedestrian had been struck, was under duty to stop immediately and render such aid as was reasonably necessary to save pedestrian's life or prevent aggravation of his injuries, and that judg-

ment should be for plaintiffs if truck driver's breach of duty was proximate cause of pedestrian's death, and that such duty to stop did not depend on negligence of truck driver or freedom of pedestrian from contributory negligence, was proper. Vehicle Code, §§ 480, 482.

12. Negligence ⚡83.9

One who negligently injures another and renders him helpless is bound to use reasonable care to prevent any further harm, which the actor realizes or should realize threatens the injured person.

13. Automobiles ⚡201(1)

Violation of statute requiring motorist who injures another to stop and render aid gives rise to civil liability, if it is a proximate cause of further injury or death. Vehicle Code, §§ 480, 482.

14. Automobiles ⚡146

Failure of motorist to stop and render aid after being involved in accident constitutes negligence as a matter of law, in absence of a legally sufficient excuse or justification. Vehicle Code, §§ 480, 482.

15. Negligence ⚡108(1)

Negligence may be alleged in general terms.

16. Negligence ⚡108(2)

It is sufficient to allege that an act was negligently done without stating the particular omission which rendered it negligent.

17. Automobiles ⚡240(2)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, wherein complaint alleged that truck driver was negligent in operation and control of truck, that by reason thereof truck ran into and over pedestrian, and as result of such negligence pedestrian was injured and died, plaintiffs were entitled to prove any act which constitutes negligence in operation and control of truck and were not limited to proof of breach of common law standards of care but had right to show statutory violations amounting to negligence.

18. Automobiles ⚡240(2)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, wherein negligence of truck driver was alleged by complaint in general terms, plaintiffs were entitled to introduce evidence to show that truck driver was negligent as a matter of law because he failed to stop after accident. Vehicle Code, §§ 480, 482.

19. Automobiles ⚡246(50)

In action for death of pedestrian run over by truck at night while he was attempting to cross highway at place other than crosswalk, wherein evidence did not compel finding that pedestrian was dead before truck driver drove away from scene of accident without stopping, hit and run instruction was authorized. Vehicle Code, §§ 480, 482.

Dana, Bledsoe & Smith, Paul C. Dana and Morton B. Jackson, San Francisco, for appellants.

James C. Purcell and Michael Riordan, San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs seek recovery for the wrongful death of John Brooks who was struck and run over by a truck which belonged to defendant company and was being driven by its employee, defendant Farnsworth. Defendants appeal from a judgment entered on a jury verdict for plaintiffs contending that prejudicial errors were committed by the trial court in admitting and excluding evidence and in instructing the jury.

The accident occurred around 11 o'clock at night on a level, unlighted portion of U. S. Highway 101 near its intersection with State Route 37. At this point, U. S. 101 lies in open country and is a four lane north-south highway with its northbound lanes separated from its southbound lanes by a dividing strip. Decedent Brooks, a chief petty officer in the Navy, was in the area on foot and was apparently attempting to secure a ride north to Eureka where his

wife and child lived. There were no eyewitnesses to the accident other than defendant Farnsworth, who was driving an empty truck northward on Highway 101. He was travelling in the outside lane at a speed of approximately 45 miles per hour when he first saw Brooks about 250 feet ahead. Farnsworth gave two versions of Brooks' location and movements immediately prior to the time of the impact. He testified that he saw Brooks leave the dividing island and start eastward across the inner lane of the northbound part of the highway. In his statement to an officer the day after the accident Farnsworth said that Brooks was on the eastern edge of the highway, and that he saw him begin to walk westward across the outer lane. Farnsworth blew his horn and reduced his speed but did not attempt to stop. Brooks continued walking toward the center of the northbound highway and gave no indication that he was aware of the truck's approach. When some 150 feet away from Brooks, Farnsworth began to move the truck into the inner lane, and the impact occurred at a point on the white line separating the two lanes. The truck was then travelling 15 to 20 miles per hour. Farnsworth said he felt the wheels of the truck go over Brooks, but he did not stop to render aid or report the accident.

When apprehended by the police the following day, Farnsworth at first denied all knowledge of the accident but later admitted to the arresting officer that he had run over decedent. He said that he did not stop after the accident because he had "had two beers" earlier in the day and was afraid that if he stopped and called the Highway Patrol the officers would smell the odor of alcohol on his breath and would "crucify" him. He also told the officer that he failed to stop because he had seen animals that had been crushed by vehicles on the highway and he was certain he had killed Brooks and did not want to see the body.

An Army chaplain, who was one of the first persons to arrive at the scene after the accident, testified that Brooks was lying in the inner lane of the northbound highway with one leg extending across the

white line into the outer lane. He fixed Brooks' position at a point which was approximately 75 feet north of the place of impact. The chaplain gave Brooks conditional absolution and then went down the highway to call an ambulance. When he returned 15 or 20 minutes later several police officers and a few motorists had gathered at the scene of the accident, and he did not notice the location or condition of the body. On the witness stand he was shown a picture of Brooks taken at the scene of the accident by a photographer who accompanied the coroner, and he testified that the body, as shown by the picture, appeared to be more mutilated than it was when he found it. The chaplain was unable to say with certainty whether Brooks was dead or alive when he found him, but said, "I have seen boys overseas mutilated far worse than he was and still alive * * *."

The officers who arrived after the chaplain had left to call the ambulance testified that they found Brooks at a point some 195 feet north of the place where the initial impact had occurred. Brooks was dead. His body was badly mangled and eviscerated and lay entirely inside the inner lane.

An examination of the truck disclosed an imprint of cloth in the valley between the right front fender and the right side of the hood. Flecks of blood were found on the grillwork in front of the radiator, and the right front headlight was broken. There was evidence that the vehicle would stop in the "turn of a wheel," including "reflex time," if all its air brakes were applied when it was going about 15 miles per hour, and that it would stop within 15 to 20 feet if the brakes were applied at a speed of 35 miles per hour.

A coroner's chemical analysis of a specimen of decedent's blood indicated an alcoholic content of .22 of 1 per cent, and defendants produced two doctors who testified that in their opinion, based upon the coroner's finding, Brooks was "under the influence of alcohol" at the time of the accident. On the other hand, attendants at the toll plaza of the Golden Gate Bridge who saw and talked to Brooks about an

hour before the accident testified that he was sober at that time. And the chaplain, who knelt alongside Brooks and put his lips to his ear, did not notice any odor of alcohol.

[1] The evidence is sufficient to support the judgment, and we turn now to defendants' claims of error.

[2,3] Defendants attempted to impeach the testimony of the arresting officer by showing that on earlier occasions, when he discussed the accident with the district attorney and when he testified at a Naval inquiry and at a preliminary hearing on a criminal charge, the officer had not mentioned Farnsworth's statement that he had "had two beers" and was afraid that the Highway Patrol would "crucify" him if he stopped to report the accident. It is not disputed that Farnsworth had been drinking; he admitted on the stand that he had had "three or four beers" on the afternoon before the accident. The court refused to permit the attempted impeachment, it appearing that on the earlier occasions the officer was not specifically questioned as to whether he had discussed drinking with Farnsworth and was not asked to state all of the reasons given by Farnsworth for his failure to stop. The ruling was proper. A witness may not be impeached by showing that he omitted to state a fact or stated it less fully at a prior proceeding unless his attention was called to the matter at that time and he was then asked to testify concerning the very facts embraced in the questions propounded at the trial. *People v. Casanova*, 54 Cal.App. 439, 446-447, 202 P. 45; *Ball v. State*, 43 Ariz. 556, 33 P.2d 601, 602; *Larrance v. People*, 222 Ill. 155, 78 N.E. 50, 51-52; *Commonwealth v. Hawkins*, 3 Gray. 463, 69 Mass. 463, 465; *State v. Ogden*, 39 Or. 195, 65 P. 449, 452-453.

[4] The following instruction was given to the jury at plaintiffs' request: "You are instructed that the operator of a motor vehicle is not necessarily exempt from liability * * * by showing simply that at the time of the accident he was running at a rate of speed allowed by law. He still remains bound to anticipate that he may

meet persons at any point of the roadway and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his vehicle under such control as will enable him to avoid a collision with another person using proper care and caution, and, if the situation requires, he must slow up and stop." The language used in this instruction was taken almost verbatim from a statement of this court in passing on the propriety of a nonsuit in the case of *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125. The statement formulates an absolute standard of conduct in that it provides that the operator of a motor vehicle *must* keep it under such control as will enable him to avoid a collision. The instruction should have been phrased in terms of a duty to use ordinary care. However, the jurors were elsewhere informed in a number of instructions that the only duty imposed upon Farnsworth was that of exercising the care of a person of ordinary prudence and caution, and under the facts of this case it does not appear that a miscarriage of justice resulted.

[5-7] The jury was instructed that the conduct of Farnsworth in driving away from the scene of the accident might be considered as a circumstance showing consciousness of responsibility on his part for the accident and death of Brooks and that the weight to be given such circumstance was a matter for the jury to determine. The jury was further instructed that the fact that Farnsworth left the scene of the accident could not, in and of itself, be the basis of a verdict against defendants, and if Farnsworth was not guilty of negligence which caused the accident and death of Brooks, or if Brooks was guilty of negligence which contributed to his injury and death, the verdict must be for defendants, regardless of what Farnsworth did or failed to do after the accident. Defendants argue that an instruction on the inferences which may be drawn from flight is appropriate only in a criminal prosecution. See Pen.Code, § 1127c. We have found no case in this state where an instruction of this type has been given in a civil action, but it has been held in other jurisdictions in negligence cases that failure to stop and

render aid is some evidence of a consciousness of responsibility for an accident. See *Kotler v. Lalley*, 112 Conn. 86, 151 A. 433-434; *Shaddy v. Daley*, 58 Idaho 536, 76 P.2d 279, 281-282; *Langenstein v. Reynaud*, 13 La.App. 272, 127 So. 764, 766; *Battle v. Kilcrease*, 54 Ga.App. 808, 189 S.E. 573. Such an inference appears to be a reasonable one, and it was not error to give the instruction. The inference, of course, may be refuted, and a defendant is entitled to explain his conduct. In this connection, defendants complain that the court sustained an objection when Farnsworth was asked by his attorney why he did not stop after running over Brooks. The ruling of the court was, of course, error, but it was acquiesced in by defendants' attorney who stated that he thought it was correct and made no offer of proof. Moreover, Farnsworth's explanation of his failure to stop was developed elsewhere in the evidence, and it does not appear that any prejudice resulted from the ruling.

[8] The jury was told that Brooks' conduct was governed by section 562 of the Vehicle Code, which requires pedestrians who are crossing a highway at a place other than a crosswalk to yield the right of way to vehicles, but that it was not contributory negligence as a matter of law for the deceased to cross the highway at the place where he was struck, that the law presumes he did yield the right of way, and that the fact that he was struck does not, of itself, show that he failed to do so. Defendants claim that the instruction, in effect, erroneously told the jury that Brooks did not violate the statute and was not guilty of contributory negligence. We do not agree that the instruction had this effect. It did not take from the jury the factual questions of whether Brooks violated the statute by failing to yield the right of way or whether his conduct was a proximate cause of his injury and death, and these questions were submitted to the jury under instructions proposed by defendants. The jurors were also told that they were the sole judges of whether Brooks was negligent and that they were not bound by the presumption that he was

exercising due care if they believed the facts to be otherwise.

[9] Two instructions were requested by defendants as follows: Number 49 reads, "I instruct you that if you believe from a preponderance of the evidence that the deceased was intoxicated and that his intoxication entered into his conduct to an extent that caused him to conduct himself otherwise than would a person of ordinary prudence, then and in that event you must find that the deceased, John Misher Brooks, was negligent." Number 51 reads, "You are instructed that Section 565 of the Vehicle Code of the State of California, in force and effect at the time of the happening of this accident, provided as follows: 'It shall be unlawful for any pedestrian who is intoxicated to such an extent as to create a hazard to himself or others to walk or be upon any roadway.'" The court gave instruction 49 as requested but did not give instruction 51, and defendants claim error. The court may well have believed that giving both instructions would confuse the jurors and that number 49 was more favorable to defendants since it would permit the jury to find that Brooks was negligent even though his condition was not such as "to create a hazard" on the highway within the meaning of the statute. Under the circumstances, the failure to instruct on section 565 did not constitute reversible error.

[10] Defendants contend that it was error to instruct the jury on the doctrine of last clear chance, claiming that under the evidence the doctrine was not applicable either to the time before the initial impact or to any subsequent period. They argue that the interval of time in which Farnsworth could have acted after becoming aware that Brooks was in a position of peril was so short that Farnsworth did not have a last clear chance to avoid striking him. It could be reasonably inferred from the evidence, however, that Farnsworth knew that Brooks was in a position of peril and was unaware of the approaching danger and that Farnsworth could have prevented the accident by bringing the truck to a stop. See *Hoy v. Tor-*

nich, 199 Cal. 545, 552, 553, 250 P. 565. Moreover, if, as Farnsworth stated to the officer, Brooks left the east side of the highway and was walking west across the outer lane, Farnsworth could have avoided striking him by reducing the speed of the truck and remaining in the outer lane. In relation to the things that occurred immediately after the impact, the jury was told that the doctrine of last clear chance would apply if Brooks were still alive and if Farnsworth, knowing that Brooks was in a perilous and helpless position, could have stopped the truck in time to prevent the wheels from running over him. It could be inferred from the evidence that Brooks did not fall under the truck immediately after he was struck but, instead, was carried in the valley between the hood and the right front fender for a distance of 75 to 195 feet. Farnsworth testified that the truck was travelling 15 to 20 miles per hour when he struck Brooks, and there was evidence that at such a speed the truck could have been stopped "within the turn of a wheel," including "reflex time," if the air brakes had been fully applied. An instruction on last clear chance was proper.

[11-14] The court instructed the jury

that Farnsworth, knowing Brooks had been struck, was under a duty to stop immediately and render such aid as was reasonably necessary to save his life or prevent aggravation of his injuries, that judgment should be for plaintiffs if Farnsworth's breach of the duty was a proximate cause of the death of Brooks, and that the duty to stop and render aid did not depend upon the negligence of Farnsworth in causing the accident or the freedom of Brooks from contributory negligence but existed irrespective of any legal responsibility for the original injuries. This is a correct statement of the law. One who negligently injures another and renders him helpless is bound to use reasonable care to prevent any further harm which the actor realizes or should realize threatens the injured person. This duty existed at common law although the accident was caused in part by the contributory negligence of the person who was injured. See Rest., Torts, § 322; Prosser on Torts [1941], p. 194.) Sections 480¹ and 482² of the Vehicle Code require an automobile driver who injures another to stop and render aid. This duty is imposed upon the driver whether or not he is responsible for the accident, and a

1. Section 480 of the Vehicle Code provides: "The driver of any vehicle involved in an accident resulting in injury to any person, other than himself, or death of any person shall immediately stop such vehicle at the scene of such accident and shall fulfill the requirements of Section 482(a) hereof and any person failing to stop or to comply with said requirements under such circumstances is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not to exceed one year or by fine of not to exceed five thousand dollars (\$5,000) or by both."

2. Section 482 of the Vehicle Code provides in part: "(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his name, address and the registration number of the vehicle he is driving, the name of the owner, and shall upon request and if available exhibit his operator's or chauffeur's license to the person struck or the driver

or occupants of any vehicle collided with or shall give such information and exhibit such license to any traffic or police officer at the scene of the accident and shall render to any person injured in such accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person. In the event of death of any person resulting from an accident, the driver of any vehicle involved must, after fulfilling the requirements of Section 480 of this code and the foregoing requirements of this subsection, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by this subsection, shall, without delay, report such accident to the nearest office of the California Highway Patrol or office of a duly authorized police authority and submit with such report the information required by this subsection. * * *"

violation gives rise to civil liability if it is a proximate cause of further injury or death. See *People v. Scofield*, 203 Cal. 703, 708, 265 P. 914; cf. *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 497, 225 P.2d 497; *Hudson v. Craft*, 33 Cal.2d 654, 660, 204 P.2d 1, 7 A.L.R.2d 696. Failure to stop and render aid constitutes negligence as a matter of law, in the absence of a legally sufficient excuse or justification. See *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 588-589, 177 P.2d 279; cf. *People v. Scofield*, 203 Cal. 703, 708-709, 711, 265 P. 914; *People v. McKee*, 80 Cal.App. 200, 203-204, 251 P. 675.

[15-18] The duty of Farnsworth to stop and render aid was put in issue by the pleadings upon which the case was tried. The complaint alleged that defendants were negligent in the operation and control of the truck, that by reason thereof it ran into and over Brooks, and that as a result of the negligence of defendants in the operation and control of the truck, Brooks was injured and died. Negligence may be alleged in general terms, which means that it is sufficient to allege that an act was negligently done without stating the particular omission which rendered it negligent. *Rannard v. Lockheed Aircraft Corp.*, 26 Cal.2d 149, 157, 157 P.2d 1. Plaintiffs were entitled to prove any act which constituted negligence in the operation and control of the truck. Cf. *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 689, 147 P. 954. They were not limited to proof of a breach of common law standards of care but had a right to show statutory violations amounting to negligence. Such violations of specific statutes need not be alleged but may properly be shown under a general averment of negligence. See *Martin v. Shea*, 182 Cal. 130, 137, 187 P. 23; *Opitz v. Schenck*, 178 Cal. 636, 639, 174 P. 40; cf. *Rannard v. Lockheed Aircraft Corp.*, 26 Cal.2d 149, 157, 157 P.2d 1. Farnsworth's action in driving on without stopping after the accident may reasonably be regarded as a part of the operation and control of the vehicle, and under the allegations of the complaint plaintiffs were entitled to

prove the direct consequences of his conduct in driving on without stopping, namely, his failure to render aid or do anything to prevent further injury to Brooks. Farnsworth's failure to stop and render aid, in violation of sections 480 and 482 of the Vehicle Code, constituted negligence as a matter of law, and, under the pleadings, it was appropriate to show such negligence and the proximate results thereof.

[19] The record does not, as asserted by defendants, compel a finding that Brooks was dead before Farnsworth drove away from the scene of the accident, and the hit and run instruction was warranted under the evidence.

Defendants complain that certain rulings of the trial court led them to believe that all questions of liability for failure to stop and render aid had been excluded from the case. More than one year after Brooks' death plaintiffs, pursuant to permission, filed an amended complaint. The first count contained the general allegation of negligence in the operation and control of the truck and was virtually identical with the original complaint. The second, third and fourth counts incorporated the allegations of the first count and alleged respectively (a) that in violation of section 480 of the Vehicle Code, Farnsworth failed to stop and continued driving, by reason whereof Brooks was carried, dragged, crushed and mangled by the vehicle; (b) that, in violation of sections 480 and 482, Farnsworth drove away from the scene of the accident without stopping to render aid, leaving Brooks on the highway so grievously injured that he died by reason of want of medical treatment and the failure of Farnsworth to render assistance; and (c) that, in violation of sections 480 and 482, Farnsworth drove away from the scene of the accident leaving Brooks lying on the highway in a helpless condition, and thereafter Brooks was struck and run over by another vehicle and died as a result thereof. Defendants demurred to the last three counts on the ground that they were barred by the statute of limitations. The demurrer was sustained without leave to amend, and the case proceeded to trial on

the first count. Near the end of the presentation of defendants' case, plaintiffs moved to amend the complaint to conform to proof by adding allegations which were substantially the same as those to which the demurrer had been sustained. The motion was denied.

As we have seen, the second, third and fourth counts of the amended complaint alleged specific acts and omissions which were a part of the operation and control of the vehicle, and since the facts alleged were not unrelated to those set forth in the original complaint, the statute of limitations was not a bar and defendants' demurrer should not have been sustained on that ground. See *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 718, 128 P.2d 522, 141 A.L.R. 1358; *Stockwell v. McAlvay*, 10 Cal.2d 368, 375, 74 P.2d 504. The ruling on the motion to amend to conform to proof was properly denied upon the ground that the matters covered by the proposed amendments were in issue under the general allegation of negligence. Even if it be assumed that defendants are in a position to complain of the rulings they have failed to show that they were in fact misled or damaged. In his opening statement defendants' counsel told the jurors that Brooks was killed by the weight of the truck passing over him and that Farnsworth drove on without stopping, "knowing that the man was dead." Farnsworth was asked numerous questions by his counsel which were obviously designed to establish the fact that Brooks' death was caused by the wheels of the truck passing over his body immediately after the initial impact. In cross-examining the arresting officer defendants developed the fact that Farnsworth said that he felt the wheels go over the man and was "certain" he had killed him and did not want to see the body. Defendants do not claim that they could have produced any other evidence as to the time and cause of Brooks' death. It is not disputed that Farnsworth drove on without stopping, and there is no claim that there was any legal justification for his conduct. See *People v. McKee*, 80 Cal. App. 200, 203-204, 251 P. 675.

Other claims of error made by defendants are entirely without merit and need not be discussed.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.



40 Cal.2d 740

McNEAL v. GREENBERG et al.

L. A. 22674.

Supreme Court of California, in Bank.

April 24, 1953.

Action for personal injuries sustained when the brakes of a tractor rented by plaintiff from defendants to grade a hillside lot failed to hold. From a judgment of the Superior Court, Los Angeles County, on a directed verdict for defendants, plaintiff appealed. The Supreme Court, Edmonds, J., held that the evidence was sufficient to take to the jury the questions whether the brakes were defective when defendants delivered the tractor to plaintiff, whether defendants failed to inspect the tractor before such delivery, and whether plaintiff had no knowledge of such failure.

Judgment reversed.

Schauer, J., dissented.

Prior opinion 251 P.2d 49.

1. Bailment ⇨9

A bailor of chattel for hire must use reasonable care to make it safe for its intended use by bailee or disclose its actual condition to bailee.

2. Bailment ⇨9

One leasing to another a chattel made by third person must exercise reasonable care to inspect it before delivering it to lessee.

3. Bailment ⇨9

One keeping articles for hire must make such inspections thereof from time to time as a reasonably careful man would make in view of nature of articles and uses

to which they are to be put by lessees thereof. **8. Bailment** ⚡33

4. Bailment ⚡9

A bailor's implied warranty of fitness of bailed chattel for bailee's purpose does not make bailor an insurer against all personal injuries suffered by bailee because of chattel's defective operation, but bailor impliedly warrants only that he has exercised reasonable care to ascertain that chattel is safe and suitable for such purpose.

5. Trial ⚡169

A court may direct verdict for defendant only when, giving plaintiff's evidence all value to which it is legally entitled and disregarding all conflicting evidence, there is no evidence of sufficient substantiality to support verdict for plaintiff.

6. Bailment ⚡33

In action for injuries to lessee of tractor as result of its brakes failing to hold while he was grading hillside lot, plaintiff's testimony that his operation of tractor before time of accident was conducted under circumstances making use of brakes unnecessary was sufficient to take to jury question whether brakes were defective when defendants delivered tractor to plaintiff, though plaintiff's answers to direct inquiries as to whether he made any attempt to use brakes before accident were conflicting and defendant introduced evidence of sound condition of brakes immediately after accident.

7. Bailment ⚡33

In action for injuries to lessee of tractor as alleged result of defective brakes, plaintiff's testimony, corroborated by his employee's testimony that he saw tractor arrive at defendant lessors' yard only a minute or two before it was hitched to plaintiff's automobile and taken away by him, was sufficient to take to jury question whether defendants failed to inspect tractor before delivering it to plaintiff as against contention that plaintiff's testimony established his knowledge of such lack of inspection when he received tractor, thereby precluding him from asserting reliance on inspection by defendants.

In action for injuries to lessee of tractor as alleged result of defective brakes, plaintiff's testimony that he had no knowledge that tractor was one which defendant lessors expected to have returned from another job and assumed that tractor had just been received by defendants from a previous lessee, but that it might have come from another yard than that of defendants for all that plaintiff knew when tractor was delivered to him, was sufficient to take to jury question of plaintiff's lack of knowledge of defendants' failure to make proper inspection of tractor before delivering it to plaintiff.

Chester S. Johnson, Los Angeles, Jerry Giesler and Harold C. Holland, Beverly Hills, for appellant.

Parker, Stanbury, Reese & McGee and Raymond G. Stanbury, Los Angeles, for respondents.

EDMONDS, Justice.

Paul McNeal rented a tractor from Samuel Greenberg and two other persons doing business as copartners under the name of Sam's U-Drive. When operating the vehicle, McNeal sustained personal injuries and sued the lessors for damages. The appeal is from a judgment entered upon a directed verdict in favor of the lessors.

[1] In the first count of the complaint it is charged that the lessors negligently failed to make a proper test or inspection of the tractor before renting it to McNeal. As a result of such failure, it is alleged, he received the vehicle in a dangerous and defective condition. Section 408 of the Restatement of the Law of Torts, quoted with approval in *Rae v. California Equipment Co.*, 12 Cal.2d 563, 569, 86 P.2d 352, declares that a bailor for hire of a chattel must use reasonable care to make it safe for its intended use or disclose its actual condition to the bailee.

[2, 3] In comment "a" under that section it is said: "The fact that a chattel is leased for immediate use makes it unreasonable for the lessor to expect that the

lessee will do more than give it the most cursory of inspections. The lessor must, therefore, realize that the safe use of the chattel can be secured only by precautions taken by him before turning it over to the lessee. * * * If the chattel is made by a third person, the lessor is required to exercise reasonable care to inspect it before turning it over to the lessee. * * * In addition to the inspection required when the chattel is acquired, the lessor is required to make from time to time such inspections of the articles, which he keeps for hire, as a reasonably careful man would make in view of the nature of the article and the use to which it is to be put."

The second count of the complaint is based upon the theory of a breach of an implied warranty of fitness. It is alleged that the lessors warranted the tractor to be fit for the purpose for which it was hired and that McNeal accepted it in reliance upon such warranty. McNeal asserts that the defective condition of the brakes made the machine unsafe and unfit for its contemplated use and caused the injuries for which he claims damages.

[4] A bailor's implied warranty of fitness does not make him an insurer against all personal injuries suffered from the defective operation of the bailed chattel. He impliedly warrants only that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it is hired. *Dam v. Lake Aliso Riding School*, 6 Cal.2d 395, 399-400, 57 P.2d 1315; *Kersten v. Young*, 52 Cal.App.2d 1, 6, 125 P.2d 501; cf. *Miller v. Midway Fishing Tool Co.*, 106 Cal.App.2d 612, 614, 235 P.2d 630; see annotation 12 A.L.R. 774; 61 A.L.R. 1336; 131 A.L.R. 845.

In this count, as in the one based upon the theory of negligence, the essential inquiry is whether the Greenbergs made such inspection of their equipment as was necessary to discharge their duty of reasonable care.

In support of the directed verdict, the lessors contend that the evidence is insufficient to show either a failure to make a

proper inspection of the tractor or a defective condition existing at the time of hiring. Furthermore, they assert, by express contract McNeal released them from any implied warranty which might have arisen out of the hiring of the chattel.

The evidence concerning the events occurring immediately prior to the accident consists largely of the testimony of McNeal and two of his employees. McNeal, a licensed paving contractor, stated that he went to the lessor's yard and asked to rent a "skip loader", a tractor equipped with scoop buckets and a scraper blade, which is used to level and grade land. He was told that none was available but that one was expected to be returned from a job at any time. Shortly thereafter he was shown one mounted on a trailer which, the lessors said, had just come in. He hitched the trailer to his automobile and took the tractor to a point about two or three blocks from the hillside lot where grading work was to be done by him. He then drove the tractor to the lot, which was situated about 200 feet from the crest of a small hill on a 20 or 30 degree slope.

When he reached the lot, McNeal commenced leveling operations, driving the tractor in reverse gear with the scoop lowered so as to dig into the earth. At the end of a run or "pass", he would stop, change gears, and proceed forward, gradually emptying the scoop bucket so as to distribute the dirt evenly over the ground. The work on that day required about 10 passes in each direction.

On the next day, he used the tractor on a different part of the lot. At that location the lot sloped downward to the south, at about the same angle as the adjacent road, to the top of an embankment, which dropped vertically a distance of 8 or 10 feet to the adjoining land. His purpose was to remove a small ridge, about 20 feet long, the southern end of which was located two or three feet from the edge of the embankment. After backing toward the embankment, he would stop near the edge, change gears and go northward away from it. At the end of his third "pass", he again shifted to a forward gear and proceeded northward. After he had gone

about 15 or 20 feet, he stopped, intending to shift into a reverse gear. Before he could do so, however, the tractor began rolling backwards. He applied the brakes, but they failed to hold, and the tractor went over the edge.

[5] A court may direct a verdict for a defendant only when, with all conflicting evidence disregarded and the plaintiff's evidence given all the value to which it is legally entitled, there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. *Burgess v. Cahill*, 26 Cal.2d 320, 321-322, 158 P.2d 393, 159 A.L.R. 1304.

In the present case, the lessors contend that the evidence is insufficient to establish either a defect existing at the time the tractor was hired or, if the brakes were defective at that time, a defect of such a nature as would be disclosed by a reasonable inspection. To permit such facts to be inferred from simply a failure of the brakes, they argue, would be to allow an inference to be founded upon another inference.

Where a motor vehicle was obtained from an automobile dealer and shortly thereafter the brakes failed to operate, such failure, said this court, is sufficient basis for an inference that the brakes were defective at the time of the delivery of the vehicle and that a reasonable inspection would have disclosed the defect. *Benton v. Sloss*, 38 Cal.2d 399, 404-405, 240 P.2d 575. The cases relied upon by the Greenbergs for a contrary rule are distinguishable upon their facts. *McCall v. Pacific Mail S. S. Co.*, 123 Cal. 42, 55 P. 706 [evidence showing a reasonable inspection had been made]; *Williams v. Lowenthal*, 124 Cal. App. 179, 12 P.2d 75 [defect located in part added subsequent to the delivery of the chattel]; *Ogden v. Baker*, 205 Okl. 506, 239 P.2d 393 [defective brakes held not to be evidence that gratuitous bailor knew of their condition].

[6] The lessors take the position that any inference of a defect in the tractor existing prior to delivery must be deemed negated by McNeal's testimony showing extensive use of the vehicle by him prior to the accident. They also rely on evidence

tending to prove sound condition of the brakes immediately after the accident.

McNeal testified that his operation of the tractor was conducted in low gear, in soft earth, with the scoop buckets engaged, or under other circumstances making use of the brakes unnecessary. And, although answers to direct inquiries as to whether he had made any attempt to use the brakes prior to the accident were conflicting, when considered in the light most favorable to the lessee's cause of action, his testimony would support a verdict in his favor. The evidence concerning the condition of the brakes after the accident created only a conflict.

[7] Another contention is that the only evidence showing a lack of inspection of the tractor prior to its delivery to McNeal was his testimony and, if given credence, established knowledge of that fact at the time he received the vehicle. Having such knowledge, the argument continues, McNeal cannot assert that he relied upon any inspection by the lessor. However, McNeal's testimony was corroborated by Gonzales, an employee, who told the jury that he saw the tractor and trailer arrive at the lessor's yard only a minute or two before it was hitched to McNeal's car and taken away. From the brief interval that the machine was in the yard it could be inferred that no inspection of it was made.

[8] Furthermore, McNeal stated that he had no knowledge that the tractor rented to him was the one which the lessors expected to have returned from another job. At the time of the trial, he stated he "assumed" that the tractor had just been received from a previous lessee. But he also said that, from all he knew at the time the tractor was delivered to him, it might have come from another yard. This evidence provides sufficient basis for a reasonable conclusion that he had no knowledge of a failure on the part of the lessors to make a proper inspection of their vehicle.

The lessors' final contention is that certain waiver provisions contained in the rental agreement preclude liability. No evidence was offered concerning the parties' understanding of the effect of the pro-

visions and, in view of the explicit denial by McNeal that he signed the agreement, it is unnecessary to consider this point.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., dissents.



117 Cal.App.2d 326

STAFFORD v. RUSSELL et al.

Civ. 19403.

District Court of Appeal, Second District,
Division 2, California.

April 15, 1953.

Hearing Denied June 11, 1953.

Quiet title action wherein the Superior Court, Los Angeles County, Julius V. Patrosso, J., sustained a demurrer to the complaint and plaintiff appealed from ensuing judgment of dismissal. The District Court of Appeal, Fox, J., held that the complaint failed to state a cause of action.

Affirmed.

1. Evidence ⚡384

Parol evidence is not admissible to establish an agreement at variance with contract in writing, and this is a rule of substantive law rather than merely a rule of evidence. Civ.Code, § 1625; Code Civ. Proc. § 1856.

2. Mortgages ⚡369(2)

Trustor could not predicate right to have trustee's sale set aside on alleged oral agreement entered into concurrently with execution of trust deed. Civ.Code, § 1698.

3. Evidence ⚡424

Parties acquiring interests by reason of trustee's sale and deeds from trustee were successors in interest to trustee and entitled to invoke parol evidence rule against oral agreement in derogation of trust deed. Code Civ.Proc. § 1856.

4. Mortgages ⚡357

An unexecuted oral agreement to postpone valid sale of realty beyond date when it could be sold under terms of trust deed was unenforceable as agreement to alter terms of written instrument. Civ.Code, § 1698.

5. Evidence ⚡420(3)

It is permissible to show that a delivery was conditional, but a conditional delivery may not be established by parol evidence if oral condition is inconsistent with express terms of writing.

6. Evidence ⚡445(9)

Oral contract postponing enforcement of note and trust deed given in payment for equipment until after repossession or sale of equipment and application of proceeds to amount due and oral contract postponing payment for equipment until after outcome of certain pending litigation were clearly inconsistent with express terms of note and trust deed which made payment unqualifiedly due six months from date note bore, and therefore evidence of oral contracts was inadmissible.

7. Mortgages ⚡200(3)

Even in absence of authority in deed of trust for payment of taxes, etc., trustee or beneficiary may pay taxes and other superior liens in order to protect security, and may add same to debt secured.

8. Mortgages ⚡369(3)

Inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made, it being necessary that there be in addition proof of some such element of fraud, unfairness, or oppression as accounts for and brings about inadequacy of price.

Guy N. Stafford in propria persona.

Vaughan, Brandlin & Wehrle, J. R. Vaughan and Warren J. Lane, Los Angeles, for respondents Russell, Vaughan and Binns.

Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., and Harold Arman, Los Angeles, for respondent Title Insurance & Trust Co.

FOX, Justice.

Defendants' demurrer to plaintiff's tenth amended complaint was sustained without leave to amend. Plaintiff appeals from the ensuing judgment of dismissal.

The first count of the complaint is in the conventional form of an action to quiet title to the described property. It is, however, premised upon the detailed factual allegations contained in the other counts. Count one must, therefore, stand or fall with the other counts. *Ephraim v. Metropolitan Trust Co.*, 28 Cal.2d 824, 833, 172 P.2d 501.

In count two it is alleged that on or about November 1, 1945, plaintiff and one Hansberger entered into an oral agreement for the purchase by plaintiff of certain used oil well equipment then in plaintiff's possession at an agreed price of \$900, payable in six months, with title reserved in the seller until payment was made. On that same date plaintiff executed and delivered to Hansberger his promissory note for \$900, payable in six months, with interest at five percent, together with a deed of trust on the lots described in count one as security for the note.

The deed of trust, attached as an exhibit to the tenth amended complaint, named defendant Title Insurance and Trust Company as trustee, and required, inter alia, that trustor pay all taxes before delinquency and pay all encumbrances, charges and liens which appear to be prior or superior to the trust deed, and further provided that should trustor fail to pay any such items, the trustee or beneficiary might do so without notice to or demand upon the trustor. The trust deed was acknowledged by two of the trustors, plaintiff and Elsa K. Stafford, and was recorded in January, 1946. The third trustor, Elsan H. Stafford, acknowledged the trust deed in January, 1947, and it was again recorded with his acknowledgement in July, 1947.

It is alleged that the note and trust deed were executed and delivered pursuant to an oral agreement that Hansberger would not resort to the security of the trust deed to enforce payment of the note until he had first repossessed and sold the equip-

ment being purchased and applied the sum received from such sale to the amount due on the note.

It is further alleged that in January, 1946, plaintiff purchased and took possession of additional equipment for an undisclosed price and executed a promissory note, due in six months, secured by another trust deed upon the same property. It is also alleged that at the time of this second transaction it was further orally agreed between plaintiff and Hansberger that payment for the equipment covered by the agreement of November 1, 1945, as well as for the equipment then purchased, would be deferred until the final outcome of certain pending litigation between plaintiff and defendants Russell and Vaughan, "provided plaintiff could not otherwise make such payment"; that plaintiff believed the litigation in question would shortly terminate, but, that through the fault of Russell and Vaughan, it continued until late in 1949; that in reliance on the aforementioned oral agreements plaintiff did not make payment when due nor did he offer payment until late in 1949. Plaintiff next alleged in effect that Russell and Vaughan employed one Clinard (who was originally named as a defendant herein together with Hansberger but whose demurrers were sustained without leave to amend at an early stage of these proceedings) to obtain from Hansberger an assignment of the note and trust deed of November 1, 1945, to himself for the benefit of Russell and Vaughan; that he obtained, without plaintiff's knowledge, such an assignment some time prior to April 3, 1947; that on that date Clinard, acting at the request of Russell and Vaughan, executed and recorded a notice of default in the performance of the terms and provisions of the note and trust deed of November 1, 1945, and requested a sale of the lots covered thereby. On September 25, 1947, after the expiration of the statutory period following the recording of the notice of default, the defendant Title Insurance and Trust Company sold two of the lots, at trustee's sale, to Vaughan for \$110, and the other three to defendant Binns for \$150, and thereafter executed deeds conveying the five lots to the respective purchasers; that

Binns, at the request of Russell and Vaughan, acted as the attorney and adviser of Clinard; that he took title to the lots sold to him at the trustee's sale for the use and benefit of Russell and Vaughan. There is no allegation of any irregularity in the notice of default or the conduct of the sale. Finally, it is alleged that on December 16, 1949, plaintiff tendered to Hansberger the full amount due under the oral agreement of November 1, 1945.

Count three incorporates many of the allegations contained in the preceding count, and in addition alleges that before executing the trust deed plaintiff informed Hansberger that accumulated taxes assessed against the five lots were delinquent and unpaid, and that the title was clouded by certain litigation then pending which had been instituted by Russell and Vaughan against plaintiff; that about the time default was declared on the trust deed by Clinard, Russell and Vaughan paid or caused to be paid in the name of Clinard delinquent taxes in the amount of \$463.09 and requested Title Insurance and Trust Company to add this sum to that necessary to remedy the default. It is further alleged that in July, 1947, Russell and Vaughan requested and paid for a second recording of the trust deed in the amount of \$7.50 and requested the trustee to add this item also to the amount necessary to remedy the default; that the sum paid for taxes and the cost of re-recording the trust deed were added to the amount necessary for plaintiff to pay in order to remedy the default thereunder; and that the trustee "notified plaintiff that the sum necessary to remedy said default was approximately \$1,600.00" which included the payments for taxes and re-recording. This count concludes with the allegation that the property covered by the trust deed at the time of the sale thereof was of a value in excess of \$5,000, excluding "an idle oil well" thereon which was of a value in excess of \$25,000, and that under the belief that Hansberger, if he "ever had any right to use said trust deed dated November 1, 1945, was still the owner thereof, plaintiff tendered to said Hansberger the full amount due under said note and trust deed in December,

1949," which tender and demand were refused.

The fourth and fifth counts merely restate the allegations of the second and third counts and differ only in the relief demanded, namely, damages, rather than the setting aside of the trustee's sale.

[1,2] Plaintiff cannot predicate a right to any relief upon the alleged oral agreement entered into concurrently with the execution of the promissory note and trust deed dated November 1, 1945, covering the transaction in question. The proof of the asserted oral agreement must of necessity rest in parol. Such evidence, however, is not admissible to establish an agreement at variance with a contract in writing. Civ. Code § 1625; Code Civ.Proc. § 1856; *Scatena v. Lawson*, 95 Cal.App. 720, 724-725, 273 P. 592; *McArthur v. Johnson*, 216 Cal. 580, 582, 15 P.2d 151; *Lindemann v. Coryell*, 59 Cal.App. 788, 791, 212 P. 47. This is not a rule of evidence merely but one of substantive law. *Harding v. Robinson*, 175 Cal. 534, 540, 166 P. 808; *McArthur v. Johnson*, *supra*.

[3,4] Plaintiff contends, however, that none of the defendants, except Title Insurance and Trust Company, can invoke the parol evidence rule, asserting that they are not parties named in the trust deed and not successors to parties named therein. See Code Civ.Proc. § 1856. Plaintiff is in error for the other defendants acquired their interests by reason of the trustee's sale and their deeds from the trustee. Hence they are clearly successors in interest to the trustee and entitled to invoke the parol evidence rule.

Likewise, plaintiff is not entitled to any relief by reason of the alleged subsequent oral agreement in January, 1946, wherein it was assertedly agreed between him and Hansberger that the time for paying the promissory note of November 1, 1945, would be extended until the litigation then pending between him and defendants Russell and Vaughan was terminated. This was an effort to alter the terms of a contract in writing, which can only be done "by a contract in writing, or by an executed oral agreement, and not otherwise."

Civ.Code, § 1698. The alleged oral agreement was obviously not executed. Therefore, as pointed out in *Stafford v. Clinard*, 87 Cal.App.2d 480, 197 P.2d 84, where this identical transaction is passed upon, the alleged oral agreement is unenforceable. "To hold otherwise would reduce a trust deed in any case to an unsubstantial if not a worthless security." 87 Cal.App.2d at page 481, 197 P.2d at page 85.

[5, 6] Plaintiff seeks to circumvent the parol evidence rule on the theory that the note and trust deed were to take effect upon the occurrence of a future event; that the delivery was conditional. It is, of course, permissible to show that a delivery was conditional, see *Peterson v. First Nat. Bank*, 101 Cal.App. 532, 536, 281 P. 1104, but this rule is not without its limitations. One of these is that a conditional delivery may not be established by parol evidence if the oral condition is inconsistent with the express terms of the writing. *Restatement of Contracts*, sec. 241; *Hanrahan-Wilcox Corp. v. Jenison Mach. Co.*, 23 Cal.App.2d 642, 645-646, 73 P.2d 1241; *Severance v. Knight-Counihan Co.*, 29 Cal. 2d 561, 563, 177 P.2d 4, 172 A.L.R. 1107; *McArthur v. Johnson*, supra, 216 Cal. at pages 582-584, 15 P.2d 151; *Scatena v. Lawson*, supra. The distinction here applicable is pointed out in *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.*, supra, 23 Cal.App.2d at pages 645-646, 73 P.2d at pages 1243, in this language: "Testimony of the circumstances surrounding the execution and delivery of a written agreement ordinarily do not vary its terms and is therefore not within the parol evidence rule. [Citations.] However, if such testimony conflicts with the terms of the written agreement it falls under the ban of the rule [citations]." In the instant case the alleged oral contracts are clearly inconsistent with express terms of the note and trust deed. Plaintiff alleges that under the first oral agreement no action could be taken to enforce the note or trust deed until after repossession or sale of the personal property and the application of the proceeds to the amount due under the oral agreement; but by the terms of the note, payment was unqualifiedly due six months

from the date it bore. Also, the trust deed provided that "Upon default of Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, Beneficiary may declare all sums secured hereby immediately due and payable by delivery to Trustee of written declaration of default and demand for sale * * *." The note provided for interest at five percent. The oral agreement did not provided for interest. The trust deed provided that the real property is granted to trustee in trust: "For the purpose of securing payment of the indebtedness evidenced by one promissory note in the following form and performance of each agreement of trust herein contained. * * *" The trust deed goes on to set out the terms of the note which required plaintiff to pay \$900 in six months. The oral agreement, however, would make the trust deed security only for the difference between \$900 and the amount which the repossessed property might bring at a sale. The note and trust deed provided for an attorney's fee. Under the alleged oral contract no attorney's fee could be recovered.

The second oral agreement, allegedly made in January, 1946, is similarly inconsistent with the note and trust deed. By the terms of this oral agreement, payment was not due until the indefinite time when certain litigation terminated instead of at the fixed time of six months from November 1, 1945. The complete lack of merit in plaintiff's position is pointed out in *Stafford v. Clinard*, supra, where plaintiff sought to enjoin the sale which he now seeks to set aside, on the ground that Hansberger had agreed that plaintiff should have until the conclusion of certain pending litigation to make payment of the note.

Plaintiff takes the position that the tax lien was improperly paid and added to the amount necessary to cure his default. He also objects to the inclusion of the \$7.50 re-recording expense of the deed of trust. There is, however, no substance to this complaint for, by the express terms of the deed of trust, plaintiff agreed to pay when due all liens, with interest, on the property which appeared to be prior or superior to

the obligation thereby secured. He failed to do this. By the terms of the document power was conferred upon the trustee and beneficiary to make such payments.

The re-recording expense was due to the fact that one of the trustors, Elsan H. Stafford, did not acknowledge the deed of trust prior to its initial recording. He did, however, later acknowledge the document. It was then recorded a second time. This, of course, was done to protect the security of the deed of trust with respect to any interest that Elsan H. Stafford might have. The instrument authorized the trustee and beneficiary to pay necessary expenses. This second recording clearly falls within that designation.

[7] It is thus apparent that there was express authority in the deed of trust for the payment of these items. Even in the absence of such authority, the trustee or beneficiary may pay taxes and other superior liens in order to protect the security and add the same to the debt secured. *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 536, 39 P. 922; *San Mateo County Bank v. Dupret*, 124 Cal.App. 395, 396-397, 12 P.2d 669. It was therefore proper to include them in the amount necessary to cure plaintiff's default.

[8] Plaintiff is not entitled to any relief because of the alleged inadequacy of the price for which the lots sold at the trustee's sale. In this state, "it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." *Stevens v. Plumas Eureka Annex Min. Co.*, 2 Cal.2d 493, 496, 41 P.2d 927, 928. Nor does plaintiff allege additional facts which show he is entitled to relief. It is not claimed there was any irregularity in the notice of default or the

conduct of the sale. We have determined it was proper to add the amount paid for delinquent taxes and for re-recording the trust deed. Plaintiff states in his amended complaint that the defendant trustee "notified plaintiff that the sum necessary to remedy said default was approximately \$1,600.00," including the amount paid for taxes and re-recording. There is no suggestion in plaintiff's pleading that he did not know of the trustee's sale, or that he or anyone else was prevented from attending and bidding. Indeed it is clear from *Stafford v. Clinard*, supra, that plaintiff brought an unsuccessful action to enjoin the sale. It is, of course, true that plaintiff claims the sale was made contrary to the alleged oral agreements. But as we have pointed out these alleged agreements cannot be the basis for any relief.

On this point plaintiff relies on *Darden v. Reese*, 88 Cal.App.2d 904, 200 P.2d 81. It is clearly distinguishable since there the execution "sale was made without the knowledge of plaintiff, the owner of the stock". There are also other materially differentiating facts.

Although plaintiff had actual notice of the proposed trustee-sale prior to the date of sale and of necessity must be deemed to have had notice of the person who had requested the trustee to sell, and appears to have had actual knowledge of the identity of such person in view of his suit to enjoin the sale, see *Stafford v. Clinard*, supra, yet he made no attempt to tender any amount due under the note and trust deed until more than two years thereafter, and then made the alleged tender to the original payee of the note and not to the assignee thereof. Plaintiff's position is utterly lacking in equity.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

GRANT v. McAULIFFE.**MANCHESTER v. McAULIFFE.****JENSEN v. McAULIFFE.***

Civ. 8153-8155.

District Court of Appeal,
Third District, California.

April 13, 1953.

Hearing Granted June 11, 1953.

Action for injuries sustained by plaintiffs when automobile in which they were riding collided with automobile driven by an intestate against whose administrator the actions were commenced. The Superior Court, Plumas County, Macmillan, J., made an order abating the action in each case, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that survivability is a substantive right, as to which the *lex loci* governs, and when accident occurred in Arizona, and that state had no statute authorizing survival, common law rule that causes of action for tort abate upon death of the tort-feasor was applicable.

Orders affirmed.

1. Action ⇨66

Generally, in conflict cases, matters of procedure are governed by the law of the forum.

2. Abatement and Revival ⇨52

At common law, causes of action founded on tort abated with death of the tort-feasor, and such rule prevails in absence of statute to the contrary. Probate Code, § 574; Civ.Code, § 956; A.C.A.1939, § 21-534.

3. Abatement and Revival ⇨54, 58(1)

The common-law rule pertaining to abatement of tort actions upon death of tort-feasor has been abrogated in Arizona with respect to personal injury actions only to the extent of reviving an action theretofore instituted against the tort-feasor, and cause of action abates upon death of tort-feasor before commencement of an action. Probate Code, § 574; Civ.Code, § 956; A.C.A.1939, § 21-534.

4. Abatement and Revival ⇨49

Question whether a cause of action sounding in tort survives the death of the

tort-feasor involves a matter of substance, and is to be determined in accordance with law of the *lex loci*, and not the *lex fori*, but revival of actions or proceedings is a matter of procedure or remedy as to which the *lex fori* governs. Probate Code, § 574; Civ.Code, § 956; A.C.A.1939, § 21-534.

5. Abatement and Revival ⇨52, 71

"Survival" has to do with accrual of a cause of action and its abatement at death of one of the parties, while "revival" refers to a cause of action pending at the death of one of the parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Revival" and "Survival".

6. Abatement and Revival ⇨49

Where automobile accident giving rise to causes of action occurred in Arizona, question of whether causes of action survived the death of the tort-feasor were to be determined in accordance with the law of that state, and when Arizona had no survival statute, but merely a statute providing for revival of causes of action commenced before death, California court would deem the causes of action to have abated with death of tort-feasor. Probate Code, § 574; Civ.Code, § 956; A.C.A.1939, § 21-534.

7. Abatement and Revival ⇨49

California public policy does not preclude application, as to tort occurring in Arizona, of rule of Arizona that causes of action sounding in tort abate upon death of the tort-feasor. Probate Code, § 574; Civ.Code, § 956; A.C.A.1939, § 21-534.

Goldstein, Barceloux & Goldstein, Chico, for appellants.

Honey & Mayall, Stockton, for respondent.

SCHOTTKY, Justice.

On December 17, 1949, appellant Jensen was driving west on U. S. Highway 66 and appellants Grant and Manchester were riding with him. W. W. Pullen was driving his automobile east on the same highway. At a point approximately 15 miles east of Flagstaff, Arizona, the Jensen and Pullen

* Subsequent opinion 264 P.2d 944.

cars collided, due to the alleged negligence of Pullen.

Jensen's automobile was badly damaged and Jensen, Grant and Manchester suffered personal injuries. Pullen died on January 5, 1950, and Frank H. McAuliffe was appointed administrator of his estate by the Superior Court in Plumas County, California, which county was and had been the residence of Pullen, Jensen, Grant and Manchester. On December 14, 1950, Jensen, Grant and Manchester each filed an action for damages against the estate of Pullen, having previously presented their claims against Pullen to the administrator who rejected each of the claims.

In response to plaintiffs' complaints defendant filed a general demurrer and notice of motion to abate. After hearing the motion the court made an order abating the action in each case. Plaintiff in each case appealed from the said order and the three appeals have been consolidated as each is based upon the same grounds.

Appellants make a vigorous and able attack on the orders abating the actions. They contend that the trial court erred in that its conclusions were contrary to the following contentions:

"1. The question of survivability is a procedural matter and should be governed by the law of the forum.

"2. Regardless of the nature of the doctrine of survivability in other states, it is definitely a purely procedural matter in the State of Arizona, and therefore has no application to California actions.

"3. Assuming the law of Arizona on the question of survival to be substantive, it will not be enforced in California where the Arizona rule is directly contrary to the public policy of the State of California."

We shall first discuss the principal contention of appellants which is that survivability is a procedural or remedial matter and not a substantive right and therefore should be governed by the law of the forum.

[1] It is the general rule, as stated by appellants, that matters of procedure are

governed by the law of the forum. The rule is stated in 11 Am.Jur., sec. 14, p. 314 (cited by appellants), as follows:

"* * * The broad, uncontroverted rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself, while the *lex fori* controls all that is connected merely with the remedy. The Courts will assume that a case is to be governed by the laws of the forum unless it is expressly shown that a different law applies, and in case of doubt as to whether the *lex loci* or the *lex fori* should govern, the court will naturally prefer the laws of its own state or country."

Also see *Frederick Sage & Co. v. Alexander & Oviatt Corp.*, 138 Cal.App. 476, 32 P.2d 655.

Respondent does not dispute this general rule but contends that in the instant case it has been shown that a different law does apply. Respondent argues that the fundamental and general rule in the field of tort law is as stated in 11 Am.Jur., sec. 182, p. 490, as follows:

"Where an action is brought in one jurisdiction for a tort committed in another, the general rule is that all matters relating to the right of action are governed by the *lex loci delicti*. That law determines whether a person has sustained a legal injury. The actionable quality or nature of acts causing death or bodily injuries as tortious is therefore to be determined by reference to the *lex loci*, rather than the *lex fori*. The law of the place of the wrong may defeat recovery because of the failure of the injured person to fulfil certain statutory conditions. Such law governs in the forum.

* * * * *

"It is obvious under the foregoing rules that in order to maintain an action of tort founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must therefore be at least actionable by the law of the place in which it is done. Correspond-

ingly, if no legally maintainable action is created by the place of the wrong, none exists elsewhere. The prosecution of transitory actions in a state or country other than that in which the cause of action arises is based on comity, so that, where under the *lex loci* no right of action exists, no action can be entertained by the courts of the forum, although a statute of the forum gives such a right of action. * * *

In the case of *Loranger v. Nadeau*, 215 Cal. 362, at page 366, 10 P.2d 63, 65, 84 A. L.R. 1264, a case having to do with the application of the rule of *lex loci delicti* in a tort action, our Supreme Court said:

"It is the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed, and, as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found. It is the general rule in tort actions that the court will, if it has jurisdiction of the necessary parties and can do substantial justice between them in accordance with its own forms of procedure, enforce the foreign law if it is not contrary to the public policy of the forum, to abstract justice, or pure morals, or injurious to the welfare of the people of the state of the forum. 12 Cor.Jur., p. 453. In *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N.E. 198, 202, it was said: 'The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.' In *Reynolds v. Day*, 79 Wash. 499, 140 P. 681, 683, L.R.A.1916A, 432, it was said: 'Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not con-

trary to the public policy of the state where the action is brought, nor contrary to abstract justice or pure morals nor calculated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions *ex contractu* and actions *ex delicto*. In all such cases, the right to recover is governed by the *lex loci* and not by the *lex fori*.'"

See, also, Restatement of the Law, Conflict of Laws, sec. 390, pp. 478-479; 15 C.J.S., Conflict of Laws, § 12, p. 896.

[2] It is a well-settled rule at common law that causes of action founded on tort abated with the death of the tort-feasor. This common-law rule has long been recognized and accepted in California, as stated in the case of *Clark v. Goodwin*, 170 Cal. 527, at page 529, 150 P. 357, at page 358, L.R.A.1916A, 1142, as follows:

"The only question on this appeal is whether the cause of action so given survives the death of the person who wrongfully or negligently causes the death on account of which damages are claimed. Admittedly it does not survive the death of the wrongdoer if the well-settled common-law rule relative to abatement of a cause of action for damages for injuries to person on the death of the wrongdoer has not been changed by statute in this state. Our statutes provide that: 'The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state.' Pol.Code, § 4468. Nothing was more firmly settled at common law than the rule that such a cause of action, except under certain circumstances which do not exist here, does not survive the death of either the person to or by whom the wrong was done."

In the absence of specific statutory enactment the common-law rule as to abatement of causes of action founded on tort still prevails. However, in a majority of jurisdictions, including California, legis-

lation has been enacted expressly modifying the common-law rule. Since the enactment of Probate Code, section 574 in 1931, as amended in 1949, and the addition of section 956 to the Civil Code in 1949, a cause of action does not abate in California upon the death of a tort-feasor.

[3] The common-law rule as to survival of tort actions prevails in Arizona, but section 21-534 of the Arizona Code provides:

"An action to recover damages for injuries to the person, or death caused by the wrongful act, default or neglect of another, shall not abate by reason of the death of the defendant, and his personal representative may be substituted as defendant; if such action be against a receiver, assignee or trustee, and such receiver, assignee or trustee shall die, resign or be removed from office, his successor in office may be substituted as defendant. The action shall thereupon proceed to judgment as if the defendant had remained alive, or the original receiver, assignee or trustee had continued in office."

This statute is the only statute enacted by the State of Arizona regarding death situations and in effect is a revival statute, providing only for the substitution of a personal representative of a deceased litigant who has died after a proceeding or action has been commenced. This Arizona statute has been expressly so construed in the case of *McLellan v. Automobile Insurance Company of Hartford, Conn.*, 9 Cir., 80 F.2d 344, wherein the plaintiffs argued that the above-cited section of the Arizona Code was a survival statute. At page 350 of 80 F.2d, the court stated:

"It is clear that in a case where the wrongdoer dies, section 3774 [21-534, Arizona Code] is designed to *revive* an 'action'; i. e., a 'proceeding', which has theretofore been instituted to recover damages for death by wrongful act, even though the *cause* of action itself, if the proceeding had not been instituted before the death of the wrongdoer, would not have survived his death."

This decision relied on the interpretation given the California revival statute, Code of Civil Procedure, section 385, in the case of *Clark v. Goodwin*, 170 Cal. 527, 150 P. 357.

The common-law rule as to the abatement of actions is still in effect in the State of Arizona and has been expressly held to be so in the case of *McClure v. Johnson*, 50 Ariz. 76, 69 P.2d 573, at page 576, where the court in passing on the decision rendered in the *McLellan* case (above cited) stated:

"We are of the opinion that the decision of that court was correct on the point referred to, and that under the law of Arizona when a tort-feasor dies before the commencement of an action, the cause of action does not survive his death, and a plea in abatement should be sustained if the fact appears on the face of the complaint, or a verdict should be directed in favor of defendant if it is first shown by the evidence."

[4] Turning to the contention of plaintiffs that survivability is a procedural or remedial right and not a substantive right, and therefore that it should be governed by the *lex fori*, we believe that our Supreme Court has determined this question adversely to plaintiffs' contention in the recent case of *Cort v. Steen*, 36 Cal.2d 437, at page 440, 224 P.2d 723, at page 725, where the court stated:

"Prior to 1949 there was no provision under the law of this state for the survival of actions to recover for personal injuries. If the statutory provisions for survival affect only the remedy or procedure, the conclusion would follow that in the absence of an express provision the enactment applies as well where a party died prior to its effective date. *San Bernardino County v. Industrial Acc. Comm.*, 217 Cal. 618, 628 et seq., 20 P.2d 673. That case also indicates when retrospective application express or implied will be invalid as an impairment of vested rights."

Again quoting from the same case; at pages 441, 442 of 36 Cal.2d, at page 725 of 224 P.2d:

"* * * In spite of the vagueness of its origin, the uncertainty of its meaning, and the criticism to which it has been subjected, the maxim *actio personalis moritur cum persona* has become firmly imbedded in the law. [Citations.] Courts have treated the phrase as referring not merely to the remedy, but to the right or cause of action itself. Thus 'abatement' as used in determining the effect of the non-survivability doctrine, did not have the same meaning as abatement of actions which could be revived for or against personal representatives. Under the doctrine the abatement of the action by the death of the injured person through the tort-feasor's act or otherwise, or by the death of the tort-feasor, was deemed to abate the wrong as well. For in legal concept death was considered not to be an injury. [Citations.] Recovery was solely punitive, and the deceased's representatives had not received or committed the wrong in their personal capacities. [Citation.] Since death 'discharged', 'terminated' [citation], or 'dissolved' the cause [citations], a survival statute was deemed to create a right or cause of action, rather than to continue an existing right, or to revive or extend a remedy theretofore accrued for the redress of an existing wrong." [Citations.]

In 1 Am.Jur., sec. 157, page 103, it is stated:

"The general rule is that the survival of a cause of action is governed by the law of the state where the cause arose. Some courts apply this rule even though there is no similar statute in the state of the forum, but other courts have limited their decisions to cases in which there is a similar statute in the forum. This is regarded as a matter pertaining to the substantive right, rather than to the remedy. This principle finds application in causes of

action for personal injuries. The survival of such a cause is governed by the law of the place where the injury occurred and the cause of action arose.

"Many of the courts limit this doctrine to cases in which no action has been brought until after the death of the injured person or of the wrongdoer. The fact that the action is brought in the state of the domicile of the wrongdoer and that by the law of that state the cause of action survives his death is not effective to make the cause of action survive where such action is brought after his death." *Ormsby v. Chase*, 290 U.S. 387, 54 S. Ct. 211, 78 L.Ed. 378.

[5] We believe that the basic weakness of the argument of plaintiffs upon this point is that they have failed to properly evaluate the distinction between the survival and revival of actions. Plaintiffs have cited a number of cases in support of their contention that survivability is procedural but an examination of these cases, with the exception of one or two extreme minority views, discloses that they all deal with revival statutes, and that the court in each instance applied its own law regardless of the law of locus delicti, in accordance with the general rule hereinbefore stated. "Survival" has to do with the accrual of a cause of action and its abatement at the death of one of the parties. "Revival" has to do with a cause of action pending at the death of one of the parties. The distinction between "survival" and "revival" is clearly pointed out in exhaustive annotations in 87 A.L.R. 852 and 92 A.L.R. 1502. Survival of actions is by the overwhelming weight of authority held to be a matter of "substantive law" and the *lex loci delicti* applies, while "revival" is considered a matter of "procedure or remedy" and the *lex fori* applies.

[6] Since in the instant cases the actions were not instituted before the death of the tort-feasor, and the State of Arizona has no survival statute, but applies the common-law rule that an action for personal injuries against a tort-feasor

abates at his death, *McClure v. Johnson*, 69 P.2d 573; *McLellan v. Automobile Ins. Co.*, 80 F.2d 344, *supra*, we must, in view of the authorities cited, hold that upon the death of the tort-feasor, before the filing of the actions, the plaintiffs' right of action abated.

The final contention of plaintiffs is that "assuming the law of the state of Arizona on the question of survival to be substantive, it will not be enforced in California where the rule is directly contrary to the public policy of the State of California." The authorities cited by plaintiffs on this point all appear to involve situations where the *locus delicti* has a "survival" statute but the forum does not. In such cases relief has been denied in the forum because to grant it would contravene strong public policy therein. However, no case has been cited where a cause of action for tort could be enforced in the forum where such cause of action could not be enforced in the courts of the state where the wrong was committed and the cause of action arose. The rule is well expressed in *Restatement of the Law, Conflict of Laws*, section 390, as follows:

"Comment:

"(a) A claim does not survive the death of a party to it unless it is made by a statute to survive. No recovery can be had for damages after the death of the injured party or of the tort-feasor unless such be the law of the place of wrong. By the early common law no claim for a tort survived. By a very early English statute, claims for breach of a contractual obligation survived. The category of claims surviving the death of the person injured has been enlarged by modern legislation to include many tort claims, but there are still states by the law of which a claim for damages for certain personal injuries dies with the injured person. By modern legislation most claims survive against the representative of a deceased wrongdoer.

"(b) If a claim for damages for injury survives the death of the injured person or the wrongdoer, as the case

may be, by the law of the place of wrong, recovery may be had upon it by or against the representative of the decedent, provided the law of the state of forum permits the representative of the decedent to sue or be sued on such a claim. Without such power created by the law of the state of suit, no recovery can be had."

[7] We are unable to agree with plaintiffs' contention that the public policy of the State of California as expressed in its statutory enactments modifying the common-law rule as to the abatement of causes of action for torts, requires a holding that the plaintiffs in the instant actions may press their actions in the courts of California. Admittedly the causes of action arose in Arizona where the torts were committed, and the laws of Arizona are controlling. No actions having been commenced prior to the death of the tort-feasor, the right of action of the plaintiffs ceased in accordance with the rules established by the courts of Arizona. Therefore, when plaintiffs filed their actions in California no causes of action existed, and to permit a recovery in California for a tort committed in Arizona when the cause of action abated in Arizona, would be contrary to the general rule hereinbefore quoted, as expressed in 11 Am.Jur., sec. 182, page 491, as follows:

"It is obvious under the foregoing rules that in order to maintain an action of tort founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must therefore be at least actionable by the law of the place in which it is done. Correspondingly, if no legally maintainable action is created by the place of the wrong, none exists elsewhere. The prosecution of transitory actions in a state or country other than that in which the cause of action arises is based on comity, so that, where under the *lex loci* no right of action exists, no action can be entertained by the courts of the forum, although a statute of the forum gives such a right of action. * * *

In view of the foregoing we conclude that the learned trial judge correctly determined that the causes of action of plaintiffs abated and that the orders abating the actions should be and the same are hereby affirmed.

PEEK, J., and VAN DYKE, P. J., concur.



118 Cal.App.2d Supp. 875

BERRY v. SKONE et ux.

Civ. No. 4.

Appellate Department, Superior Court
Kern County, California.

April 1, 1953.

Action by one joint adventurer against co-joint adventurer for money had and received and for account stated based on returns of celery crop. Joint adventurer sought one-half of \$2,883.02, but prior voluntary accounting between parties from same joint adventure involved more than \$30,000. The Bakersfield Municipal Court entered judgment for joint adventurer, and co-joint adventurer appealed. The Superior Court, Bradshaw, J., held that, for purpose of determining jurisdiction of the municipal court, amount involved was not in excess of \$3,000.

Judgment affirmed.

1. Appeal and Error ⇨1011(1)

Where evidence was definitely conflicting, trial court had discretion to resolve conflict, and its findings would not be disturbed upon appeal if there was substantial evidence to support them.

2. Joint Adventures ⇨5(1)

Where joint adventurers, in arriving at settlement, agreed to leave matter of accounting for celery crop for adjustment at later date, one such joint adventurer could bring action at law against other for adjudication of the remaining item.

3. Courts ⇨170

The most frequently used yardstick in determining jurisdiction of the municipal court in action for money judgment is amount in controversy as indicated by prayer of complaint.

4. Courts ⇨169(2)

In action by one joint adventurer against co-joint adventurer for money had and received and for account stated based on returns of celery crop, wherein joint adventurer sought one half of \$2,883.02, but prior voluntary accounting between parties from same adventure involved more than \$30,000, for purpose of determining jurisdiction of the municipal court, amount involved in action was not in excess of \$3,000.

West, Vizzard, Howden & Baker, Bakersfield, for respondent.

Deadrich, Gill & Bates, Bakersfield, for appellants.

BRADSHAW, Judge.

B and S in March or April of 1951 entered into an oral agreement to form a joint venture for the production, processing and marketing of certain vegetable crops. They were to share losses and profits equally. One of the projects in which they engaged was that of the purchase of 40 acres of growing celery. Toward the end of the season this celery crop did not appear to be a promising venture, and there was considerable discussion between the joint venturers about giving it up or turning it back to the original grower. The testimony of S is to the effect that B gave up all interest in the crop and relinquished it entirely to S. This was in December, 1951. On or about the 15th of December, 1951, the parties mutually agreed to dissolve the joint venture and on January 11, 1952, made an accounting as of December 31, 1951, as to all matters except the celery crop. At that time, to wit: on January 11, 1952, the celery crop had been completely gathered and marketed, but the final returns on the proceeds had not been received. Subsequently payment was received by S for the celery that had been sold and B de-

manded one-half of the profits thereof, the total amount of which was \$2,883.02. S declined to pay any part of this to B contending that the accounting on January 11 was a complete accounting as to all matters and that B had in effect disclaimed all interest in the celery deal. In the accounting of January 11, proceeds in excess of \$30,000 were divided. B as plaintiff brought this action for money had and received and for an account stated based on the returns from the celery crop alone. S as defendant answered by way of general denial and as an affirmative offense alleged that the accounting and dissolution of January 11 was complete and conclusive of all claims between the parties; and also pleaded a lack of jurisdiction of the Municipal Court. The pleadings present the issues first, of whether the accounting of January 11 was a full and complete settlement of all matters between the joint venturers and secondly, assuming it were not a complete settlement, whether one joint venturer may sue another in an action at law upon matters involving the joint venture.

The trial court gave judgment in favor of the plaintiff for one-half of the proceeds of the celery crop, and the defendant appeals from that judgment and urges as grounds of reversal the following: 1) Lack of jurisdiction of the Municipal Court; 2) Insufficiency of the evidence to support the judgment; and 3) Errors in the admission of evidence.

[1] The question of whether or not the parties had agreed to make a full and complete settlement or to leave the item of the celery crop for further adjustment is a matter of the credibility of witnesses and the interpretation of the evidence. The evidence is definitely conflicting, and it is the discretion of the trial court to resolve the conflict; its findings will not be disturbed on appeal if there is substantial evidence to support them.

[2] The trial court found in effect that there was an agreement to leave the matter of accounting on the celery crop for adjustment at a later date. Accepting this finding of the trial court that there was

such an agreement and that the unadjusted item of the celery crop had been omitted from the original accounting to be settled at a subsequent date, it is clearly the law that one joint venturer under those circumstances may bring an action at law against the other joint venturer for the adjudication of the remaining item. *Hall v. Hagerman*, 107 Cal.App.2d 523, 237 P.2d 80.

[3, 4] As a further ground for reversal the appellant urges that the Municipal Court did not have jurisdiction to try this case. The basis for this contention is that the total amount involved in the transactions and settlement between the parties was in excess of \$3,000. This proposition necessarily assumes that the settlement and accounting of January 11 must be included in determining the question of the court's jurisdiction; but this is contrary to the authorities cited and the conclusion reached in the preceding paragraph, *Hall v. Hagerman*, *supra*. The case cited supports the proposition that the suit in the instant case is a proper one under the circumstances, and we do not know of any principle of law that requires it to be related back to the accounting in order to determine the matter of jurisdiction. The most frequently used yardstick to determine jurisdiction of the court in actions for money judgments is the amount in controversy as indicated by the prayer of the complaint. It would follow, therefore, that if the Municipal Court had jurisdiction to try the case it must necessarily admit evidence pertaining to the facts of the subject matter in dispute, and no prejudice or error appears in the record as to the evidence so admitted.

In regard to the second cause of action, there does not appear to be sufficient evidence to support a finding that there was actually an account stated agreed to. But in view of the foregoing opinion regarding the first cause of action it is not necessary to determine the question whether an action in an account stated has been established.

The judgment is therefore affirmed.

LAMBERT, P. J., and MAIN, J., concur.

117 Cal.App.2d 347

**LYNCH et al. v. CITY AND COUNTY OF
SAN FRANCISCO et al.**

No. 15515.

District Court of Appeal, First District,
Division 1, California.

April 17, 1953.

Hearing Denied June 11, 1953.

Action by civil service employees against City and County of San Francisco, for declaration of employees' preferential eligibility rights, for injunction restraining defendants from removing petitioners from promotional eligibility lists, and for writ of mandate commanding their retention upon such lists. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment for petitioners, and defendants appealed. The District Court of Appeal, Bray, J., held that the President's declaration of cessation of hostilities of World War II was not a "proclamation of peace" or a "termination of emergency", within San Francisco charter provision placing civil service employees returning from military service on preferred promotional eligibility lists until four years after proclamation of peace or termination of emergency, and petitioners' preferential eligibility rights did not terminate upon expiration of four years from date of such declaration.

Judgment affirmed.

1. Evidence ⇨44

District Court of Appeal could take judicial notice of fact that President of the United States and other administrative officers are still exercising powers given them only for World War II emergency.

2. Municipal Corporations ⇨217(4)

President's declaration of cessation of hostilities of World War II was not a "proclamation of peace" nor a "termination of emergency" within San Francisco charter provisions placing civil service employees returning from military service on preferred promotional eligibility lists until four years after proclamation of peace or termination of emergency, and preferential eligibility rights of such employees did not terminate on expiration of four years from date of such declaration. St.1948, p. 213, § 146.1; St.1951, p. 4236, § 153; Presidential

Proclamation No. 2714, 50 U.S.C.A.Appendix, § 601 note.

See publication Words and Phrases, for other judicial constructions and definitions of "Proclamation of Peace" and "Termination of Emergency".

Dion R. Holm, City Atty., and Donald J. Kropp, Deputy City Atty., San Francisco, for appellants.

Francis McCarty and Jack E. Speckman, San Francisco, for respondents.

BRAY, Justice.

Petitioners brought an action for injunction, writ of mandate, and declaratory relief. From a judgment in petitioners' favor defendants appeal.

Question Presented.

Has the "proclamation of peace or the termination of the emergency" referred to in San Francisco's charter occurred?

Facts.

They are undisputed. Both petitioners were and are civil service employees of the City and County of San Francisco (hereafter referred to as "City"). Petitioner Lynch was on military leave pursuant to charter provisions from February 6, 1943, to November 1, 1945, petitioner Mineck from October 3, 1942, to January 16, 1946. Both petitioners are on preferred promotional eligibility lists because of preference due to their military service, provided, in Lynch's case by charter section 146.1, and in Mineck's case by section 153. On September 8, 1939, the President declared a *limited* national emergency in connection with the enforcement of neutrality. May 27, 1941, he declared an *unlimited* national emergency. Section 146.1 provides for a substitute promotional examination for persons returning from military service and that "Such employees shall be eligible for appointment from such list of eligibles in accordance with civil service rules to any vacancy thereafter occurring * * * for a period of four years *after the proclamation of peace or the termination of the emergency*, and before eligibles procuring

standing through examinations held subsequent to the original promotional examination." (Emphasis added.) St.1948, p. 213.

Section 153 provides, among other things, that "Persons serving in the armed forces of the United States or the State of California during time of war or during any emergency lawfully declared by the President of the United States, who have standing on an eligible list, shall retain their places thereon, and * * * shall be preferred for appointment for a period of four (4) years *after the proclamation of peace or the termination of said emergency* * * *." (Emphasis added.) St.1951, p. 4236.

December 31, 1946, the President of the United States issued a Declaration of Cessation of Hostilities of World War II in which he referred to the unconditional surrender of our enemies and stated, " * * * great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated. Now, Therefore, I Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II * * *." Proclamation No. 2714, 50 U.S.C.A.Appendix, § 601 note.

On February 20, 1950, the Civil Service Commission sent letters to petitioners to the effect that their preferential eligibility rights could only be retained for four years from December 31, 1946, terminating on December 31, 1950. Thus defendants took the position, and take it here, that the President's Declaration of Cessation of Hostilities constituted the "proclamation of peace or the termination of the emergency" mentioned in both sections 146.1 and 153. The trial court in its judgment declared that the President's decree did not constitute either a proclamation of peace or a termination of the emergency, enjoined defendants from removing petitioners from the eligible lists and commanded defendants to retain petitioners thereon until the contingency specified in the said charter sections occurs.

Effect of the President's Decree.

[1, 2] Obviously, whether considered in a technical or popular sense, it did not proclaim a peace. It stated that "great gains" had been made towards permanent peace, but it did not state that peace had arrived. It then stated, "Although a state of war still exists * * *." That is not reconcilable with a proclamation of peace. The term "proclamation of peace" is clear, unambiguous and even in the popular sense refers to a historical and clearly understood method of terminating war. Nor was it a declaration of termination of the emergency. Even though hostilities had ceased the emergency still continued, both in fact and in law. This court can take judicial notice of the fact that the President and other administrative officers are still exercising powers given them merely for the emergency.

Defendants' main contention is that in adopting the charter sections the People meant something other than what the language seems to mean, that the People used the words "proclamation of peace" and "termination of the emergency" in the sense of an ending of the fighting, the same sense in which expressions like "termination of said war" and "in time of war" have been held to mean the termination of the fighting or the time of the fighting. Thus in *Burger v. Employees' Retirement System*, 101 Cal.App.2d 700, 226 P.2d 38, 40, it was held that the words "termination of said war" in a section of the charter making inoperative during that period provisions reducing certain pensions by sums otherwise earned, meant in a popular sense the cessation of hostilities. "But many decisions recognize that in a popular sense a war is terminated with the surrender or capitulation of the enemy and that in that sense the termination of all hostilities is the termination of the war." 101 Cal.App.2d at page 702, 226 P.2d at page 40, citing many cases. Again, in *Kaiser v. Hopkins*, 6 Cal.2d 537, 58 P.2d 1278, 1280, article XIII, section 1¼ of the California Constitution was construed. It provided a certain exemption from taxation of property of residents who had served in the armed forces "in time of war". In

denying such exemption to a soldier who enlisted and served after the Armistice of 1918 and before the declaration of peace, the court held that the words were used in their popular sense, meaning when all the war activities ceased never to be renewed.

But in our case the People used alternatives, one, "proclamation of peace" which has a more narrow meaning than "termination or time of war" and two, "termination of said emergency" which has a broader meaning than "termination or time of war." It is significant, too, that the People in protecting employees from loss of promotion due to their service in the armed forces, used different language than when dealing with the right of persons working during the war to receive their pensions without deduction. In the latter case the advisability for preferential treatment in order to encourage the pensioners to engage in war work would normally end when the hostilities ended, but the end of hostilities would not end the emergency which would keep employees in the armed forces possibly as long as the emergency existed. It is reasonable to assume that the People might have had in mind the great delay that ensued in the first World War between the cessation of hostilities and the declaration of peace and that they intended as long as the emergency existed prior to such declaration, the eligibility should continue. The part of section 153 with which we are concerned was added after the entry of the United States into World War II. Section 146.1 was first adopted in 1947. It was voted by the People in 1946 prior to the President's declaration. The fact that the war was then on would indicate that the People in using the alternative meant something different than cessation of hostilities.

On questions dealing with various phrases concerning termination of war there has been some conflict in the authorities. In the Burger case, *supra*, nine cases are cited holding that the popular meaning is cessation of hostilities. Three are New York cases. In a later New York case, *Malbone Garage, Inc., v. Minkin*, 272 App. Div. 109, 72 N.Y.S.2d 327, 332, affirmed 297 N.Y. 677, 76 N.E.2d 331, it was held that

"duration of the war" in a lease covered the period after termination of hostilities until a formal proclamation of peace. In *Commercial Cable Co. v. Burlison*, D.C., 255 F. 99, Judge Learned Hand held that the President's power to seize private utilities during the continuance of the war did not end with the 1918 Armistice as our armed forces were still in occupation of enemy territory and in European and Asiatic Russia. In *United States ex rel. Knauff v. Shaughnessy*, 1950, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317, the court was considering the application of the War Brides' Act which is effective only "When the United States is at war or during the existence of the national emergency proclaimed by the President" in 1941. The court held, 338 U.S. at page 546, 70 S.Ct. at page 314: "The special procedure followed in this case was authorized not only during the period of actual hostilities but during the entire war and the national emergency proclaimed May 27, 1941. The national emergency has never been terminated."

We still have armed forces in enemy territory, some of which territory is still under military occupancy. Other reasons for holding that, in the popular sense of the term, the emergency is not terminated, follow. The President, when he issued his proclamation of cessation of hostilities, stated that his proclamation did not effect the termination of the national emergencies or the state of the war. Vol. 95, Congressional Record, No. 135, p. 10492. On February 19, 1947, the President in recommending the repeal of certain statutes enacted by virtue of the emergencies stated, "I have under continuing study the question of terminating the emergencies proclaimed in 1939 and 1941, and intend to take action as soon as circumstances permit." Vol. 95, Congressional Record No. 135, p. 10492. On July 27, 1949, the Speaker of the House stated (p. 10492) that the state of war and the national emergencies continued to exist and had been recognized on numerous occasions by both the Congress and the United States Supreme Court. He referred to *Fleming v. Mohawk Wrecking & Lumber Co.*, 1947,

331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed. 1375 and *Woods v. Cloyd W. Miller Co.*, 1948, 333 U.S. 138, 68 S.Ct. 421, 92 L.Ed. 596. He stated that neither the Congress nor the President "has taken any step whatever which would have the effect of terminating World War II as such or the national emergencies as such." Emphasis added: p. 10492. On July 27, 1949, the House was determining whether Congress could remain in session after the last day of July in view of a provision of the reorganization bill to the effect that "Except in time of war or in a national emergency" it could not do so. An opinion was obtained from the American Law Section of the Legislative Reference Service of the Library of Congress. The opinion concluded, Vol. 95, Congressional Record, Appendix, A5051, that the United States was still technically in a state of war "and furthermore the terminations of the limited and the unlimited emergencies have not been proclaimed." P. A5052.

As neither in a technical nor a popular sense has there been a proclamation of peace or a termination of the emergency, the judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



117 Cal.App.2d 398

JONES v. EVARTS et al.

Civ. 19170, 19271.

District Court of Appeal, Second District,
Division 1, California.

April 22, 1953.

Action to quiet title and for an accounting. The Superior Court, Los Angeles County, George Francis and Joseph Raycraft, Judges, entered judgment for plaintiff, and defendants brought appeals, consolidated for decision, from two orders and judgment. The District Court of Appeal, Drapeau, J., 250

P.2d 671, affirmed, and remittitur was issued and filed in Superior Court. Defendants filed notice of motion to recall remittitur. The District Court of Appeal, held that in absence of showing of mistake or inadvertence or that fraud or imposition had been worked upon court or defendants, motion would be denied.

Motion to recall remittitur denied.

Appeal and Error ⇐1218

In absence of showing that fraud or imposition was worked upon court or movants or of showing of mistake or inadvertence, a remittitur may not be recalled to enable parties to relitigate their cause or appellate court to redetermine merits.

Elon G. Galusha, Los Angeles, for appellants.

Clock, Waestman & Clock, Los Angeles, for respondent.

PER CURIAM.

On December 2, 1952, this court affirmed two orders and a judgment adverse to defendants Eugene F. Evarts and Monrova S. Evarts, husband and wife, which arose out of a single action to quiet title and for an accounting. *Jones v. Evarts*, 114 Cal.App. 2d 496, 250 P.2d 671. A petition for rehearing was denied by this court on December 29, 1952, and a petition for hearing was denied by the Supreme Court on January 22, 1953. The remittitur issued on February 2, 1953, and was filed in the superior court.

On April 10, 1953, the aforesaid defendants filed in this court a notice of motion that at the hearing of the regular calendar on May 26, 1953, they would move the court to "recall the remittitur" issued herein and to vacate said order affirming said trial court judgment and to rehear the appeal."

We have examined the notice of motion, the allegations therein contained, and the argument and authorities in support thereof.

The notice of motion is devoid of any showing that any fraud or imposition was worked upon the court or upon appellants. Neither is there any showing of mistake or

inadvertence. In the absence of such a showing, a remittitur may not be recalled to enable the parties to relitigate their cause or the appellate court to redetermine the merits. *Southwestern Investment Co. v. City of Los Angeles*, 38 Cal.2d 623, 630, 241 P.2d 985.

We perceive no reason for further delay in this matter by continuing the hearing until May 26.

For the foregoing reasons, the motion to recall the remittitur is denied.



UNION TRANSP. CO. et al. v. SACRAMENTO COUNTY et al.*

Civ. 8158.

District Court of Appeal, Third District,
California.

April 16, 1953.

Rehearing Denied May 13, 1953.

Hearing Granted June 11, 1953.

Actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the two defendant counties. The Superior Court, El Dorado County, granted motions for nonsuits in favor of both counties, and company and owners appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to establish, *prima facie*, county in which bridge was located and that question whether dangerous condition of bridge had existed for sufficient length of time to constitute constructive notice with reasonable time after notice to have condition remedied was for jury.

Judgment in favor of one county affirmed and in favor of other county reversed.

I. Evidence ⇨8

It is a matter of common knowledge that wooden bridges will rot and that, while process is slow, nevertheless those in charge of such bridges are charged with inspection at reasonable periods.

* Subsequent opinion 267 P.2d 10.

2. Automobiles ⇨308(7)

In actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the defendant counties, question whether dangerous condition of bridge had existed for sufficient length of time to constitute constructive notice with reasonable time after notice to remedy condition or protect against it was for jury. *Gen.Laws, Act 5619; Pol. Code, § 2618.*

3. Evidence ⇨25(1)

In actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the defendant counties, the court would take judicial notice that boards of supervisors of the defendant counties were the governing bodies having authority and duty to maintain bridges which were parts of public roads. *Gen.Laws, Act 5619; Pol.Code, § 2618.*

4. Evidence ⇨5(2)

It is a matter of common knowledge that many roads and highways, starting, perhaps, as mere trails, became public highways without any formal or express dedication, but by long uninterrupted use and general acquiescence.

5. Highways ⇨6(1)

When public, or such portion of public as have occasion to use road, travel over road, with full knowledge of landowners interested, without asking or receiving any permission, and without objection from anyone, for period of time beyond that required by law to bar a right of action, a right in public to use of road arises by prescription or implied dedication.

6. Highways ⇨17

In actions by truck company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the defendant counties, evidence was sufficient to show *prima facie* that road, of which bridge was a part, was public highway within statute pertaining to liability of counties for

injuries to property resulting from defective conditions of public highways.

7. Appeal and Error ◊1056(1)

Evidence ◊358

In actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the defendant counties, exclusion of official topographic map produced by United States Geological Survey for purpose of determining in which county bridge was located was prejudicial error. Code Civ.Proc. § 1875, subd. 3.

8. Evidence ◊48

The trial court and the District Court of Appeal have judicial notice of the public and private official acts of the Executive Department of the United States, including the public surveys. Code Civ. Proc. § 1875, subd. 3.

9. Automobiles ◊306(3)

In actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the defendant counties, evidence, which revealed that Geological Survey coincided closely with monuments which were found by county surveyor and which were arranged along a straight line, was sufficient to establish, prima facie, county in which bridge was located. Code Civ.Proc. § 1875, subd. 3; Gen.Laws, Act 5619; Pol.Code, § 2618.

Horace E. Dunning, Sacramento, for appellant.

Gerald M. Desmond, Sacramento, for Sacramento County.

Johnson & Davies and Claire H. Greve, Sacramento, for El Dorado County.

VAN DYKE, Presiding Judge.

Plaintiffs and appellants, Union Transportation Company, a corporation, and George and Ray Smith, copartners, joined in two actions, one brought in the County of Sacramento and the other in the County of El Dorado, alleging in each that the defendant counties were liable for the

proper maintenance of a bridge, part of a public road, where it crossed a creek known as Carson Creek, which bridge collapsed when a truck owned by the Union Transportation Company and loaded with cattle owned by the Smiths attempted to cross, resulting in damage to the truck and to the cattle. The actions were predicated on the Public Liability Act of 1923, 2 Deering's Gen.Laws, Act 5619. The venue of the action filed in Sacramento County was changed to El Dorado and both actions came on for trial. The allegations in both complaints were identical. The cases were tried to a jury and when plaintiffs rested the trial court granted motions for nonsuits in favor of both defendants in each action. From the judgments thereafter entered upon these orders the plaintiffs have appealed.

[1-3] The cited public liability law provides that counties are liable for injuries to property resulting from defective conditions of public highways where the board of supervisors having authority to remedy the condition had notice of the defects and failed for a reasonable time thereafter to remedy the condition or take such action as might be appropriate to protect the public against the same. There is no claim that plaintiffs failed to prove an injury to their property and the evidence is sufficient to show that the collapse of the bridge resulted from its defective condition. The bridge was made of wood. There was testimony that the ends of the stringers where they rested on the north concrete abutment were rotted and deteriorated; that the bottom ends of the uprights were rotted, some of them having rotted to a depth of several inches; that the bridge had been last repaired some 12 years before it collapsed, at which time, however, the repairs consisted of new planking; that the bridge was built about 1920 and that when built it was so constructed that it had a load capacity of 90 tons, that is, 30 tons to the span with three spans, with a large margin of safety before the breaking point would be reached. The equipment under which it collapsed consisted of a truck and trailer, which with

the loads totaled a weight of about 30 tons. From the foregoing it could be readily inferred and must be taken as true on this appeal that the bridge had been allowed to become defective through rotting of its members, and in view of the slow process of such deterioration and the great extent thereof as evidenced by the direct testimony and the fact of collapse under a load far below the proper capacity of the bridge it can be further inferred, and must here be taken as true, that whichever governing board had authority to remedy, and the duty to maintain, the bridge had constructive knowledge of the condition. *Sheldon v. City of Los Angeles*, 55 Cal. App.2d 690, 693, 131 P.2d 874; *Wise v. City of Los Angeles*, 9 Cal.App.2d 364, 366, 49 P.2d 1122, 50 P.2d 1079. It is a matter of common knowledge, of course, that wooden bridges will rot and that while the process is slow, nevertheless those in charge of such bridges are charged with inspection at reasonable periods. Under the circumstances in evidence here it was a question of fact for the jury to determine as to whether or not a dangerous condition of the bridge had existed for a sufficient length of time to constitute constructive notice with reasonable time after notice to have remedied the condition or protected against it. *Sheldon v. City of Los Angeles*, supra, 55 Cal.App.2d at page 693, 131 P.2d 874. The court has judicial knowledge that the boards of supervisors of the defendant counties were the governing bodies having authority and duty to maintain bridges which were parts of public roads.

A prima facie case was also made with respect to the character of the road and bridge involved. The 1923 statute upon which the cases were predicated refers to the dangerous and defective condition of public highways. At that time the Political Code, Section 2618, defined public highways as: "In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made

such in actions for the partition of real property." There was evidence that the section of the road involved was part of a road going southerly from a point commonly known as White Rock and extending southerly beyond the property of the Smiths; that it was an old road; that to the knowledge of some of the witnesses, going back to 1936, the road had been traveled by property owners southerly from Smiths, by hunters, picnickers and fishermen; that somebody went over it at least once a week and oftener during the hunting and fishing seasons; that it had never been closed off by gates or fences; that a road maintainer was run over it once or twice a year, although the witness did not know to what county the equipment belonged; that it was, however, county equipment; that the maintenance work consisted of a power grader going over the road, throwing the outside dirt toward the center and smoothing off the road surface; that sometimes there would be 20 automobiles a day making a round trip on the road on a week-end; that the traffic had steadily increased since 1940.

[4-6] "It is a matter of common knowledge that many roads and highways in this state—starting, perhaps, first as mere trails—became public highways without any formal or express dedication, but by long uninterrupted use and general acquiescence. When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission and without objection from any one, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication. *Schwerdtle v. County of Placer*, 108 Cal. 589, 41 P. 448." *Hartley v. Vermillion*, 141 Cal. 339, 348, 74 P. 987, 991; see, also, *City of Long Beach v. Payne*, 3 Cal.2d 184, 189, 44 P.2d 305. The foregoing evidence was sufficient to show prima facie that the road in question was a public highway within the meaning of the liability statute invoked.

[7-9] Although they had sued both counties, nevertheless it was incumbent upon plaintiffs to make out a prima facie case against one or the other of the counties by showing that the bridge was in such county, there being no attempt to claim or to prove that there was any joint maintenance situation involved. These plaintiffs were bound to approach the point where they could no longer contend both defendants were liable. They contend that they did make a prima facie showing that the bridge was in El Dorado County. This contention must be sustained. They produced the official surveyor of El Dorado County who had been such for a period of nine years. He testified he had been directed by his board of supervisors to ascertain whether or not the bridge in question was in El Dorado County and that pursuant to that authorization he went forth to trace the common boundary line between the two counties and thus determine upon which side of the line the bridge lay. He surveyed what he believed to be the line for 17,000 feet and past the bridge. He stated that he started at a concrete monument, shown on the highway right of way maps as being on the boundary between the two counties. He went from there to a like monument he found in the former highway 50. He also found on the right of way of the Southern Pacific Railroad a monument, being a wooden post painted "El Dorado County" on the east side and "Sacramento County" on the west. Further south he found a pipe set in the fence line, the top of it painted white. There was introduced in evidence a plat of his survey and it appears therefrom that the line through the indicated monuments is straight, which corresponds with the call of the statute describing that part of the boundary common to the two counties. The plat shows, and he testified, that at the point on the railroad track where he found the monument described and just south of the right of way of the road, which had been on the Sacramento County side of the line, crossed the line and turned southerly along it and across Carson Creek over the bridge in question at a point which

was 200 feet within El Dorado County, assuming that the line he had traced was the common boundary of the counties. There was offered in evidence a copy of the official topographic map produced by the United States Geological Survey and covering the area in question. This map was rejected upon objection of the defendant El Dorado County, but the rejection was error. The trial court and this Court alike have judicial knowledge of the public and private official acts of the Executive Department of the United States, among which are the public surveys. C.C.P., Sec. 1875, subd. 3; *Merritt v. Trinity County*, 3 Cal.App. 168, 84 P. 675; *Rogers v. Cady*, 104 Cal. 288, 38 P. 81; *Varcoe v. Lee*, 180 Cal. 338, 343, 181 P. 223; see, also, *Tompkins, Chamberlayne Trial Evidence*, p. 1047. The Geological Surveys are made, and maps reflecting them and the information they are required to furnish are published, under statutes passed by Congress. The work has been in progress since 1882. These surveys are intended to include information as to such features as bodies of water, streams, relief, including mountains, hills, valleys and other features of the land surface and the culture of the region, that is, the works of man, such as towns, cities, roads, railroads and boundaries. Faithful to these purposes, the offered map shows the "approximate boundary" between the two counties, shows the Southern Pacific Railroad referred to in the testimony of the county surveyor and the point at which it crosses the common boundary, shows the road referred to in the testimony of the various witnesses and shows that road crossing the common boundary, at the very point testified to by the surveyor, thence turning southerly therefrom; shows it crossing Carson Creek on the El Dorado County side of the line and thence leaving that county by recrossing the common boundary. The testimony of the surveyor, the line as fixed by him, and the map descriptions of the physical features we have referred to all correspond with remarkable fidelity. The Geological Surveys are well known for their great accuracy and the high degree of care with which they are

made. A designation on such a map of a line as being an approximate boundary between El Dorado and Sacramento counties is not to be taken as meaning that the boundary has not been located with considerable accuracy. And when the matters shown by the Geological Survey coincide so closely with the monuments found by the surveyor, arranged along a straight line, the entire showing is sufficient to establish prima facie that the bridge in question was in the defendant El Dorado County. The map should have been received in evidence and when as here rejected evidence which ought to have been admitted would have completed a prima facie showing the rejection is prejudicial. Of course by parity of reasoning the plaintiffs have established prima facie that the bridge was not in Sacramento County. It may be added that on cross-examination the surveyor testified that in what he did he had done what any surveyor would have done who had been sent out on the same mission. The force and effect of this testimony is not dispelled by his further statements that he did not know of his own knowledge who had placed the monuments he accepted nor when they had been placed, nor whether or not they were placed accurately. The common line between the counties of El Dorado and Sacramento in the area with which we are here concerned was established in 1850 by legislative enactment. The common line begins at the confluence of the north and the south fork of the American River and proceeds thence up the south fork to a point described in the statute as being one mile beyond Mormon Island, thence it turns southeasterly and proceeds in a straight line past the location here involved and on for many miles until it intercepts the Cosumnes River at a point eight miles "above the house of William Daylor". True, a surveyor starting out now to trace the Sacramento County and El Dorado County boundary might experience great difficulty in finding its exact location upon the ground, but this does not destroy the prima facie effect of the evidence here received and offered as to lines, locations and the

relation thereto of the bridge which collapsed.

The judgment in favor of Sacramento County is affirmed; the judgment in favor of El Dorado County is reversed.

PEEK and SCHOTTKY, JJ., concur.



117 Cal.App.2d 362

PEOPLE v. CARNER.

Cr. 4924.

District Court of Appeal, Second District,
Division 2, California.

April 17, 1953.

Defendant was convicted of unlawful sale of preparation of heroin. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Poisons ☞9

Evidence was sufficient to sustain conviction for unlawful sale of preparation of heroin. Health and Safety Code, § 11500.

2. Criminal Law ☞878(4)

In prosecution for unlawful sale of preparation of heroin, court's verdict, which, under one count, found defendant guilty of sale of narcotic and which, under another count, found defendant not guilty of having a preparation of heroin in his possession, was not inconsistent, and, therefore, acquittal on the one count would not be deemed an acquittal on the other. Health and Safety Code, § 11500.

3. Criminal Law ☞878(3)

Each count in an information or complaint which charges a separate and distinct offense must stand on its own merit, and disposition of one count has no effect or bearing on verdict with respect to other counts

contained in the information or complaint, and, therefore, verdict of acquittal on one or more counts is not deemed to be an acquittal on any other count.

4. Criminal Law §878(4)

Contention that verdicts on separate counts of information or complaint are inconsistent is untenable unless verdicts are rendered upon charges wherein elements of offenses alleged are identical.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Alan R. Woodard, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury defendant was found guilty of selling a preparation of heroin contrary to the provisions of section 11500 of the Health and Safety Code. He appeals from the judgment and from the order denying his motion for a new trial.

[1] *Questions: First: Was there substantial evidence to sustain the judgment of guilty?*

Yes. The evidence disclosed that Mr. Walker, an investigator from the District Attorney's office of Los Angeles, approached defendant on February 14, 1952 in his service station. After exchanging greetings, Mr. Walker told defendant he had been informed it would be possible for him to purchase a half of a quarter paper from him. Defendant stated he was not too sure since he did not know Mr. Walker and it was a serious thing to sell narcotics. After attempting to locate the telephone number of the party Mr. Walker mentioned, defendant asked him whether he had any needle marks on his arm as a result of the injection of narcotics. Mr. Walker stated that he had none since he was a "horner". The term "horner" is used to distinguish a narcotic addict who inhales or snuffs heroin from the addict who takes it by injection.

After defendant went to the west corner of his service station and stood for a few

minutes, he asked Mr. Walker if the latter had the money in silver. The reply being made in the negative, defendant observed that the money might possibly be marked. Mr. Walker then handed defendant a five-dollar bill and a one-dollar bill. This money defendant wadded into a small ball and asked Mr. Walker to follow him to the rear of the garage, saying he would take a chance.

Behind the garage on the ground was a Phillip Morris cigarette package. Defendant told Mr. Walker to take it, which he did. Upon examination it was found that the package contained heroin. This evidence clearly supported the trial judge's finding that defendant sold a narcotic illegally.

People v. Grijalva, 48 Cal.App.2d 690, 121 P.2d 32, is entirely consistent with our conclusion since the trial court in such case merely held that the evidence was sufficient to sustain the conviction that the defendant had sold a narcotic in violation of the provisions of the Health and Safety Code.

People v. Herbert, 59 Cal.App. 158, 210 P. 276, is factually distinguishable from the present case. There is no merit in defendant's contention that he did not have possession of the narcotic which he sold.

[2, 3] *Second: Was the verdict of the court finding defendant guilty of the sale of a narcotic inconsistent with its finding that defendant was not guilty of having in his possession a preparation of heroin?*

No. Each count in an information or complaint which charges a separate and distinct offense must stand on its own merit and the disposition of one count has no effect or bearing on the verdict with respect to other counts contained in the information or complaint. Hence, a verdict of acquittal of one or more counts is not deemed to be an acquittal of any other count. (*People v. Carothers*, 77 Cal.App.2d 252, 254[1], 175 P.2d 30.)

[4] The foregoing rule is here applicable since each count in the complaint stated separate and distinct offenses. The contention that verdicts are inconsistent is untenable unless they are rendered upon charges wherein the elements of the offenses alleged

are identical. (People v. Hight, 94 Cal. App.2d 100, 107, 210 P.2d 270; People v. Amick, 20 Cal.2d 247, 249[1] et seq., 125 P.2d 25.)

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.



117 Cal.App.2d 352

HENNINGSSEN v. BARNARD et al.

Civ. 15348.

District Court of Appeal, First District,
Division 2, California.

April 17, 1953.

Action to recover for goods sold by plaintiff's assignor to partnership in which defendants were allegedly general partners. The Superior Court, County of Santa Clara, entered order granting plaintiffs a new trial and defendants appealed. The District Court of Appeal, Nourse, P. J., held that under Uniform Partnership Act, applicable in New York, when certificate of partnership listed defendant as limited partner and defendant never represented that he was other than limited partner, and it was not alleged that anyone suffered any loss by any falsity in certificate, or that partnership had not received amount agreed to be contributed by defendant, no general liability could be imposed on defendant, even though his brother may have furnished part of defendant's partnership contribution and was entitled to share in profits.

Order reversed.

1. New Trial ⚡108(3)

Plaintiff's affidavit for new trial on ground of newly discovered evidence in action to recover for goods sold by her assignor to partnership of which defendants were allegedly members, which alleged existence of concealed interest in partnership on part of third party to whom assets had been conveyed when partnership was insol-

vent, did not warrant grant of new trial, when witness at original trial had testified as to interest of such third party for limited period and counter-affidavit alleged disclosure of such fact in certificate of limited partnership.

2. New Trial ⚡99

Generally, the granting of a motion for new trial on ground of newly discovered evidence is matter within discretion of trial court.

3. New Trial ⚡70

The matter of granting a new trial on ground of insufficiency of evidence is largely in discretion of trial court, since it is exclusive province of that court to weigh the evidence and draw inferences from it, except that if, as a matter of law, there is no substantial evidence to support judgment in favor of moving party, order granting new trial will be reversed on appeal.

4. Partnership ⚡354

Under Uniform Partnership and Limited Partnership Act, applicable in New York, when certificate of partnership listed defendant as limited partner in firm which obtained goods from plaintiff's assignor, and defendant never represented that he was other than limited partner, and it was not alleged that anyone suffered any loss by any falsity in certificate, and partnership had received amount agreed to be contributed by defendant, no general liability could be imposed on defendant, even though defendant's brother may have furnished part of defendant's partnership contribution and was entitled to share in profits, either as subpartner or principal in whole or in part.

5. Partnership ⚡355

There is no requirement that one who becomes a limited partner must furnish his contribution entirely from his own money.

6. Partnership ⚡365

Under Uniform Partnership Act, applicable in New York, defendant who was either a subpartner of limited partner in partnership to which plaintiff's assignor had furnished goods, or was directly entitled to profits from partnership because limited partner was in fact his agent, could not be

held liable as general partner, when defendant had never held himself out as partner, either general or limited, and no one had relied on his being such.

Shapro & Rothschild, San Francisco, for appellants.

O. Vincent Bruno and Harold Unterberg, San Jose, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order granting a new trial after judgment for defendants by the court sitting without a jury. The amended complaint contained four causes of action, to the following effect: The first that Moe Howard, Meyer Winkleman, David Barnard and Alec Barnard individually and as copartners doing business under the name of Barnard Brothers Textile Division in June, 1949, in New York City bought and received from plaintiff's assignor textiles on the price of which \$7,787.84 remained due and owing; the second that plaintiff's assignor on September 21, 1949, in the Supreme Court of New York County recovered judgment against said Moe Howard, individually and as copartner and against said copartnership Barnard Brothers Textile Division in the amount of \$8,548.74 of which \$7,913.74 remained due and owing; the third is to the same effect as the first but with the addition of the allegations that on March 19, 1949, a certificate of limited partnership of Barnard Brothers Textile Division was executed, which was filed in the office of the county clerk of New York County on March 21, 1949, and thereafter published which provided that said David Barnard was a limited partner who would contribute \$25,000 in cash, but that he had not contributed more than \$15,000 and that the amount of \$10,000 he owed to the partnership should be subjected to plaintiff's claim; the fourth that said David Barnard and Al Zeder in October, 1949, when the said partnership was insolvent, shipped assets of the said partnership of a value in excess of \$8,000 to California for the purpose of defrauding creditors, disposed of these assets and converted the proceeds, of which they became involuntary trustees for creditors.

Only David Barnard and Alec Barnard were served in this action so that they were the only parties defendant. The court gave judgment for them finding among other things in substance that Alec Barnard was not a partner in Barnard Brothers Textile Division, that David Barnard was a limited partner in said partnership, that he had contributed in excess of \$25,000 and was not liable for debts of the partnership and that neither of said two defendants had been served with summons in the New York action. Plaintiff moved for a new trial on the grounds of newly discovered evidence, with supporting affidavits, of insufficiency of the evidence to justify the decision and of errors of law occurring at the trial. The motion was granted "on the grounds among others of insufficiency of the evidence to justify the decision of the Court." Defendants appeal.

[1, 2] The main point in dispute on appeal is whether the new trial could correctly be granted on the ground of insufficiency of the evidence. Plaintiff-respondent did not point out any specific errors of law as having occurred at the trial and we did not find any. The affidavit in support of the motion for a new trial showed that the alleged newly discovered evidence related to the alleged existence of a concealed interest of Alfred D. Zeder in the limited partnership under the name of "Barnard Brothers Textile Division", said to be discovered on September 20, 1951, by the examination of a partnership contract dated March 14, 1949, which provided for said interest. However, at the trial in this case the witness Winkleman, concededly a general partner in said partnership, had testified to the fact that Al Zeder entered the partnership on March 14, 1949, and that said partnership was terminated by him on March 15. Counter-affidavits in behalf of defendants showed more-over that on March 17 a certificate of Limited Partnership under the name of "Barnard Brothers Textile Division" containing the interest of Zeder had been filed in the office of the county clerk of the county of New York and that on March 19, 1949, there had been filed in said office a certificate cancelling said prior certificate. Appellants therefore urged that the alleged

newly discovered evidence could not justify a new trial because it was known and obtainable at the time of the trial and cumulative only. *Knox v. Benbo*, 218 Cal. 779, 780, 24 P.2d 761; *Parker v. Southern Pacific Co.*, 204 Cal. 609, 616 et seq., 269 P. 622; *Langdon v. Langdon*, 47 Cal.App.2d 28, 33, 117 P.2d 371; *Sitkei v. Frimel*, 85 Cal.App. 2d 335, 338, 192 P.2d 820, and moreover because no showing whatever of diligence was made wherefore the affidavits were insufficient to support an order for a new trial on the ground of newly discovered evidence. *Edwards v. Floyd*, 96 Cal.App.2d 361, 215 P.2d 117; *Slemmons v. Paterson*, 14 Cal.2d 612, 615-616; 96 P.2d 125.

Respondent's brief does not contain anything with respect to these points. Although generally the granting of a motion for a new trial on the ground of newly discovered evidence is a matter within the discretion of the trial court, we must under the above circumstances and authorities hold that there was no legal basis for the granting of a new trial on that ground.

[3] We come now to the main question, whether a new trial could be granted on the ground of insufficiency of the evidence, the only ground on which respondent defends the order. Here again it is the rule that the matter is largely in the discretion of the trial court, that it is its exclusive province to weigh the evidence and to draw inferences from it. If, however, as a matter of law there is no substantial evidence to support a judgment in favor of the moving party, an order granting a new trial must be reversed on appeal. *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689; *Pirrone v. Nuccio*, 78 Cal.App.2d 864, 868-869, 179 P.2d 18. Appellants urge among other things that there is no substantial evidence on which either of the two defendants could be held liable to plaintiff on any of the counts. As to the fourth cause of action, although there was evidence that goods were shipped to Al Zeder in California, there was none that David Barnard had any connection with said shipments or the disposition of the goods or received in any manner any of their proceeds. Respondent did not dispute this on appeal, and it is in-

disputable. The facts on which the parties base their arguments as to the liability or absence of liability of the two defendants for obligations of Barnard Brothers Textile Division with relation to the first three causes of action are mostly undisputed although in some particulars not very clear.

For many years David and Alec Barnard had been in the office equipment business in San Jose as a partnership under the name of Barnard Brothers in which both equally were general partners. They also transacted many other kinds of business as partners. Moreover they had a general understanding that if David would transact any other business in his own name Alec would get 50% of the profit David made and contribute 50% in the loss David might suffer. In the beginning of 1948 a large purchase of government surplus merchandise was concluded in New York under the name of Barnard Brothers, but with them some other persons, among whom Meyer Winkleman, were internally interested in said transaction as joint venturers. The San Jose firm transferred \$35,000 to New York originally for said surplus venture. Alec remained in San Jose; David went to New York City and there opened an office for Barnard Brothers at 67 Wall Street. As an off shoot of the surplus business Barnard Brothers on Winkleman's initiative also entered the textile business at the same address. It is not quite clear who before March 19, 1949, participated in that business or whether it was transacted under the name of Barnard Brothers or Barnard Brothers Textile Division. The certificate of limited partnership dated March 19, 1949, and filed March 21, 1949 (Plaintiff's Exh. 1) recites that since October 14, 1948, Winkleman and Howard were interested with David Barnard in the textile business "under the firm name of Barnard Brothers at 67 Wall Street, Manhattan, New York City", and that they wished to continue that business in a limited partnership, but there is also testimony that the textile business started earlier than October 14th, that the name since October was Barnard Brothers Textile Division and that Howard was not interested in it but only worked on commission. Moreover the re-

cital disregards the short lived partnership in which Al Zeder was a partner. At any rate there is no evidence that Alec Barnard personally had any contact with said textile business.

The certificate mentioned Winkleman and Howard both residing in New York City as general partners and David Barnard residing at San Jose, California, as limited partner. It was provided that the latter "shall contribute to the capital of this partnership the sum of twenty-five thousand (\$25,000) Dollars in cash." Both David Barnard and Winkleman testified that around March 19 the contribution of David Barnard as limited partner was paid in by transfer of an account in the National City Bank in the name of Barnard Brothers to Barnard Brothers Textile Division by means of a check or otherwise. Both testified that they believed the amount transferred in that way was probably about \$35,000 and David Barnard moreover testified that all the money in said account in the name of Barnard Brothers was his. Winkleman further testified that David Barnard withdrew a total of \$2,200 from Barnard Brothers Textile Division for profit items and Alec Barnard testified that he received small checks in said aggregate amount and that theoretically he got half of it. Both Alec and David denied that Alec was a partner in the limited partnership, although he would participate in David's profit or loss; Winkleman, when as a witness he enumerated the participants with himself in the limited partnership, did not mention Alec.

Although in June, 1949, when Barnard Brothers Textile Division allegedly purchased textiles from plaintiff's assignor the above certificate of limited partnership had been filed and published in New York and although the judgment which said assignor obtained by default after substituted service on Moe Howard mentions as debtors over and above said Moe Howard only Meyer Winkleman and David Barnard (both not summoned), individually and as partners d/b/a Barnard Brothers Textile Division, respondent contends that the granting of the new trial was justified because under the above facts David and Alec Barnard were both liable as general partners. She urges

that Alec Barnard concededly was to share in profit or loss of Barnard Brothers Textile Division. That such under New York law, which since 1922 has accepted the uniform partnership and limited partnership laws, is prima facie evidence that he was a partner but for exceptions not here applicable, that said prima facie evidence was not rebutted, and that as his name did not appear as a limited partner in the certificate filed he was not entitled to the benefits of such limitation. With respect to David Barnard she contends that he was not released from liability as a general partner because the certificate filed did not satisfactorily represent the actual facts in that Alec Barnard was not mentioned as a partner, and David had not contributed in cash the \$25,000 to be furnished, as the actual contribution of \$35,000 had been for 50% by Alec Barnard as an undisclosed partner, and because the whole contribution had been made by check instead of in cash. New York cases dating from before the adoption of the uniform partnership legislation in that state are cited in support of the contention that each of these defects causes David to be personally liable. Appellants take the position that the above evidence shows as a matter of law that Alec Barnard was not a partner, but a subpartner in David's interest, which subpartnership does not make him liable for partnership obligation under New York law, *Burnett v. Snyder*, 81 N.Y. 550, 555; *Silberfeld v. Swiss Bank Corporation*, Sup., 99 N.Y.S.2d 888, which latter case is also cited by respondent on the same matter, that the certificate filed substantially complied with all statutory requirements, that the source from which David received the money he contributed is immaterial, and that under the present law contribution by means of a good check instead of cash does not cause liability.

Although the testimony at the trial seems to indicate that Alec's position probably was that of a subpartner in David's interest we cannot say as a matter of law that from all the evidence the inference could not be drawn that David when he became a limited partner in Barnard Brothers Textile Division was, without disclosing it, doing so as representing his partnership with his broth-

er or was acting in part as agent for his brother as an undisclosed principal. Such inference could possibly be based on the fact that the San Jose partnership indirectly contributed capital to the limited partnership through the transfer of the bank account by David Barnard and that the checks representing profit element from the limited partnership seem to have been transferred to the San Jose partnership account. However, we do not think that even if this inference were drawn it would follow under the uniform partnership and limited partnership laws that such would cause liability of defendants as general partners, although this might well have been the result under the previous law.

The leading cases on this subject are *Giles v. Vette*, 263 U.S. 553, 44 S.Ct. 157, 68 L.Ed. 441, and *In re Marcuse & Co.*, 7 Cir., 281 F. 928, affirmed in the *Giles* case. *Marcuse and Morris* as general partners and *Hecht and Finn* as limited partners but such as trustees for themselves and five other contributors intended to form a limited partnership for the conduct of a brokerage business; although contracts were signed, a certificate filed, the contributions paid in and business begun, the attempt to form a limited partnership miscarried because the Uniform Limited Partnership Act, S.H.A. ch. 106½, § 44 et seq., as it had meanwhile been adopted in Illinois did not permit such formation for brokerage purposes and because formalities in accordance with the new statute had not been complied with. When the firm became insolvent the lower court held that with *Marcuse and Morris* all seven other persons interested were subject to bankruptcy proceedings. The circuit court, however, held that neither *Hecht and Finn* nor the persons for whom they were trustees were liable as general partners or subject to bankruptcy proceedings and the Supreme Court affirmed.

The opinions on appeal and certiorari explain the difference between the old and the new law: Under the old law whoever shared the profits of a business was held liable as a general partner except in so far as he could invoke the benefit of a limitation of liability on the basis of strict compliance with statutory provisions as to lim-

ited partnerships. Any falsity in certificate or other defect made all liable as general partners. Under this law the limited partnership became a trap instead of a safe means to provide capital to a business without general liability. The uniform partnership and limited partnership laws were intended to remedy this defect and make the position of the intended limited partner more safe. Under said uniform law one is except for estoppel not a partner as to third persons unless he is a partner with respect to his co-participants, U.P.A. § 7(1), and only those are such partners who carry on the business as co-owners for profit, U.P.A. § 6. The receipt by a person of a share of the profits of a business is only prima facie evidence that he is a partner, U.P.A. § 7(4), and this prima facie evidence can be rebutted by evidence that he is not a partner under the preceding rule. The strict construction of the statute as in abrogation of the common law is expressly excluded, U.P.A. § 4(1); U.L.P.A. § 28(1). Substantial compliance in good faith with the statutory requirements is sufficient for the formation of a limited partnership, U.L.P.A. § 2(2). A limited partner becomes liable as a general partner if he takes part in the control of the business, U.L.P.A. § 7; anyone who is knowingly a party to a certificate containing a false statement is liable to one who suffers loss by reliance on such statement. U.L.P.A. § 6. Moreover a person who has contributed to a business in the erroneous belief that he thereby became a limited partner, can prevent liability as a general partner by promptly renouncing his interest in the profits of the business. U.L.P.A. § 11.

Both the circuit court and the Supreme Court held in substance that *Hecht and Finn* were not liable as general partners because they did not intend to become general partners and their actual position was not that of general partners as defined in the U.P.A.; they had no authority to act for the partnership and did not carry on the business of the firm, nor did their interest make them real co-owners. Neither did they represent themselves as partners so as to make them partners by estoppel.

Even if the certificate were false in that it did not disclose the names of all the limited partners or the amount of the contribution of each, that would not cause them to be liable because no one had suffered loss in reliance on the false statement. If the promised contribution to the capital was fully made it did not make material difference whether it was contributed by two or more persons. The nonliability is further justified on the basis of section 11, U.L.P.A., the required renunciation having been made, but the opinions do not consider section 11 as the only remedy of the putative limited partners, and show the nonliability also independent from that section. See to the same effect *Crane on Partnership*, § 32 and the same author in 31 *West Virginia Law Quarterly*, 1, 8. If the indirect contributors should be considered as having become contributors to the business by being represented by Hecht and Finn their liability cannot be wider than the liability of Hecht and Finn themselves.

[4,5] Although the facts of the case before us differ from those of the above federal case, application of the reasonings there used will lead to the same result. There can be no doubt that David Barnard did not intend anymore than Hecht and Finn to become a general partner, that the evidence shows that his actual position in relation to his associates was like Hecht's and Finn's not that of a general partner, and that like them he did not represent himself as a general partner but only as a limited partner. As a limited partner under the uniform act is in no sense a partner, see Commissioner's Note to section 1, U.L.P.A., 8 U.L.A. 2, 4, this evidence rebuts the prima facie evidence of partnership from the sharing in profits. Again if there were any falsity in the certificate there is no evidence nor even any contention that anybody suffered loss in relying on it. There is no contention that the limited partnership did not receive all of \$25,000 promised to be contributed, no contention that the account of Barnard Brothers transferred did not contain at least that amount or that the check was not cashed. There was even no evidence

that the check was not cashed or the account transferred to the name of the limited partnership before March 21, the date of filing of the certificate. Under these circumstances it is very doubtful whether even under the old New York law the contribution by check instead of cash could have led to general liability, *White v. Eisman*, 134 N.Y. 101, 31 N.E. 276, but under the U.L.P.A. the absence of any loss in reliance on the allegedly false statement certainly excludes the imposition of general liability for that reason. As in the *Marcuse* case it does not make any difference for creditors whether the amount was paid in by one or more persons. The contention of respondent that David was under duty to contribute \$25,000 of his own money is not based on any authority and was false even under the strict old New York law, *Webster v. Lanum*, 2 Cir., 137 F. 376; *In re Rasmussen*, 2 Cir., 287 F. 860.

[6] As to Alec Barnard, if he was a subpartner sharing profits and losses of David, without himself having a direct connection with Barnard Brothers Textile Division, he was no partner and not liable for partnership liabilities even under the old law, *Burnett v. Snyder*, 76 N.Y. 344; *Id.*, 81 N.Y. 550; *Rockafellow v. Miller*, 107 N.Y. 507, 14 N.E. 433. If he is considered to be directly entitled to profit from the partnership because David in part represented him as an undisclosed principal or represented the partnership then the prima facie evidence that he was a partner was rebutted at least as strongly as it was in the case of David. He had no intention to be a partner, his position in relation to the partners of Barnard Brothers Textile Division could obviously at most be the same as the one of David, he did not in any respect carry on the business of the limited partnership; he did not hold himself out as a partner or even a limited partner and nobody relied on his being so. Under the Uniform Partnership Act he was not a partner and there is no basis to hold him liable as such.

We conclude that as a matter of law neither Alec nor David Barnard could be held liable for the liabilities of the limited partnership. As said in the *Giles* case, *supra*,

263 U.S. at page 561, 44 S.Ct. at page 160: "To hold them liable as general partners would give creditors what they are not entitled to have, and would impose [on defendants] burdens that are not theirs to bear." It follows that the order granting a new trial must be reversed.

Order reversed.

GOODELL and DOOLING, JJ., concur.



117 Cal.App.2d 364

In re SPINOSA'S ESTATE.

SPINOSA et al. v. STATE.

Civ. 8094.

Sac. 6219.

District Court of Appeal, Third District,
California.

April 17, 1953.

Hearing Denied June 11, 1953.

Proceeding by nonresident alien heirs to obtain money on deposit with state treasurer. The Superior Court, Sacramento County, rendered judgment denying relief, and petitioners appealed. The District Court of Appeal, Schottky, J., held that order made by Probate Court while the United States was at war with Italy, reciting that no heirs or other claimants had appeared and established their rights and ordering county treasurer to pay money belonging to intestate's estate into state treasury, was not an adjudication that residents and citizens of Italy, listed as heirs in petition for distribution filed by public administrator, were not heirs of intestate.

Judgment reversed.

1. Judgment ⇐634

Under doctrine of "res judicata", an existing final judgment of a court of competent jurisdiction rendered upon the merits, without fraud or collusion, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other court of concurrent jurisdiction.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Judicata".

2. Judgment ⇐540

There are exceptions to doctrine of res judicata based upon important reasons of policy, and the doctrine should not be applied so rigidly as to defeat the ends of justice.

3. Judgment ⇐742

Order filed by probate court while the United States was at war with Italy, reciting that no heirs or other claimants had appeared and established their rights and ordering county treasurer to pay money belonging to estate of intestate into state treasury, was not an adjudication that residents and citizens of Italy listed as heirs in petition for distribution filed by public administrator were not heirs of intestate and was not "res judicata" on question of heirship, in view of inability of heirs, being enemy aliens, to appear and establish their rights. Probate Code, § 1147; Joint Resolution Dec. 11, 1941, 50 U.S.C.A. Appendix note preceding section 1; Trading with the Enemy Act, § 7(b), 50 U.S.C.A. Appendix, § 7(b).

4. Judgment ⇐958(1)

Language of order or judgment upon which plea of res judicata is predicated must be considered in the light of, and in connection with, the circumstances as they existed at time of entry of such order or judgment.

5. Evidence ⇐11

District Court of Appeal could take judicial notice that on December 11, 1941, the United States declared war upon Italy. Joint Resolution Dec. 11, 1941, 50 U.S.C.A. Appendix note preceding section 1; Code Civ.Proc. § 1875, subs. 2, 3.

6. War and National Defense ⇐10(2)

When the United States declared war upon Italy, all residents and citizens of Italy became enemy aliens and as such were prohibited from prosecuting or maintaining any suit in law or in equity in any court in the United States prior to end of such war. Joint Resolution Dec. 11, 1941, 50 U.S.C.A. Appendix note preceding section 1; Trad-

ing with the Enemy Act, § 7(b), 50 U.S.C.A. Appendix, § 7(b).

7. War and National Defense ⇨10(2)

While the United States was at war with Italy, residents and citizens of Italy, being enemy aliens, could not appear and establish their rights as heirs of an intestate whose estate was being administered in California Probate Court, and no distribution could be made to such heirs. Joint Resolution Dec. 11, 1941, 50 U.S.C.A. Appendix note preceding section 1; Trading with the Enemy Act, § 7(b), 50 U.S.C.A. Appendix, § 7(b).

8. Judgment ⇨958(1)

Language of order on which plea of res judicata is predicated should not be given a strained construction, where such construction would manifestly defeat the just claims of litigants.

9. Limitation of Actions ⇨113

Five-year statute of limitation within which period nonresident alien heirs were required to make demand for property of intestate brother which had been distributed to the state was tolled during time aliens were denied access to courts because of war. Code Civ.Proc. §§ 354, 1272, 1272a; Probate Code, §§ 1026, 1027, 1147; Trading with the Enemy Act, § 7(b), 50 U.S.C.A. Appendix, § 7(b).

10. Escheat ⇨1

Escheats and forfeitures are not favored and state has no right to have property escheated to it unless there is an express statutory provision for such escheat.

11. Escheat ⇨4

Escheat statutes contemplate that where a person dies without heirs, or without known heirs who fail to file their claim to estate within the time fixed by statute, decedent's property will be escheated. Probate Code, §§ 1026, 1027, 1147.

SCHOTTKY, Justice.

Appellants filed a petition in the Superior Court of Sacramento County, under sections 1272 and 1272a of the Code of Civil Procedure, to obtain money on deposit with the State Treasurer. Respondent, state of California, opposed said petition and after trial judgment was rendered against petitioners and this appeal is from said judgment.

The facts, as shown by the settled statement on appeal, are substantially as follows:

Vito Madio Spinoso died intestate in Oakland, California, on January 17, 1941. His heirs, the petitioners and appellants, are non-resident aliens, residing in Italy. Letters of administration were issued to the Public Administrator of Alameda County on February 7, 1941. On June 13, 1941, the appellants through their attorney filed the following "Notice of Appearance" in the probate proceedings: "To Albert E. Hill, Public Administrator and Administrator of the Estate of Vito Madio Spinoso, * *: You and Each of you please take notice and notice is hereby given that Francesco Spinoso, Lucia Perelli Spinoso and Antonia Fanelli Spinoso, brother and sisters of Vito Madio Spinoso, and sole heirs-at-law of his estate, hereby appear in the matter of the estate of said decedent and request that special notice be given them of all matters, steps and proceedings taken in the administration of said estate pursuant to section 1202 of the Probate Code of the State of California. Such notice to be sent to Sylvester Andriano, Attorney for said heirs, at 550 Montgomery Street, San Francisco, California."

On August 15, 1941, the administrator filed a petition for distribution which contained the following: "Your petitioner is informed and believes and therefore alleges that the following are the persons entitled to share the distribution of this estate: Francesco Spinoso, brother, Lucia Perelli Spinoso, sister, Antonia Fanelli Spinoso, sister." On January 22, 1942, the probate court filed its decree entitled "Decree of Settlement of Final Account and Order for Payment of Moneys into State Treasury." This order recited: "And it appearing that

Sylvester Andriano, Louis Ferrari, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., William J. Power, Deputy Atty. Gen., for respondent.

the affairs of said estate have been finally settled; that no heirs or other claimants thereof or thereto have appeared and established their rights; It is further ordered, adjudged and decreed that the County Treasurer of the County of Alameda, be and he is hereby directed to forthwith pay into the State Treasury all moneys in his hands belonging to said estate. * * *

On June 22, 1948 this petition was filed in the Superior Court of Sacramento County to obtain money on deposit with the State Treasurer in the sum of \$3,339.21.

The judgment against petitioners was based upon the following conclusions of law: "That the decree of the probate court finding that no heirs had appeared and established their rights, was an adjudication that Francesco Spinosa, Lucia Perelli Spinosa and Antonia Fanelli Spinosa, were not the heirs of Vito Madio Spinosa and not entitled to share in the estate of Vito Madio Spinosa and that said decree of the probate court is res adjudicata as to the rights of Francesco Spinosa, Lucia Perelli Spinosa and Antonia Fanelli Spinosa to succeed to the estate of Vito Madio Spinosa. That the petition filed herein to recover the estate of Vito Madio Spinosa from the State Treasury was not filed within the time allowed by Probate Code section 1027; * * *"

Appellants first contend that the order of the probate court did not adjudicate the rights of petitioners, or vest any interest in the funds in the state of California. Appellants refer to the title of the decree which states: "Order for Payment of Moneys into State Treasury." It is next argued that the words of the order, "pay into" do not denote a passage of title to the state. Appellants point out that under section 1147 of the Probate Code, the public administrator is required to deposit all funds with the County Treasurer; that at the end of administration, the County Treasurer, if the money is not distributed to known heirs, is authorized to deposit the same with the state. Appellants cite Estate of Miner, 143 Cal. 194, 76 P. 968, 969, for the proposition that the words "pay into" do not vest any interest in the state. In that case the decree recited:

"The affairs of the estate of James Miner, deceased, having been finally settled, and there being no heirs or other claimants thereof, it is order that the county treasurer of this city and county forthwith pay into the state treasury all moneys and effects in his hands belonging to said estate." It was held that: "After hearing further argument, and a re-examination of the case, we have arrived at the conclusion that the final order of the probate court did not operate to vest the title to the fund, so deposited in the state treasury, in the state, as upon a decree in an action brought to escheat the same."

Respondent in arguing that the decree of the probate court is res judicata points out that petitioners appeared in the probate proceedings; that the petition for distribution named the petitioners as heirs; and that, however, the court found that no heirs had appeared and established their claim. Respondent concludes that this finding is an adjudication that the petitioners were not entitled to share in the estate. In arguing that the decree of the probate court was a decree of distribution it is stated that the court had before it "a petition for distribution," and having found that heirs had not proved their claim, ordered the estate paid to the state.

[1,2] The general rule as to the doctrine of res adjudicata is well expressed in 30 Am.Jur., secs. 161 and 162, pages 908, 909:

"Briefly stated, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. To adopt the language of the English court in announcing the doctrine in an early case, which has been frequently repeated by the courts, the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question

in another court. In speaking of this rule and the distinctions which appear therein, it has been said that this brief but comprehensive summary furnishes a rule for every case that any complication of circumstances can produce. On the other hand, it has been declared that when a case lies hard by the line of cleavage between what is and what is not *res judicata*, it may be a nice question to determine on which side of the line the case falls."

"The doctrine of *res judicata* is a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations. It is not, however, to be applied so rigidly as to defeat the ends of justice; there are exceptions to it based upon important reasons of policy. There is also support for the rule that judgments relied upon as creating an estoppel are to be construed with strictness."

And in *Guardianship of Di Carlo*, 3 Cal. 2d 225, at page 234, 44 P.2d 562, 566, 99 A.L.R. 990, the court said:

"It may be conceded that the proceeding by the guardian has the character of a probate proceeding and is *in rem*. *Smith v. Fidelity & Deposit Co.*, 130 Cal.App. 45, 19 P.2d 1018. But we do not agree that this designation necessarily compels the holding that an intermediate account of a guardian is conclusive against the ward. The Legislature has expressly made it so in the case of executors, administrators, and testamentary trustees. Prob.Code, secs. 931, 1123. The absence of such a declaration in the case of guardians leaves the matter open to the courts to determine the proper rule. There is, no doubt, some force in the analogy of the estate and trustee cases. Nevertheless, they are distinguishable in one important respect, namely, that the ward is a person under legal disability and ordinarily unable to protect himself against overreaching or other improper conduct of the guardian. This distinction is sufficient to justify an exception to the normal application of the principle

of *res judicata*. That principle is not to be applied so rigidly as to defeat the ends of justice; there are exceptions to it, based upon important reasons of policy, and we think that this case calls for such an exception."

[3-7] We are unable to agree with respondent's contention that the "Decree of Settlement of Final Account and Order for Payment of Moneys into State Treasury," filed by the Probate Court on January 22, 1942, was *res adjudicata* upon the question that appellants were not the heirs of Vito Madio Spinosa. The exact language in the order was "That no heirs or other claimants thereof or thereto have appeared and established their rights." This language must be considered in the light of, and in connection with, the circumstances as they existed at that time. The administrator had on August 18, 1941, filed a petition for distribution in which he alleged that appellants were the persons entitled to share in the distribution of the estate. This petition was not heard until January 22, 1942. In the meantime, on December 11, 1941, the United States declared war upon Italy, Joint Res. Dec. 11, 1941, c. 565, 55 Stat. 797, 50 U.S.C.A. Appendix note preceding section 1. Of this we can take judicial notice. Code Civ.Proc. sec. 1875, subds. 2, 3; 10 Cal.Jur., Evidence, sec. 27, p. 699. Upon this declaration being made, appellants, all residents and citizens of Italy, became enemy aliens and as such were prohibited from prosecuting or maintaining any suit in law or in equity in any court in the United States prior to the end of the war. 50 U.S.C.A. Appendix § 7(b); 56 Am.Jur., War, sec. 131, p. 240. Under such circumstances, appellants, being enemy aliens, could not appear and establish their rights and no distribution could be made to them. Under such circumstances the Probate Court could only find that no heirs had appeared and established their rights and order the County Treasurer to pay the moneys on hand belonging to said estate into the State Treasury. We do not believe that the language "no heirs or other claimants have appeared and establish their rights" can be held to be an ad-

judication that appellants were not the heirs of Vito Madio Spinosa, when the petition for distribution filed by the administrator stated that they were the heirs. If the court had intended to determine that appellants were not the heirs of deceased, it could and would have said so in direct language, but it could hardly so determine because there was and is no dispute as to the fact that they were the heirs. However, because of the state of war between the United States and Italy, it could not declare that appellants had, or had established any rights.

[8] Before we would be justified in agreeing with respondent's contention that the order of January 22, 1942, was res adjudicata that appellants were not the heirs, we would have to give to the language of the order a strained construction, and where, as here, such a construction would manifestly defeat the just claims of appellants, the doctrine of res adjudicata should not be "applied so rigidly as to defeat the ends of justice." As hereinbefore pointed out, such a construction is neither necessary nor reasonable.

Respondent contends further that even if the order of the probate court of January 22, 1942, was not a final determination that appellants were not the heirs of deceased, they are still not entitled to recover the funds of said estate because their petition was not filed within the time allowed by Probate Code section 1027. One of the conclusions of law of the trial court was in accordance with this contention.

In the very recent case of *Estate of Caravas*, 40 Cal.2d 33, at page 38, 250 P.2d 593, 595, decided since the trial of the instant case, the court said:

"* * * When property is held under section 1027, claimants must appear and claim the estate or any part thereof in the Superior Court of Sacramento County. If the claim is not filed within the statutory period, it 'shall be forever barred, and such property, or so much thereof as is not claimed shall vest absolutely in the State.' Section 1027 further provides that 'Rights of nonresident aliens shall

be governed by the provisions of Section 1026'. Since the sentence of section 1027 preceding the quoted reference to section 1026, provides that the five year period under section 1027 commences from the date of the decree making distribution to the state treasurer, the purpose of the reference to section 1026 is to call attention to the fact that when nonresident aliens succeed to the property, the five year period is computed from the 'time of succession' rather than from the date of distribution. When sections 1026 and 1027 are read together, it is clear that after the state treasurer takes possession of assets of an estate pursuant to section 1027, a 'demand' by a nonresident alien under section 1026 must be made in the Superior Court of Sacramento County in the same manner that a 'claim' would be made for other assets held by the state treasurer under section 1027, and that, after the distribution to the state treasurer, the only difference between the two classes of property is that in the case of a nonresident alien the five year period for making the claim is computed in a different manner."

Section 354 of the Code of Civil Procedure provides:

"When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of the continuance of such disability is not part of the period limited for the commencement of the action whether such cause of action shall have accrued prior to or during the period of such disability."

[9] In dealing with a similar contention in *Estate of Caravas*, 40 Cal.2d at page 39, 250 P.2d at page 596, supra, our Supreme Court said:

"Petitioner contends that proceedings under sections 1026 and 1027 are subject to sections 354 and 356 of the Code of Civil Procedure. This contention must be sustained. A 'disability' under section 354 and a 'statutory prohibition' under section 356 are both

present since the Trading With the Enemy Act prevented petitioner from filing a claim to the property. The word 'action' in sections 354 and 356 includes a 'special proceeding of a civil nature.' Code Civ.Proc. § 363. When a claim is filed in the Superior Court of Sacramento County pursuant to sections 1026 and 1027, the applicable procedure is that outlined in section 1272 and 1272a of the Code of Civil Procedure, *Ebert v. State*, 33 Cal.2d 502, 509, 202 P.2d 1022; see amendment to section 1027 by Stats. 1951, ch. 1459, § 1, and those sections are in Part III of the Code of Civil Procedure, entitled 'Special Proceedings of a Civil Nature'. It is thus clear that the act of filing a claim in the Superior Court of Sacramento County under sections 1026 and 1027 is the 'commencement of an action' within sections 354 and 356. *Taketa v. State Board of Equalization*, 104 Cal.App. 2d 455, 459, 231 P.2d 873, (mandate to set aside order revoking liquor license); *People v. Grant*, 52 Cal.App. 2d 794, 800, 127 P.2d 19 (proceeding under section 325 of Penal Code to forfeit money taken from slot machines); *Wells v. California Tomato Juice, Inc.*, 47 Cal.App.2d 634, 637, 118 P.2d 916 (proceeding to enforce mechanic's lien).

"Moreover, although sections 1026, 1027, 1272 and 1272a do not expressly refer to suspension of the limitation period when war has prevented access to the Superior Court of Sacramento County to file a claim, it is an established principle of international and municipal law that a statute of limitation is tolled during the period when the existence of a state of war prevents access to the courts, whether or not the particular statute of limitation expressly provides for such suspension thereof. *Kolundjija v. Hanna Ore Mining Co.*, 155 Minn. 176, 179, 193 N.W. 163; *Wirtele v. Grand Lodge, A.O.U.W.*, 111 Neb. 302, 305, 196 N.W. 510; *Siplyak v. Davis*, 276

Pa. 49, 52, 119 A. 745; *Inland Steel Co. v. Jelenovic*, 84 Ind.App. 373, 376, 150 N.E. 391; 54 C.J.S., Limitations of Actions. § 259; 137 A.L.R. 1454."

It is conceded by respondent that if the time of the duration of the war is no part of the statute of limitation then the petition of appellants to obtain the moneys of Vito Spinosa on deposit with the State Treasurer was filed within the period of time allowed by said Probate Code sections 1026 and 1027.

We conclude, therefore, that the trial court erred in determining that the order of the Probate Court of Alameda County was *res adjudicata* that appellants were not the heirs of Vito Madio Spinosa, and also that the court erred in determining that the petition of appellants to recover the fund of the estate of said deceased from the State Treasury was not filed within the time allowed by the Probate Code.

[10] As stated in 10 Cal.Jur., *Escheat*, sec. 2, page 568:

"Escheats and forfeitures are not favored and unless there is an express provision therefor the right of the state to have property escheated to it does not exist."

[11] The escheat statutes contemplate that where a person dies without heirs, or without known heirs who fail to file their claim to the estate within the time set forth in the statutes, the property will be escheated. In the instant case appellants are without question the rightful heirs and have filed their petition in the Superior Court of Sacramento County within the time required. To hold that they were barred by the prior probate proceedings under circumstances as extraordinary as the ones present in the instant proceeding would be to defeat the very spirit of the law relating to escheat and succession.

No other points raised require discussion.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

ENTERPRISE DEVELOPMENT CORP. v. TERRY.

Civ. 19382.

District Court of Appeal, Second District,
Division 3, California.

April 21, 1953.

Rehearing Denied May 11, 1953.

Hearing Denied June 18, 1953.

Action by distributor against manufacturer for money which had been deposited in bank to be paid over in accordance with judgment declaring the rights of the parties and which represented the difference between the prices of articles sold to plaintiff under price schedule in effect at time order was accepted and under price schedule in effect at time merchandise was delivered. The Superior Court, Los Angeles County, Eugene P. Fay, Judge Assigned, entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Shinn, P. J., held, *inter alia*, that since the contract between the parties provided that defendant would manufacture, sell and deliver promptly to plaintiff all the manufactured articles plaintiff should order at prices fixed by defendant and that defendant should not change the prices except upon 30 days' notice, the new prices announced applied only to orders accepted by defendant after the effective date of the notice of increase in prices.

Modified and affirmed.

1. Sales ⇨75

Where manufacturer agreed to manufacture, sell and deliver promptly to distributor such number of manufacturer's product as distributor might order, and agreed not to change prices, which manufacturer had right to fix, except upon 30 days' notice, announced new prices applied only to orders accepted by manufacturer after effective date of notice of increase in prices, not to articles which were sold pursuant to orders accepted prior to such date but which were delivered after such date.

2. Judgment ⇨252(1)

Where plaintiff in suit concerning right to money which had been deposited in bank and which was to be paid over in accordance with judgment did not pray for personal judgment, entry of personal judgment against defendant was error.

3. Declaratory Judgment ⇨388

Where amount in dispute had been deposited in bank to be paid over in accordance with judgment declaring rights of parties, plaintiff for whom judgment was entered was not entitled to personal judgment against defendant, but was entitled only to the money so deposited plus any interest earned on the deposit and costs.

Larwill & Wolfe, Los Angeles, for appellant.

John S. Bolton and F. V. Lopardo, Los Angeles, for respondent.

SHINN, Presiding Justice.

Charles Terry, doing business as Interstate Rubber Products Company, holding a license agreement to manufacture a rubber device called a "Traffic Safety Cone," granted to Enterprise Development Company the exclusive right to sell the cones in certain territories, and also agreed to manufacture, sell and deliver to Enterprise such cones as it might order. Enterprise agreed that during each three months it would take a minimum of 10,000 cones and sell them to its customers for at least 50 per cent above prices paid to Terry. The agreement provided that Terry was to fix the prices of cones sold to Enterprise, and that he would not change them except upon 30 days' notice. The agreement was entered into in January, 1949. On June 12, 1950, Terry notified Enterprise that commencing July 20, 1950, the price of the cones would be raised according to a schedule attached to the notice. The court found that prior to July 20th Enterprise ordered 14,979 cones; 3,465 were delivered prior to July 20th, and 1,749 were delivered after July 20th, all at prices prevailing before that date; Terry refused to deliver 9,765 cones except at the increased price. Prior to July 20th Enterprise had committed itself to deliver all said cones, and in order to fill its commitments paid Terry the increased price for said 9,765 cones upon the condition that the sum in dispute, amounting to \$2,974.50, be deposited in bank, to be paid over in accordance with a judgment declaring the rights of the par-

ties. The money was deposited and Enterprise was given judgment that it was entitled to the money, and also a personal judgment against Terry for the same amount.

[1] It is stated in appellant's brief that the question involved is whether a completed sale of the articles took place at the time Enterprise ordered the cones, or at the time they were actually manufactured and delivered. It is argued that the order, although accepted by defendant, was a mere executory contract to sell the goods when they actually came into existence, and since they were not delivered, and title did not pass, until after July 20th, they must be paid for at the new prices. This was evidently Terry's idea at the time, but he did not realize the extent of his obligation under the agreement, which was "to manufacture, sell and deliver promptly" to plaintiff all the cones plaintiff should order. He accepted the orders for the 14,979 cones and was obliged to manufacture and deliver them promptly. He did not accept the orders conditionally, nor advise plaintiff they would not be filled at the prices prevailing at that time. Plaintiff was receiving orders from customers and giving defendant orders from time to time as required by its commitments. The provision that Terry would not change his prices except upon thirty days' notice was clearly for the protection of plaintiff, his distributor. If defendant, after having raised the prices, could delay performance and thereby gain the advantage of the new prices after they had gone into effect, plaintiff would have had no protection whatever with respect to commitments it had made at the current prices. The new prices applied only to orders accepted by Terry after the effective date of the notice of increase in prices. The facts found established plaintiff's right to receive the money on deposit.

[2, 3] Defendant says the court should not have rendered a personal judgment against him in addition to declaring that the money on deposit should be paid to plaintiff. His criticism is well founded. Plaintiff did not pray for a personal judgment, nor was it entitled to one.

The judgment is modified to declare only that plaintiff shall receive the money on deposit, plus any interest earned on the deposit, and its costs, and as modified is affirmed; respondent to recover costs.

WOOD and VALLÉE, JJ., concur.



117 Cal.App.2d 285

ROZZEN et al. v. BLUMENFELD et al.
Civ. 19183.

District Court of Appeal, Second District,
Division 1, California.

April 13, 1953.

Rehearing Denied May 4, 1953.

Hearing Denied June 11, 1953.

Action for injuries sustained when minor plaintiff drove bicycle from sidewalk down driveway into street and collided with automobile of one defendant who had swerved to left side of street to pass milk truck driven by another defendant toward its right side of street after truck had been parked on left, or wrong, side of street to make milk delivery. The Superior Court of Los Angeles County rendered a judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that giving of instruction relative to presumptions that every person takes ordinary care for his own concerns and obeys law was error requiring reversal of judgment for defendants.

Judgment reversed and cause remanded.

I. Negligence ☞138(2)

Giving of instruction in negligence action for injuries that at outset of trial each party is entitled to presumptions of law that every person takes ordinary care of his own concerns and obeys law, that such presumptions are prima facie evidence and support findings in accordance therewith in absence of contrary evidence, and that jury must weigh evidence conflicting with such presumptions and evidence supporting presumption to determine which preponderates, is error when thereby benefit of presumption of due care is extended to party

who has disclosed his acts and conduct immediately preceding and at time of accident.

2. Appeal and Error ⇐1064(1)

Automobiles ⇐246(60)

In action for injuries sustained when minor plaintiff drove bicycle from sidewalk down driveway into street and collided with automobile of one defendant who had swerved to left side of street to pass milk truck driven by another defendant toward right side of street after truck had been parked on left, or wrong, side of street to make milk delivery, whether either defendant took ordinary care of his own concerns while operating his vehicle was matter of evidence established by such defendant and his witnesses, leaving no room for presumption, and giving of instruction relative to presumptions that every person takes ordinary care of his own concerns and obeys law was error requiring reversal of judgment for defendants.

3. Automobiles ⇐246(60)

In action for injuries sustained when minor plaintiff drove bicycle from sidewalk down driveway into street and collided with automobile of one defendant who had swerved to left side of street to pass milk truck driven by another defendant toward right side of street after truck had been parked on left, or wrong, side of street to make milk delivery, given instruction reciting in part that at outset of trial each party was entitled to presumptions of law that every person takes ordinary care of his own concerns and obeys law was objectionable as being bound to produce doubt or confusion in minds of jurors when considered in light of other instructions.

4. Automobiles ⇐201(1)

Where A has so operated his vehicle as to imperil automobile or truck of B, and B, in attempting to avert apprehended collision, has caused his vehicle to collide with vehicle of C, the last named may hold A liable for injury and damage sustained.

5. Appeal and Error ⇐928(1)

In determining whether instructions given are correct District Court of Appeal must assume that jury might have believed

evidence upon which instruction favorable to losing party was predicated, and that if correct instruction had been given upon that subject jury might have rendered a verdict in favor of losing party.

Melvin Simon, Samuel Schekman, Los Angeles, Jacob Chaitkin, Pasadena, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, J. H. Peckham, Los Angeles, of counsel, for respondents William Clarence Blumenfeld and Gussie Stein.

F. Carlton Myers, Richard L. Hall, William K. Young, Los Angeles, for respondents Arden Farms Co. and Loren Peterson.

WHITE, Presiding Justice.

Plaintiffs appeal from a judgment entered upon a verdict for defendants in an action to recover for personal injuries sustained by the minor plaintiff when he was riding his bicycle and collided with an automobile operated by the defendant Blumenfeld. The grounds urged for reversal are two: first, that the court committed prejudicial error in giving an instruction which extended to defendants the benefit of a presumption that they exercised ordinary care; and second, that prejudicial error resulted from the giving of a number of instructions upon the assumption that there was evidence of contributory negligence on the part of the minor plaintiff.

On October 21, 1950, at about 9:50 a. m. of a Saturday morning, the defendant Peterson was making deliveries of milk for defendant Arden Farms Company on South Orange Grove Avenue in the City of Los Angeles. The street is 30 feet in width and lined with single-family residences. Peterson parked his milk truck on the west side of the north-south street, that is, on the wrong side of the street, in order to make a delivery. After making the delivery he drove his truck across the street in a northeasterly direction. Defendant Blumenfeld, driving north on the same street, attempted to pass the milk truck by swerving to the west or left side of the street just as the minor plaintiff, a boy 6½ years of age, drove his bicycle

from the sidewalk on the west side of the street down a driveway and into the side of Blumenfeld's vehicle. The child suffered a skull fracture and was unable to remember any of the facts surrounding the accident. Peterson and Blumenfeld each testified concerning their movements preceding and up to the time of the accident.

The trial court, on its own motion, gave the following instruction:

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

An instruction in almost identical language, but confining the benefit of the presumption to the plaintiff child alone, was proffered by the plaintiffs and refused.

[1] Repeatedly it has been held that the giving of the quoted instruction, or an instruction of similar tenor, is error when thereby the benefit of the presumption of due care is extended to a party who by his testimony or by evidence introduced in his behalf has disclosed his acts and conduct immediately preceding and at the time of the accident. *Speck v. Sarver*, 20 Cal.2d 585, 587, 588, 128 P.2d 16, and cases cited; *Cole v. Ridings*, 95 Cal.App.2d 136, 212 P.2d 597; *Ford v. Chesley Transportation Co.*, 101 Cal.App.2d 548, 225 P.2d 997; *Wertheim v. Mears*, 104 Cal.App.2d 120, 231 P.2d 89. The precise instruction here under attack was considered in the two last-cited cases and in each case the court on appeal concluded that the giving of the instruction constituted prejudicial error.

Whether the error in the giving of the instruction is prejudicial and requires re-

versal depends upon the facts of the particular case. *Speck v. Sarver*, supra; *Cole v. Ridings*, supra; *Ford v. Chesley Transportation Co.*, supra. As was said in *Ford v. Chesley Transportation Co.*, supra, 101 Cal.App.2d at page 552, 225 P.2d at page 1000, "Inasmuch as the question of prejudice depends upon the facts of the particular case it would not be useful to point out the particulars in which the facts of the present case differ from those in which it has been held that the giving of the same instruction, while erroneous, was not prejudicial." We conclude as did the court in the last-cited case, that the error was prejudicial.

[2] In determining whether prejudice resulted in a particular case, the vice of the criticized instruction should be kept in mind. The party against whom the presumption is invoked must not only overcome by a preponderance of the evidence the case presented by the opposing party, but must also overcome the presumption, for in the language of the instruction, conflicting evidence must be weighed "against the presumption, and any evidence that supports the presumption, to determine which, if either preponderates." In circumstances such as are here presented, paraphrasing the language in *Speck v. Sarver*, supra, 20 Cal.2d at page 588, 128 P.2d 16 (quoting from *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884), whether either of the defendants took ordinary care of his own concerns while operating his vehicle on the particular occasion in question was a matter of evidence established by such defendant and witnesses called by him, and "in the face of this evidence, there was no room for any presumption." [20 Cal.2d 585, 128 P.2d 18.] Or, as was said by Division Three of this court in an opinion prepared by Presiding Justice Shinn in *Ford v. Chesley Transportation Co.*, supra, 101 Cal.App.2d at page 553, 225 P.2d at page 1001, "The effect of the instruction was to add strength to defendant's claim that it was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that de-

fendant was not negligent." This court, in *Cole v. Ridings*, supra [95 Cal.App.2d 136, 212 P.2d 600], quoted from *Clary v. Lindley*, 30 Cal.App.2d 571, 573, 86 P.2d 920, as follows:

"A disputable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands.' *Noble v. Key System, Ltd.*, 10 Cal.App.2d 132, 137, 51 P.2d 887, 889. It may be controverted by evidence. Code Civ.Proc., § 1961. It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884. When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption (*Kelly v. Fretz*, 19 Cal.App.2d 356, 65 P.2d 914), for the simple reason that one side or the other would be forced to introduce evidence to controvert other evidence, plus a presumption. (*Paulsen v. McDuffie*, 4 Cal.2d 111, 47 P.2d 709; *Mundy v. Marshall*, 8 Cal.2d 294, 65 P.2d 65)."

[3] A second vice of the instruction is that it is bound to produce doubt or confusion in the mind of a conscientious juror, when he considers it in the light of other instructions given. In the present case, for example, in explaining the meaning of "burden of proof" and "preponderance of the evidence", the jury was told that "should the conflicting evidence be evenly balanced in your minds, * * * then your finding must be against the party carrying the burden of proof." The juror is further advised that "A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but *unless so controverted, the jury is bound to find in accordance with the presumption.*" Further, the juror is told to decide the case "solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and *such presumptions as the law deduces therefrom, * * **" Again, the juror is instructed:

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"You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number *or a presumption or other evidence, which appeals to your mind with more convincing force.*" (Emphasis added.)

Manifestly, the instruction given herein, viewed in the light of the factual situation present, could serve only to confuse the jury. While the meaning of "a preponderance of the evidence" is correctly set forth, the jury nevertheless was confronted with another instruction that there is a presumption of due care which continues throughout the trial and that if it satisfies the mind of the juror he may rely on the presumption. The question naturally rises in the minds of the jurors whether to resolve the issues on the basis of the evidence or on the basis of the presumption of due care.

Turning now to the evidence in the particular case, the testimony of the two individual defendants, Blumenfeld, and Peterson the milk truck driver, was in sharp conflict. If the version of defendant Blumenfeld is to be accepted, then the presence of his vehicle on the wrong side of the street was the result of an emergency occasioned by the negligence of the milkman in moving his vehicle from the left to the right side of the street without warning. If the story of Peterson is given credence, then Blumenfeld had ample space and time after the milk truck started moving in which to bring his vehicle under control so as to avoid a collision with the milk truck, and without swerving suddenly to within five feet of the westerly or left-hand curb.

[4] It may be that the jury concluded that the accident occurred without negligence on the part of Blumenfeld. But it strains credulity, in view of their contradictory testimony, to conclude that both individual defendants were without fault. If the milkman's story is correct, then Blumenfeld could easily have waited to pass him after the truck had reached the right-hand curb and Blumenfeld could have kept his vehicle somewhere in the center of the

30-foot street. If Blumenfeld's story is correct, then the proximate cause of the accident was the violation of law by the milkman in parking on the wrong side of the street and creating an emergency by driving across the street without warning into the path of Blumenfeld, forcing the latter to swerve sharply to the left. "Where A has so operated his vehicle as to imperil the car or truck of B, and B, in attempting to avert the apprehended collision, has caused his vehicle to collide with the vehicle of C, the last named may hold A liable for the injury and damage sustained." 2 Cal.Jur.Supp., "Automobiles", sec. 344, p. 532, citing *Merrill v. Finigan*, 133 Cal. App. 101, 24 P.2d 188.

Appellant further urges, as noted at the outset, that undue emphasis was placed on the question of contributory negligence by the instructions given on the subject. While we cannot hold that undue emphasis was given in this regard, nevertheless, in determining whether a miscarriage of justice has resulted from the error in giving the instruction as to a presumption of due care,—that is, the possible adverse effect of the instruction and its influence upon the jury—it should be noted that the evidence of contributory negligence on the part of the injured child is far from convincing. The child rode his bicycle down a driveway into the street. After the impact both the body of the child and his bicycle were lying south of the driveway and about five feet from the curb. An inference that the child intended to turn to his right out of the driveway and did in fact do so would be well supported. A conclusion that not only the child, but a person of mature years, was not guilty of contributory negligence in failing to anticipate the sudden appearance of a motor vehicle approaching him on the wrong side of the street, would be fully justified. The child was where he had a right to be, and the presence of the Blumenfeld vehicle on the wrong side of the street called for an explanation. *Green v. Uarte*, 87 Cal.App.2d 75, 78, 196 P.2d 63, and cases cited. As heretofore noted, contradictory explanations were given.

[5] It appears most likely that the verdict of the jury in this cause was based

upon a finding that Blumenfeld and Peterson were free from negligence. The erroneous instruction may well have tipped the scales in their favor in the deliberations of the jury. We cannot assume that the verdict was based upon evidence of contributory negligence, but in determining whether instructions given are correct, "we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party." *Cole v. Ridings*, supra, 95 Cal.App.2d at page 142, 212 P.2d at page 601, quoting *O'Meara v. Swortfiguer*, 191 Cal. 12, 15, 214 P. 975. In view of the physical evidence justifying an inference that the child had not attempted to cross the street but was where he had a right to be, and the contradictory testimony of the two individual defendants as to their relative positions and movements in the street in the moments preceding the accident, the conclusion is compelled that the error complained of operated to the prejudice of the substantial rights of the plaintiff child.

Respondents contend that the instruction challenged by appellants was properly given. The answer to their contention is that this court declines to depart from the views on the subject which have been heretofore expressed by the Supreme Court and this and other appellate tribunals of this state. We find no merit in the contention that respondent Arden Farms Company, employer of the milk driver Peterson, was entitled to the benefit of the presumption. The liability of the employer is founded upon the conduct of its employee under the doctrine of respondeat superior, and no question of negligence of the employer is involved. Other arguments of respondents are directed to their claim that if there was error it was not prejudicial, but what we have hereinbefore said negatives any such assumption.

The judgment is reversed, and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

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ANDERSON v. PASTORINI et al.

Civ. 8181.

District Court of Appeal, Third District,
California.

April 23, 1953.

Action for money alleged to be due plaintiff for construction work performed for defendants. The Superior Court, Tuolumne County, J. A. Smith, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence sustained the trial court's finding that there had not, as defendants contended, been a specific agreement for a fixed fee.

Affirmed.

1. Appeal and Error ⚡1010(1)

Rule that issues in civil causes are to be decided according to preponderance of evidence has application in trial court and not in reviewing court; question on appeal being whether findings of trial court upon facts are supported by substantial evidence in record.

2. Contracts ⚡350(2)

In action for money alleged to be due plaintiff for construction work performed for defendants, evidence sustained finding that there had not, as defendants' contended been a fixed fee contract.

3. Evidence ⚡536

Plaintiff who had been licensed contractor for approximately three years before doing work for defendants and who was generally familiar with laws regarding contractors was qualified to testify as expert witness on his own behalf in action for money allegedly due him for construction work performed for defendants.

4. Trial ⚡404(1)

A trial court's findings are to be construed so as to support rather than destroy conclusions of law and judgment made and rendered, but such construction must be reasonable.

5. Work and Labor ⚡30(4)

In action for money alleged to be due plaintiff for construction work performed for defendants, trial court's finding that

plaintiff had furnished all labor and materials set forth in his corrected bill of particulars, and that thereby, and by his services, he had conferred upon defendants benefits totaling \$4,232.82 in excess of what he had been paid, would have to be construed as a finding that plaintiff had furnished work, labor and services of the reasonable value allowed, and such finding responded to issues tendered in common count.

Marvin J. Colangelo, San Francisco, for appellants.

F. Edmund O'Connell, Sonora, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff and respondent brought action against defendants and appellants for money alleged to be due him for construction work he performed in completing the defendants' club and cafe, and in building a related residence. The complaint contained two counts. One was based upon an alleged cost plus fee contract whereunder he was to furnish all labor, services and materials necessary to complete the work for a compensation of total cost plus 10%. This total cost was alleged to be \$25,151.33, to which was added \$2,515.13 compensation. Only \$19,000 had been paid. Judgment was asked for the balance. A separate count was in common count form alleging that appellants were indebted to respondent in the sum of \$8,666.46 as the reasonable value of work, labor, services and materials performed and furnished at their request. By their answer the appellants denied that there existed a cost plus contract and on the contrary alleged that the work done by respondent was done under a contract whereby they were to pay him for the work on both buildings a total of \$19,000, which sum they alleged they had paid. The trial court found against appellants' allegations of a fixed sum contract; found that plaintiff had furnished and performed labor, materials and services and had been paid therefor the total sum of \$19,000; found that by what respondent had done appellants had received benefits amounting to

\$4,232.82 in excess of the \$19,000 they had paid.

[1,2] Appellants state that they "base their appeal on the fact that the preponderance of the evidence clearly indicated that a fixed price had been agreed upon, and had been fully paid." Of course the rule that issues in civil causes are to be decided according to the preponderance of evidence has application in the trial court and not in the reviewing court. The question here is whether or not the findings of the trial court upon the facts is supported by substantial evidence in the record. We have examined the record and therefrom it appears that appellants did present much evidence and most persuasive evidence that the contract was as alleged by them. However, the respondent likewise presented evidence that the contract was as he claimed it to be. It will suffice to mention the following: The club and cafe building which was the principal structure involved had been begun and partially completed by a contractor who had for some reason gone off the work and left it unfinished. Some of his work was materially defective and had to be remedied before the building could be completed. There were no written plans or specifications and indeed when the contract was made there was no oral agreement that was in any wise detailed as to what was still to be done. There were broad indications as to what remained to be done resting in the state of completion to which the building had been brought, but there was nothing more than that. In this situation respondent testified that while he gave an estimate of what it would require to complete the building and also gave an estimate as to what would be required to construct the dwelling house, yet he definitely refused to take the work on a fixed fee contract basis because of the great uncertainty as to what installations, materials and labor would be required. He testified positively that upon his refusal to take the contract on a fixed fee basis it was agreed that he would go ahead and complete the building as ordered by appellants, doing such work and following such plans as they should from time to time direct and that it would be for appellants to pay the costs and to

pay him his 10% thereof as his compensation. It is not necessary to labor the proposition that the foregoing constitutes substantial support for the court's finding that the contract was not a fixed fee contract. The decision of the trier of fact on this issue must prevail. *Goldberg v. Underhill*, 95 Cal.App.2d 700, 213 P.2d 516; *Macart v. San Joaquin B. & L. Ass'n*, 45 Cal.App.2d 395, 114 P.2d 395; *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 45 P.2d 183.

[3] Aside from appellants' contentions hereinbefore discussed that the findings of fact to the effect there was no specific agreement for a fixed fee contract were unsupported, the appellants contend that their objection to certain testimony given by respondent as a qualified expert on matters having to do with building construction should have been sustained. We do not agree. To qualify himself to give such testimony respondent stated that he had been a licensed contractor for approximately three years before doing the work for appellants; that before that period he had been general superintendent for a construction company in San Francisco for about a year and a half, and that before that time and for 2 or 3 years he had been in charge of construction work at various places in the State; that he was generally familiar with laws regarding contractors. We think it clear that the foregoing qualified him to testify as an expert witness. Any objection to his qualifications in view of the foregoing would go only to the weight to be accorded to his testimony.

[4,5] A trial court's findings are to be construed so as to support rather than to destroy the conclusions of law and the judgment made and rendered. 24 Cal.Jur., secs. 229, 230, 231. Such construction of course must be reasonable. We think that in accordance with the foregoing rule it clearly appears that the trial court found that there was no fixed fee contract between the parties; but that there was an agreement on the part of respondent to perform all of the work required and to furnish all of the labor and materials requisite therefor and that he was to be reasonably compensated. The court specifically found that respondent had furnished

all the labor and materials set forth in his corrected bill of particulars; and that thereby and by his services he had conferred upon appellants benefits totaling \$4,232.82 in excess of what he had been paid. This must be construed as a finding the respondent furnished work, labor and services of the reasonable value allowed and responds to the issues tendered in the common count. *Wilson v. Smith*, 61 Cal. 209; 3 Cal.Jur. "Assumpsit", sec. 2, p. 374; 14 So.Cal.L.Rev. 289-294.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



117 Cal.App.2d 292

**STONAKER et al. v. SUPERIOR COURT
IN AND FOR LOS ANGELES
COUNTY.**

Civ. 19427.

District Court of Appeal, Second District,
Division 3, California.

April 13, 1953.

Rehearing Denied May 1, 1953.

Hearing Denied June 11, 1953.

Proceeding in certiorari to annul orders of a Superior Court adjudging petitioners guilty of contempt of court for violation of an injunction. The District Court of Appeal, Parker Wood, J., held that evidence did not justify finding that petitioners had violated injunction.

Orders and judgments annulled.

1. Contempt $\S$ 40, 51

A contempt of court proceeding is of a criminal nature and summary character.

2. Contempt $\S$ 66(7)

Findings in a contempt of court proceeding are to be strictly construed in favor of accused and presumption in favor of regularity of proceedings and judgment does not apply in contempt matters.

3. Injunction $\S$ 230(3)

In proceeding in certiorari to annul court orders adjudging petitioners guilty of contempt of court for violation of injunction prohibiting petitioners from selling

burial spaces in cemetery after specified date, evidence did not justify finding that petitioners had violated injunction.

A. Brigham Rose, Los Angeles, for petitioners.

No appearance for respondent.

Roland Maxwell and Paul H. Marston, Pasadena, for Byron Peebler and Ethel M. Peebler.

PARKER WOOD, Justice.

Proceeding in certiorari to annul orders of the superior court adjudging petitioners guilty of contempt of court for violation of an injunction.

On January 5, 1950, Byron Peebler and Ethel M. Peebler obtained judgment for \$10,722.98, as damages for malicious prosecution, against petitioners herein J. M. Danziger and Edith W. Danziger. That judgment was also against one Hutchinson, but on appeal the judgment was reversed as to him. *Peebler v. Danziger*, 104 Cal.App.2d 614, 232 P.2d 301. Petitioners herein Stanley S. Stonaker and Melville E. Farmer were not parties in said action.

On October 8, 1951, the sheriff sold to the Peeblers at execution sale (under a writ of execution issued upon said judgment) all the right, title and interest of J. M. Danziger and Edith W. Danziger in certain cemetery property. (Hereinafter more particularly described.)

On November 15, 1951, Byron Peebler filed his affidavit for an order requiring said Danzigers, Hutchinson, Stonaker and Farmer, doing business as Graceland, a corporation, to show cause why they should not be enjoined from permitting interments in said cemetery property during the period for redemption of the property after said execution sale. On November 29, 1951, an order to show cause was issued requiring said persons, except Farmer, to show such cause on December 17, 1951. On December 14th, the attorneys for the Peeblers and attorney Rose, representing the Danzigers and Stonaker, stipulated in writing (1) that attorney Rose thereby entered a general appearance for the Danzigers and Stonaker,

and (2) that the hearing on the order as to the Danzigers and Stonaker be continued to January 4, 1952. The order to show cause was served on Hutchinson but he did not appear on said December 17th, and an injunction, as prayed for in the affidavit of Byron Peebler, was granted by Judge Swain as to Hutchinson upon the filing of a \$500 bond.

The order to show cause came on for hearing on January 4th before Judge Patrosso, and said Danzigers and Stonaker filed written objections to the jurisdiction of the court to hear said order to show cause. No affidavit, in reply to the affidavit of Byron Peebler, was filed, and no evidence in addition to the Peebler affidavit was introduced at the hearing on the order to show cause. The attorney for the Danzigers and Stonaker called the judge's attention to the objections which had been filed. The matter was then submitted for decision.

On January 8th, the following minute order was made: "Order to show cause re preliminary injunction, having been heretofore submitted January 4, 1952, the court now orders: Injunction is ordered restraining defendants, their and each of their servants, agents and employees from interring any bodies in any portion of the property sold upon execution issued upon the judgment lien not previously sold for burial purposes to third persons. In other respects, application is denied. Attorney for plaintiff is to prepare a formal order."

On January 22, 1952, the judge made the formal injunction order which provided: "*It is hereby ordered*, that the said Edith W. Danziger and J. M. Danziger, the agents, servants and employees of them or either of them, including Stanley S. Stonaker and Frances A. Stonaker, are enjoined and restrained either directly or indirectly from interring or permitting the interment of any bodies in any portion of the following described property situated in the County of Los Angeles * * * [here is legal description by metes and bounds of certain real property] not sold for burial purposes to third persons previous to October 8, 1951. *Dated*: January 22, 1952."

A copy of said injunction was served on February 8, 1952, on each of the following named persons: J. M. Danziger, Edith W. Danziger and Stanley S. Stonaker. A copy thereof was served on Melville E. Farmer on February 20, 1952.

On May 1, 1952, Byron Peebler filed his affidavit for an order requiring the Danzigers, Stonaker and Farmer to show cause why they should not be adjudged to be in contempt of court by reason of violation of said injunction. The affidavit stated that said injunction (containing said provision hereinabove recited) had been duly made on said January 22, 1952; copies of the injunction were served on the Danzigers, Stonaker and Farmer on certain dates (as hereinabove stated); affiant is informed and believes and therefore alleges that said Farmer is, and since said January 22d has been an agent and employee of "Edith W. Danziger and/or J. M. Danziger"; since said January 22d the affiant has seen Farmer on the premises many times; since said date the Danzigers, Stonaker and Farmer have been in charge of and have supervised all cemetery operations on said premises; said persons interred and permitted the interment of certain bodies (the names of the decedents being stated) in said real property on the following dates in 1952: February 15, 21, 28, March 14, 17, 20, 22 and 27; affiant is informed and believes and therefore alleges that none of the burial spaces in which said bodies were interred was sold previous to October 8, 1951; that a person who purchased burial space for the burial on February 15 (burial of Mr. Huntley) told affiant that she came to affiant's office to purchase a space but no one was there and she went to the adjoining property (which is the cemetery property involved herein) and purchased the burial space; that the purchaser of said space also stated that the purchase was made after October 8, 1951, and that Farmer and Stonaker both participated in said interment; Farmer supervised the burial of Mr. Chamberlain on February 21, and Mrs. Chamberlain told affiant that she bought that grave after October 8, 1951; after October 8, 1951, certain persons visited affiant and asked about the purchase of a grave for

the interment on February 28 (Mr. Tedlock); Farmer supervised the interment on March 14 (Mrs. McGregor); before said interment of March 17 (Mr. Lloyd) affiant received a telephone call from a person who asked the price of a burial space in affiant's cemetery for the burial of said decedent; Mr. and Mrs. Schoonover, the parents of the person who was buried on March 20, told affiant on the day after the funeral that they had contracted for the grave and for five other graves after October 8, 1951; a person told affiant that she purchased a grave for the interment on March 22 (Mr. Laird) after October 8, 1951; Stonaker supervised the interment on March 27 (Mr. Sharp—the date of interment was changed, in a later affidavit, to March 28); and affiant is informed and believes and therefore alleges that all the acts of said persons, Danzigers, Stonaker and Farmer, described in said affidavit, were done with the knowledge and consent of each and all of said persons and at the direction of each and all of them.

On May 1, 1952, an order was made requiring the Danzigers, Stonaker and Farmer to show cause why they should not be adjudged guilty of contempt of court for disobeying said injunction of January 22d, which injunction and disobedience are described in the affidavit of Byron Peebler. It was further ordered therein that a copy of said affidavit, attached to said order, should be served on each of said persons.

J. M. Danziger stated in his affidavit, in response to the affidavit of Byron Peebler, as follows: that he denied that he has or ever had any right, title or interest to any part of the property described in the Peebler affidavit, that he denied that he had conducted or carried on any operations or business within said cemetery since long before the date of the judgment in said action (the judgment was entered January 5, 1950); denied that Stonaker or Farmer was acting for him or had ever acted for him in any operations within or concerning said cemetery property.

Mrs. Danziger stated in her affidavit that: since before the date of said judgment she has not had any right, title or interest in any part of said cemetery property; since

the levy of execution no one has acted as her agent or employee in connection with any operations on said property, and she has not at any time since said levy conducted any cemetery or business operations within or concerning said cemetery property; Stonaker or Farmer has not been, and is not, her agent or employee.

Stonaker stated in his affidavit that: he has not been a party to said action (the action for damages); he was examined in supplementary proceedings, and an order was made that he had nothing in his possession or under his control subject to levy or lien in connection with said judgment; that he "submits" that he is not the agent of Mr. or Mrs. Danziger and that he is not acting for any of the parties to said action; he "submits" that if he ever appeared at the cemetery premises it was because he was and had for a long time acted as the accountant for Graceland, Inc., a corporation having an office on said premises; he has had nothing to do with any of the burials mentioned in the affidavit of Byron Peebler.

Farmer stated in his affidavit that: he was served with a copy of the order to show cause in re contempt; that no other papers have been served upon him; since May 1, 1951, he has been executive vice-president of Graceland, Incorporated; he was not a party to said action; he has not been cited previously in connection with any of the matters involved in said action; he has never been an agent or employee of said Danzigers or either of them; he "submits" that he has never seen Mrs. Danziger, and he has not seen or communicated with J. M. Danziger for over six years preceding the making of said affidavit; that Graceland, Incorporated, an accredited cemetery authority, has been long prior to October 8, 1951, the owner in fee and in control and possession of all cemetery lots referred to in the Peebler affidavit in respect to which certain burials allegedly took place; said Graceland owns said lots free and clear of any claim of said plaintiff Peebler; affiant never permitted, or had anything to do with interring any body, "to which burial spaces and lots Graceland, Incorporated, a recognized

cemetery authority, did not have title or right to inter * * * bodies of anyone long prior to October 8, 1951"; he "submits" that any acts on his part, whether alleged in the Peebler affidavit or otherwise, were not done as an agent or employee of the Danzigers or Stonaker or anyone employed or acting at their behest; his activity has been solely that of an officer of Graceland; said corporation has owned, long prior to said October 8th, burial space in said cemetery property; that if there is any controversy about the title of Graceland in whose behalf he had been acting, then he and Graceland should have their day in court in an independent proceeding and not as citees in said action referred to herein.

In a counter-affidavit made by Byron Peebler, it was stated: that in 1945 Mrs. Danziger alleged in a complaint filed in the superior court that she was the owner of the cemetery property involved herein; on May 1, 1950, she filed with the sheriff an objection to the proposed sale of said property under execution; on the hearing of said objection, Stonaker testified that he was employed by Mrs. Danziger in 1949 to check the burial cards and re-issue burial certificates for anyone buried there; that in January, 1951, Stonaker testified in supplementary proceedings that: he was employed by Mrs. Danziger in 1949 as an accountant; his work was carried on at the cemetery; Mrs. Danziger was then, and for several months had been, in Italy; that the corporation, Graceland, was his personal business and he owned the company; he acquired Graceland from a stockholder; the Graceland corporation which he claimed to own is the old defunct corporation ("Graceland, a corporation," was in bankruptcy in 1943); he had been charging \$2 an hour for his accounting work; she had paid him \$100 on account in 1949; that is all he received; he was instructed by Mrs. Danziger that if the owner of a non-perpetual-care certificate presented it, he should issue a perpetual-care certificate to that person; when he signed such a certificate, he signed it as follows: "E. W. Danziger, Stanley S. Stonaker, Secretary"; an abstract of said judgment (for dam-

ages) was recorded on February 10, 1950. Mr. Peebler stated further in his affidavit that he is informed and believes and therefore alleges: that Mrs. Danziger has not made any conveyance of her interest in said property other than the purported conveyance of burial spaces therein; that she has not conveyed any interest in said property to Graceland, Inc. Mr. Peebler also included in his affidavit various alleged quotations of testimony given by J. M. Danziger in the trial of said action for damages. Such quotations pertain to certain records of the cemetery and to the auditing by Stonaker. He also stated in his affidavit that he and Mrs. Peebler observed the practices of Stonaker in carrying on the cemetery operations; that Stonaker measures the graves, does the preliminary digging, places and removes chairs, and directs those participating in the funeral ceremonies; Stonaker also sweeps markers and sets vases for flowers; affiant saw Stonaker, Farmer and others lower the casket at said interment on February 15.

At the hearing upon the order to show cause in re contempt, Mrs. Peebler testified that: she lives in a house that is at the entrance to a 5-acre parcel of cemetery property known as "Olive Lawn Memorial Park"; the office of that cemetery adjoins the house, and an "L-shaped" parcel of cemetery property known as "Graceland Cemetery" adjoins two sides of Olive Lawn Memorial Park; the entrances to the two cemeteries are about 100 feet apart, and the names of the two cemeteries are at the entrances; she first saw Stonaker on the "L-shaped" property about the first part of 1950; on many occasions she has seen Stonaker locate the boundaries of graves by doing the preliminary digging; she has also seen him place the chairs and carpets around the graves and help lower caskets; she first saw Farmer on that cemetery property about June, 1950; he does "about the same thing Mr. Stonaker does"; she "kept track of every funeral they have had"; she made notations in a book regarding burials in the "L-shaped" cemetery property, and regarding persons who assisted in the burials; she made the notations on the day

of the burials, except the notations as to the names of decedents; she obtained the names of the decedents from the Bureau of Vital Statistics, and then she wrote those names in the book; it was necessary for her to refresh her memory by referring to the book. She testified further, with regard to the funerals on the dates set forth in the affidavit of Byron Peebler, that she observed all of those funerals, except the ones on February 15 and 21; that on February 28, Stonaker and Farmer helped carry and lower the casket; Farmer took care of the funeral on March 14 or 15 (Mrs. McGregor), but the witness did not remember what he did; she did not remember whether she observed a funeral on March 17; on March 22, at the funeral of Mr. Laird, she saw Farmer and Stonaker set out the chairs, put flowers by the grave, lower the casket, and take the carpets away; also on March 22 (funeral of Mr. Fisk), she saw Stonaker and Farmer show the location of the grave and saw them fold the chairs. She also testified that she was present in court in May, 1950, and heard Stonaker testify at the hearing of Mrs. Danziger's objection to the proposed sale under execution—her claim that the property was exempt from execution. Counsel for the Peeblers, over the objection of opposing counsel, then read a page of the reporter's transcript of that hearing (purportedly testimony of Stonaker to the effect that Mrs. Danziger had employed him) and asked her if Stonaker had so testified. She replied in the affirmative. She also testified that she heard Stonaker testify in supplementary proceedings in January and March, 1951. Counsel for the Peeblers, over the objection of opposing counsel, then read three portions of the reporter's transcript in those proceedings (purportedly testimony of Stonaker), and asked her if Stonaker had so testified. She replied in the affirmative. Said portions consisted, respectively, of 5, 17, and 10 pages of the transcript. Those portions of said transcript were in substance to the same effect as the statements in Byron Peebler's counter-affidavit regarding the testimony of Stonaker in said proceedings.

Mrs. Phillips, a witness called by counsel for the Peeblers, testified that a few days

after the burial of her father (Mr. Laird) on March 22, 1952, Farmer came to her home to collect for opening and closing the grave; Farmer said that the cemetery "was in court," and that Peebler would tell her that he (Peebler) owned it, but she should not pay any attention to what he said. She testified further that Farmer handed to her an invoice, at the top of which were the printed words: "Graceland, Inc."; when Farmer came to her house about April 4, 1952, she paid him \$30 and he gave her a receipt which is signed "Graceland Inc M E Farmer"; she talked with Farmer again at the cemetery about April 7th, and he wanted her to buy five graves for an investment; while she was talking to Farmer, Stonaker came out with a map and told her that she could have "these graves, which I bought"; she bought two graves, and Stonaker gave her a card with some penciled notations on it "to show me where our graves were, my father's and ours"; in the mail she received a book, dated April 7, 1952, which was entitled "Memorial Property Purchase Account." On the inside of the front cover of the book, and also on the first page, there are rubber-stamped words as follows: "Purchase Contract Memorandum Graceland, Inc." Also on the first page of the book, there is typewriting as follows: "Burial-right Ownership Certificate No. 1057 has been issued in the name of:—Ruth Phillips—* * *." The writing is signed: "Graceland Cemetery, Stanley S. Stonaker." Opposite said signature there are rubber-stamped words: "Graceland, Inc."

Mr. McGregor, a witness called by counsel for the Peeblers, testified that on March 13, 1952, he bought a lot for the burial of his wife; when he bought the lot he talked to Stonaker at the cemetery; he told Stonaker that his mother was buried there and he wanted his wife buried beside her; he bought the lot beside his mother's grave, and Stonaker gave him a receipt; Stonaker also delivered to him a document which recited that Graceland, Inc., assigned and conveyed to Mr. McGregor a certain burial place in Graceland Cemetery (which space was within said L-shaped parcel); that he (witness) did not surrender a prior ownership certificate. On that document there are rubber-stamped words as follows:

"Surrender of Prior Ownership Certificate" and "Transfer." The said receipt was signed "Graceland S. S. Stonaker." Also upon the receipt were the words: "Transfer Resale."

Mrs. Chamberlain, a witness called by counsel for the Peeblers, testified that her husband was buried in Graceland Cemetery on February 21, 1952; she bought the burial lot on February 16; about six weeks after the burial, Farmer came to her home and said that it was necessary that she purchase a stone for her husband's grave; she asked him who owned the cemetery; he said that she had nothing to worry about, that it would all be straightened out.

None of the citees testified. A certificate of the Secretary of State, which was offered in evidence by the citees, was received in evidence. That certificate, dated February 23, 1951, stated in effect that the name "Graceland" does not resemble the names of other corporations so closely as to tend to deceive, and that said name is reserved for 30 days for the exclusive use of the applicants for the certificate.

Each citee was adjudged guilty of contempt of court and was sentenced to five days in the county jail, fined \$500 and ordered to serve one day in jail for each \$2 thereof remaining unpaid.

Petitioners contend that: (1) the affidavit, upon which the order to show cause in re contempt was based, did not state facts sufficient to constitute contempt of court, in that, certain allegations were made upon information and belief; (2) the evidence at the hearing on the order to show cause established that the transactions referred to were not the acts of any of the defendants in said action for damages or of their agents or employees, that is, the transactions were not the acts of J. M. or Edith W. Danziger or of their agents or employees; (3) neither Stonaker nor Farmer was a party to said action; (4) the injunction is a nullity, in that, (a) it was a preliminary injunction and did not require the giving of a bond, and (b) it was an attempt, by way of order to show cause, to reopen an action in which a judgment for money had become final and

convert the action into one for an injunction involving additional parties without requiring pleadings and without giving the parties an opportunity to have a trial; (5) the affidavit in re contempt was not served on Farmer; (6) there was no evidence that ownership in any of the lots, where any of the burials took place, was in any person other than the corporate entity, Graceland, a corporation; (7) there was no evidence that any of said lots had not been sold to a third person prior to October 8, 1951; (8) under statutory provisions, only a corporation can perform cemetery operations; (9) Stonaker had nothing to do with said burials except in the capacity of an accountant for Graceland, Inc.; (10) Farmer had nothing to do with any burial in said cemetery except in instances where the burial space was the property of Graceland, Inc., and whatever activities he had in connection with the cemetery were exclusively related to the business of said corporation of which he was executive vice-president; (11) and long prior to October 8, 1951, Graceland, Inc., owned said burial spaces, mentioned in Byron Peebler's affidavit, free and clear of any claim of the Peeblers.

[1-3] Under the provisions of the injunction, the Danzigers, Stonaker, Farmer and their agents were enjoined from interring or permitting the interment of any bodies in any portion of the L-shaped cemetery property "not sold for burial purposes to third persons previous to October 8, 1951." Graceland, Inc., was not named expressly in the injunction as one of those enjoined. The documentary evidence, with respect to the burial spaces sold after said October 8th to the persons mentioned in the Peebler affidavit, shows that the sales were made in the name of Graceland, Inc., as seller. The receipt and assignment, with respect to the sale to Mr. McGregor, indicate that the space sold to him had been sold previously. The evidence was sufficient to prove that, after said October 8th, Stonaker and Farmer had aided in the interment of bodies in said property. There was not sufficient proof, however, that any portion of the property, where the bodies were buried, had not been sold for burial

FERNANDEZ v. CONSOLIDATED FISHERIES, Inc.

CITY AND COUNTY OF SAN FRANCISCO
v. CONSOLIDATED FISHERIES, Inc.

Civ. 15387.

District Court of Appeal, First District,
Division 1, California.

April 13, 1953.

Hearing Denied June 11, 1953. *

purposes to a third person previous to said October 8th. Under the evidence here, it might well be that said burial spaces had been sold before said date, and that the sales made after said date, in the name of Graceland, Inc., represented resales or transfers by former purchasers. A contempt of court proceeding is of a criminal nature and summary character. *Hotaling v. Superior Court*, 191 Cal. 501, 504, 217 P. 73, 29 A. L.R. 1217. The findings in a contempt of court proceeding are to be strictly construed in favor of the accused and the presumption in favor of the regularity of proceedings and judgment does not apply in contempt matters. *Gróves v. Superior Court*, 62 Cal. App.2d 559, 568, 145 P.2d 355. It is true there was evidence (counter-affidavit of Mr. Peebler) that: in 1943, in the bankruptcy proceedings of "Graceland, a corporation," the bankrupt did not claim any interest in said cemetery property; in 1945, Mrs. Danziger alleged in a complaint that she was the owner of the cemetery property involved herein; in May, 1950, she claimed that said property was exempt from execution. Such evidence regarding ownership in 1943, 1945 and 1950, is not determinative, of course, as to the condition of title in 1951. It is not to be presumed in this proceeding that the condition of the title, as it existed in said prior years, continued to be the same condition until the execution sale on October 8, 1951. Various changes in the matter of ownership of the property might have occurred after said dates in 1943, 1945 and 1950. The evidence was not sufficient to support a finding of violation of the injunction.

By reason of the above conclusion, it is not necessary to discuss the question of admissibility of the long excerpts of alleged testimony of Stonaker (in former proceedings) which were read to the witness, Mrs. Peebler. Also, by reason of said conclusion, it is not necessary to discuss other contentions of the citees.

The orders and judgments adjudging said citees (the Danzigers, Stonaker and Farmer) guilty of contempt of court are annulled.

SHINN, P. J., and VALLÉE, J., concur.

Street sweeper brought action against owner of truck to recover for injuries sustained when street sweeper opened door of truck to notify truck driver that box had fallen from truck into street and truck driver suddenly started truck and threw street sweeper under wheels of truck, and the City and County of San Francisco intervened to recover payments made to street sweeper under the Workmen's Compensation Act. The Superior Court, City and County of San Francisco, entered judgment in favor of street sweeper and the City and County of San Francisco, and owner of truck appealed. The District Court of Appeal, Peters, P. J., held that questions of negligence and contributory negligence were questions of fact for jury, and that instructions which did not require jury to segregate items of damage and which permitted double recovery as to certain items were prejudicially erroneous.

Judgment modified and, as modified, affirmed.

1. Appeal and Error ⇨930(1)

On appeal by defendant from judgment for plaintiff, District Court of Appeal was required to interpret evidence and reasonable inferences therefrom in favor of plaintiff and resolve all conflicts in his favor.

2. Automobiles ⇨244(8)

In action by street sweeper against owner of truck to recover for injuries sustained by street sweeper when street sweeper opened door of truck to inform driver that a box had fallen off truck and driver started up truck while street sweeper had hold of door handle and threw street sweeper under wheels of truck, evidence supported verdict for street sweeper.

3. Appeal and Error ⇨204(6)

Where defendant made no objection to introduction in evidence of city ordi-

nance, except as to one inapplicable sentence which plaintiff voluntarily deleted, defendant had no right to urge on appeal that no proper foundation was laid for introduction of ordinance.

4. Appeal and Error ⇨1064(1)

In action by street sweeper against owner of truck to recover for injuries sustained by street sweeper when street sweeper opened door of truck to inform driver that a box had fallen off truck and driver started up truck while street sweeper had hold of door handle and threw street sweeper under wheels of truck, wherein street sweeper introduced in evidence without objection city ordinance prohibiting throwing of rubbish in street, and wherein there was evidence from which jury could find that truck driver was negligent in dropping box on street, giving of instruction concerning such ordinance was not prejudicial error.

5. Appeal and Error ⇨1064(1)

In action by street sweeper against owner of truck to recover for injuries sustained by street sweeper when street sweeper opened door of truck to inform driver that a box had fallen off truck and driver started up truck while street sweeper had hold of door handle and threw street sweeper under wheels of truck, giving of instruction that care required of truck driver was greater than care required of street sweeper because truck driver was in charge of a dangerous instrumentality, was not prejudicial error.

6. Automobiles ⇨245(9, 75)

In action by street sweeper against owner of truck to recover for injuries sustained by street sweeper when street sweeper opened door of truck to inform driver that a box had fallen off truck and driver started up truck while street sweeper had hold of door handle and threw street sweeper under wheels of truck, questions of negligence and contributory negligence were fact questions for jury.

7. Trial ⇨344

Affidavits of jurors may not be used to impeach or interpret verdict, except to show that it was arrived at by chance.

8. Trial ⇨339(3)

If verdict is ambiguous, party adversely affected should request a more formal and certain verdict, and then, if trial judge has any doubts on the subject, he may send jury out, under proper instructions, to correct informal or insufficient verdict. Code Civ.Proc. § 619.

9. Trial ⇨343

Trial judge has function to interpret verdict from its language, considered in connection with pleadings, evidence, and instructions.

10. Workmen's Compensation ⇨2237

Where city employee brought action against owner of truck to recover for injuries, and city intervened to recover from owner of truck for payments by it to or on behalf of employee under the Workmen's Compensation Act, and jury returned a verdict for employee for \$50,000 and for city for \$8,813.87, trial court correctly interpreted verdict as being for a total of \$58,813.87, rather than a total of \$50,000.

11. New Trial ⇨142

On motion for new trial, court properly refused to consider juror's affidavits interpreting verdict contrary to its terms.

12. New Trial ⇨140(1)

Where affidavits in support of motion for new trial were not filed until about six weeks after notice of intention to move for new trial, and there was no extension of time for filing of affidavits, trial court properly refused to consider affidavits. Code Civ.Proc. § 659a.

13. Appeal and Error ⇨668

Unauthenticated letters of jurors interpreting their verdict would not be considered by District Court of Appeal on appeal.

14. Workmen's Compensation ⇨2240

In a case where an employer intervenes in employee's injury action against third person for reimbursement of compensation payments made by employer to employee, separate judgments may be rendered against third person in favor of employer and employee. Labor Code, §§ 3852, 3853, 3856.

15. Workmen's Compensation ⇨2215

Where employer has made compensation payments to employee, who has been injured through negligence of third person, remedies of employer against third person are lien procedure under the Workmen's Compensation Act, or an independent action against third person, or consolidation of employer's action with action of employee against third person, or intervention in employee's action against third person. Labor Code, §§ 3852, 3853, 3856.

16. Workmen's Compensation ⇨2245, 2249

Where employee is injured in course of employment as result of negligence of third person, the Workmen's Compensation Act comprehends segregation of items of damages which employer and employee are entitled to recover from third person, so as to prevent double recovery from third person. Labor Code, §§ 3852, 3853, 3856.

17. Workmen's Compensation ⇨2242

In action by employee against third party to recover for injuries, wherein employer intervened to recover from third party payments made by employer to employee under the Workmen's Compensation Act, instructions which did not require jury to segregate items of damage, and which permitted double recovery as to certain items, was prejudicially erroneous. Labor Code, §§ 3852, 3853, 3856.

Hadsell, Murman & Bishop and Joseph L. Alioto, San Francisco, for appellant.

Belli, Ashe & Pinney, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, a street sweeper employed by the city of San Francisco, brought this action for personal injuries alleged to have been caused by the negligence of one Tringali employed by defendant corporation as a truck driver. The city intervened to recover payments made by it to or on behalf of plaintiff under the Workmen's Compensation Act. Pursuant to its construction of the jury's verdict the trial court entered judgment in favor of the plaintiff for \$50,000, and in favor of the city

for \$8,813.87. Defendant corporation appeals.

This is the second trial and appeal in this case. On the first trial the jury brought in a verdict for defendant. A new trial was granted by the trial court because of errors in the instructions. This was affirmed. *Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal.App.2d 91, 219 P.2d 73. On the present appeal the defendant challenges certain instructions, and also contends that the judgment allows plaintiff and the city a double recovery for certain elements of damage. We find no prejudicial error in the instructions except those that relate to the claims of the intervener, but we do find that under the instructions the jury was erroneously told that it could allow double recovery for certain elements of damage.

[1] The evidence on the two trials was substantially the same. (See the prior opinion for a detailed summary of the evidence on the first trial.) On this appeal, of course, this court must interpret the evidence and the reasonable inferences therefrom in favor of the plaintiff and resolve all conflicts in his favor. So interpreted, the record shows the following:

The accident occurred about 11 a. m. on the clear, dry morning of March 26, 1947, at the intersection of Golden Gate Avenue and Steiner Street in San Francisco. Golden Gate Avenue runs east and west and is a stop street, while Steiner runs north and south. One of plaintiff's duties as street sweeper was to notify persons who drop articles in the street to pick them up. Plaintiff testified that, while acting in the course of his employment and while crossing Steiner Street at its intersection with Golden Gate in the pedestrian lane, he noticed defendant's truck driven by Tringali approaching from the south on Steiner Street. Defendant's truck had a flatbed and an enclosed cab. The tailgate of the truck was down. Plaintiff testified that he then saw on the street about fifty feet in back of the truck, and in the same traffic lane, a large box, that he had the impression and believed that

the box in the street was similar to those on the truck, and that he inferred that it had dropped from the truck. While it is admitted that a large box was in fact in the street, there is no direct evidence that the box dropped from defendant's truck. Tringali admitted that, after the accident, he saw the box in the street, but testified that he could account for all boxes on the truck and that the box had not been dropped by him. He admitted that he did not see the box while driving down the street. The evidence on this issue need not be further reviewed. Suffice it to say that the evidence and the reasonable inferences therefrom support the implied findings of the jury that the box dropped from defendant's truck, and that plaintiff reasonably believed that it had so been dropped.

Plaintiff further testified that, upon observing the box, and while the approaching truck was still some distance from the intersection, he started waving his arms and yelling to the driver that he had dropped a box; that the truck pulled about two feet into the intersection and stopped; that as the truck approached plaintiff saw Tringali look straight at him; that when the truck stopped plaintiff moved over to the side of the truck and grabbed the door handle and started to open the door opposite to the driver, yelling that the driver had dropped a box; that Tringali looked straight at him and nodded his head; that while plaintiff still had his hold on the door handle, and while the door was open, Tringali started his truck with a jerk which closed the door; that he was thrown off balance; that he gripped the door handle to keep from being thrown; that he could not get on the running board; that he was dragged some fifteen to twenty feet, all the time trying to grab something with his other hand and hollering; that he held on with his right hand to save his life; that he finally lost his grip and tried to throw his body away from the truck; that he fell and the double right rear wheels of the truck ran over him. The truck then stopped. Plaintiff was then in the street about fifteen feet in back of the truck. He suffered severe, permanent and disabling injuries.

[2] Tringali testified that he did not see plaintiff at all until after the accident. This, and other testimony by this witness, was obviously not believed by the jury. It must have believed that Tringali saw plaintiff, knew he was at the side of the truck and opening the door, but started up in reckless disregard of plaintiff's safety. He heard, or should have heard, plaintiff yelling at him. Defendant argues that there was no need for plaintiff to continue to hold onto the door handle after the truck started, and that he needlessly continued to hold on in mere stubbornness. It was a jury question as to whether plaintiff acted as a reasonable man in continuing to hold onto the handle. It is easy enough for defendant, in retrospect and with plenty of time for analysis, to figure out how plaintiff could have avoided being hurt. But, because of Tringali's actions, plaintiff did not have any time to think or to analyze the possibilities. The jury evidently believed that when the truck started up plaintiff was thrown off balance, retained his hold on the handle to keep from being thrown, and that such actions were reasonable under the circumstances. These beliefs are supported by the evidence and the reasonable inferences therefrom. They cannot be successfully attacked on this appeal.

Before discussing the major contention made on this appeal in reference to the claimed double award of certain elements of damage, the contentions of appellant in reference to the other matters should first be considered.

[3] There exists in San Francisco an ordinance prohibiting the throwing of rubbish in the street. A copy of this, and other related ordinances, is contained in a booklet given to every street cleaner. This ordinance was introduced into evidence and the trial court gave an instruction based upon it. The defendant made no objection to its introduction except as to one inapplicable sentence which the plaintiff voluntarily deleted. Defendant having made no objection is now in no legal position to urge that no proper foundation was laid for its introduction. See cases collected 3 Cal.Jur.2d 634, § 156.

The instruction reads as follows:

"The plaintiff has offered into evidence and you must accept it now as the law, that ordinance of the City and County of San Francisco, to-wit, Section 33, which was in effect at the time of the accident in question:

"Rubbish, etc.—Throwing on streets prohibited.

"It shall be unlawful for any person or persons to put, place, sweep, throw, brush or in any other manner deposit any rubbish, paper, cards, newspapers, wrapping, or any wrapping paper whatsoever of any kind, string, cord, rope or other binding or fastening material, sweepings, dirt or debris or discarded material of any kind or character upon any sidewalk, alley, street, gutterway or other public place in the City and County of San Francisco."

"Further, I charge you that if the defendant corporation, Consolidated Fisheries, Inc., through its agent and driver, Carmelo Tringali, violated, whether knowingly or unknowingly, this section of law on the 27th [26th] day of March, 1947, at Steiner Street and Golden Gate Avenue in the City and County of San Francisco, then you may consider this fact, if you find it to be a fact, among other circumstances, in determining whether the defendant was negligent."

Defendant claims that the instruction is erroneous because there is insufficient evidence that the box dropped from the truck and because, even if it did, there is no evidence that the box was a proximate cause of the accident. These contentions are without merit. The testimony of plaintiff as to the location of the box in the highway, its similarity to the boxes in the truck, and Tringali's testimony that he had not seen the obviously visible box in driving down the street, permits the reasonable inference that the box had been dropped from the defendant's truck.

So far as proximate cause is concerned it is apparent that if the jury found, as it apparently did, that the box dropped from the truck, then it could find that the dropping of the box was a link in the chain of causation. The ordinance, among other

things, was intended to prohibit the dropping of rubbish or boxes in the street. The plaintiff as a street sweeper was obviously one of the group intended to be protected by the ordinance. It is reasonable to suppose that, among other things, the ordinance was intended to protect those working in the streets from traffic hazards.

Defendant cites and places some reliance on the decision of this court in *Noble v. Cavalier Restaurant*, 106 Cal.App.2d 518, 235 P.2d 396, where the same ordinance was introduced and an instruction given to the effect that violation of the ordinance constituted negligence *per se*. Here the instruction merely told the jury that it could consider such violation, if found to exist, "among other circumstances, in determining whether the defendant was negligent."

This court, in the *Noble* case, did assume that it was "doubtful if these sections are applicable to the situation here", 106 Cal. App.2d at page 527, 235 P.2d at page 401, but then continued: "These sections apparently require that the deposit of rubbish on a sidewalk be an intentional act * * *. Assuming that the reading of these sections was error, it was error without prejudice. Under the facts of this case the dropping of the material in question by defendants in removing it from the restaurant could only have been negligently done. Hence, once the jury found that it was dropped when the cans were carried out, a finding of negligence must necessarily follow, and the court's intimation that it might be a violation of the ordinance and hence negligence as a matter of law was not prejudicial."

[4] This reasoning applies equally to the present case, and to the further contention that it was error to tell the jury that the ordinance could be violated "knowingly or unknowingly." If the jury could reasonably find that the box fell from the truck, and we have already held that it could, then under the evidence, the defendant must have been negligent in dropping the box. The only explanation in the evidence as to why the box dropped is that the tailgate of the truck was down.

It follows, therefore, that the jury could find that this was negligence and that is so whether defendant knew or did not know that the box had actually fallen. Although the choice of words used is not to be commended, this is the most reasonable interpretation of the instruction. In view of the fact that no objection was made to the introduction of this ordinance, and no clarifying instruction offered, it cannot be held that the giving of the challenged instruction was prejudicial error.

[5] Defendant next objects to the following instruction: "The amount of care required of the defendant corporation's driver, Carmelo Tringali, as the driver of a truck along a public highway, was greater than the amount of care required of plaintiff, Ramon Fernandez, as a pedestrian. The driver of a motor vehicle is in charge of a dangerous instrumentality capable of inflicting serious and often fatal injuries, and for that reason he is charged by law with a greater amount of care than the pedestrian."

In connection with this instruction defendant also objects to one stating that no person shall start a vehicle unless it can be done with "reasonable safety," and to another to the effect that a driver must use ordinary care in the operation of his vehicle to avoid "collisions." It is argued that a standing truck is not a dangerous instrumentality and that the plaintiff collided with the truck rather than the truck colliding with him. It is also urged that on the previous appeal it was determined that the reasonably prudent man standard was applicable to plaintiff. These contentions are without merit. To contend that plaintiff collided with the standing truck of defendant is patently contrary to the evidence. The contention that the instructions here given are contrary to those passed upon on the prior appeal is equally without merit. The problem under discussion was not involved, passed upon or discussed on the prior appeal.

The defendant contends that the quoted instruction erroneously imposes a higher standard of care upon defendant than it does on plaintiff. This is not the first time

that this criticism has been levelled at the concept involved in this instruction. Quite generally the instruction has been upheld, or, at least, it has been held that the giving of it was not prejudicial. *Powers v. Shelton*, 74 Cal.App.2d 757, 169 P.2d 482; *De Victoria v. Erickson*, 83 Cal.App.2d 206, 188 P.2d 276; see, also, *McNear v. Pacific Greyhound Lines*, 63 Cal.App.2d 11, 146 P.2d 34. It was not prejudicial error to give the instruction in the present case.

[6] The contentions that plaintiff was guilty of contributory negligence as a matter of law, or that plaintiff assumed the risks of his position as a matter of law, are but different ways of stating the same contention. The evidence already summarized demonstrates to a certainty that the questions of negligence and contributory negligence were fact questions for the jury. The trial court, therefore, properly refused to decide them as questions of law.

Defendant next points out that the law does not require a workman in the street to exercise the same vigilance required of a pedestrian, and then contends, at some length, that plaintiff must be held to the standard required of pedestrians. We have some difficulty in ascertaining just what defendant is trying to establish by this contention. The jury was not instructed as to the "workman in the street" doctrine. In fact the trial court rejected an instruction proposed by the plaintiff based on this theory. An examination of the instructions discloses that plaintiff throughout the charge was treated as a pedestrian.

This brings us to the contention that the trial court failed to compel the segregation of some items of damage for which the plaintiff had been compensated by the intervener. Admittedly, the city, as plaintiff's employer, paid to or for plaintiff, under the Workmen's Compensation Act, for compensation or medical care, the sum of \$8,813.87. There is no challenge of the amount of such payments, and it is agreed that if plaintiff recovers, the intervener is entitled in some way to recovery in that amount.

The jury brought in the following verdict: "We, the jury in the above entitled

cause, find a verdict in favor of Plaintiff Ramon Fernandez for the sum of \$50,000.-00; in favor of Plaintiff in Intervention City and County of San Francisco, a municipal corporation, for the sum of \$8,813.-87, and against defendant Consolidated Fisheries, Inc." By this verdict, according to defendant, the jury intended to bring in a total verdict of \$50,000, the \$8,813.87 due the city to be deducted from that sum. The trial court, however, interpreted the verdict as one of \$50,000 to plaintiff and an additional \$8,813.87 to the intervener, and entered its judgment accordingly on October 26, 1951. On November 5, 1951, defendant filed a notice of intention to move for a new trial upon most of the grounds permitted by law. In support of this motion affidavits of ten of the jurors were filed December 18, 1951. Each affidavit averred that it was the juror's intention to vote for a total verdict of \$50,000. In addition, defendant has presented to this court letters from each of the remaining two jurors who did not sign affidavits to the effect that the writers had a similar understanding of the verdict. On December 18, 1951, by minute order, and on December 20, 1951, by formal order, the motion for a new trial was denied. In its formal order the court denied the offer of the ten affidavits, and stated that the affidavits had not been considered by it.

It is defendant's theory that the verdict, properly interpreted, provided for a total award of \$50,000, and that these affidavits should have been considered on the motion. Refusal to consider them, so it is argued, was error entitling defendant to a new trial.

[7-11] The trial court properly refused to consider the affidavits for at least two reasons. In the first place, whatever the rule may be in other states, see 64 Cor.Jur. p. 1108, § 914, the rule is well settled in California that affidavits of jurors may not be used to impeach or to interpret the verdict, except to show that it was arrived at by chance. *Phipps v. Patterson*, 27 Cal. App.2d 545, 81 P.2d 437; *Mish v. Brockus*, 97 Cal.App.2d 770, 218 P.2d 849; *Fitzpatrick v. Himmelmann*, 48 Cal. 583. If the

verdict is ambiguous the party adversely affected should request a more formal and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient verdict. § 619, Code Civ.Proc.; *Curtis v. San Pedro Transp. Co.*, 10 Cal.App.2d 547, 52 P.2d 528; *Phipps v. Superior Court*, 32 Cal.App. 2d 371, 89 P.2d 698. Otherwise, it is the function of the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions. *Curtis v. San Pedro Transp. Co.*, 10 Cal.App.2d 547, 52 P.2d 528. In the present case the trial court, in our opinion, correctly interpreted the verdict.

[12] The second reason why the affidavits were properly rejected by the trial court is to be found in the provisions of section 659a of the Code of Civil Procedure. That section requires that affidavits in support of the motion must be filed "Within ten (10) days after serving the notice * * *. The time herein specified may * * * be extended by any judge for an additional period of not exceeding twenty (20) days." The affidavits here involved were filed about six weeks after the notice of intention to move for a new trial. No extension of time for any period appears in the record. Under these circumstances the trial court could properly reject the affidavits. *Sitkei v. Frimel*, 85 Cal.App.2d 335, 192 P.2d 820.

[13] The impropriety of filing the copies of the two letters with this court is too apparent to require discussion. Not only are they not authenticated, but they are not properly part of the record on appeal and have not been considered.

The defendant next contends, apparently, that, as a matter of law, the trial court was prohibited from allowing the intervener an independent recovery, but was limited to a determination that the employer's claim was a lien upon and must be satisfied out of the amount awarded plaintiff. Defendant then urges that the trial court must so segregate the items of damage that a double recovery is not allowed against the tortfeasor.

[14] There can be little doubt but that, in a case where an employer intervenes in the employee's action for reimbursement of compensation payments paid to the employee, separate judgments may be rendered in favor of the employer and employee. The pertinent statutes of the Labor Code are the following:

3852. "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents."

3853. "If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently."

3856. "The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on his application shall allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation".

[15] Under these sections, although the lien procedure is permitted, it is not the exclusive remedy. The employer, in addition,

is permitted to bring an independent action, to consolidate his action with that of the employee or to intervene in the employee's action. *Limited Mutual, etc. Ins. Co. v. Billings*, 74 Cal.App.2d 881, 169 P.2d 673; *City of Los Angeles v. Howard*, 80 Cal.App.2d 728, 182 P.2d 278; *Pacific Indemnity Co. v. California, etc., Ltd.*, 29 Cal.App.2d 260, 84 P.2d 313; *State Comp. Ins. Fund v. Matulich*, 55 Cal.App.2d 528, 131 P.2d 21. In any of these situations an independent judgment may be rendered.

[16] But defendant is correct in contending that the Labor Code sections comprehend a theory of segregation of items of damage so as to prevent a double recovery against the tort-feasor. All the relevant cases so hold. *Eckman v. Arnold Taxi Co.*, 64 Cal.App.2d 229, 148 P.2d 677; *Limited Mutual, etc., Ins. Co. v. Billings*, 74 Cal.App.2d 881, 169 P.2d 673; *State Comp. Ins. Fund v. Dalton*, 13 Cal.App.2d 284, 56 P.2d 962; *Pacific Indemnity Co. v. California, etc., Ltd.*, 29 Cal.App.2d 260, 84 P.2d 313.

In the light of this rule requiring segregation and prohibiting a double recovery defendant complains of certain instructions, contending that they failed to require segregation of certain items of damage. With this contention we agree.

Particular objection is made to the following instruction, the first two paragraphs of which were offered by the intervener and the last paragraph added by the court. The three paragraphs read as follows:

"There is no dispute herein as to the amount paid by the plaintiff in intervention, City and County of San Francisco, under the provisions of the Workmen's Compensation Law for disability indemnity and medical care rendered to plaintiff, Ramon Fernandez.

"You are instructed that if you find that plaintiff, Ramon Fernandez, was employed by the plaintiff in intervention, City and County of San Francisco, a municipal corporation, at the time he sustained the alleged injuries which are the basis of this action, and that said alleged injuries were incurred in the course and scope of his said employment, and if you further find

that plaintiff, Ramon Fernandez, is entitled to a verdict against defendant Consolidated Fisheries, Inc., a corporation, under the instructions herein given you, then you must return a verdict for the plaintiff in intervention, City and County of San Francisco, a municipal corporation, and against the defendant Consolidated Fisheries, Inc., a corporation, in the amount of \$8,813.87, for disability indemnity and medical expenses paid by plaintiff in intervention, City and County of San Francisco, to plaintiff Ramon Fernandez.

"In other words, if you find in favor of the plaintiff, then you should also find in favor of the City and County of San Francisco in the amount I have just indicated."

Almost immediately prior to this quoted instruction the trial court instructed: "One of the elements of damage which you may consider is the reasonable value of the time lost, if any, by the plaintiff since he has been unable to pursue his occupation. In determining this amount, you should consider evidence of said plaintiff's earning capacity, his earnings and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled."

While in some of its other instructions the trial court did list some of the items of damage recoverable by plaintiff, nowhere did it limit the damages recoverable by the plaintiff to items not recoverable by the intervenor—in fact, the last quoted instruction contains a direction to include such damages in plaintiff's recovery.

[17] The authorities sustain defendant's contention that these instructions are erroneous as authorizing a double recovery. In *Jacobsen v. Industrial Acc. Commission*, 212 Cal. 440, 299 P. 66, it was so held and it was further suggested that the jury should be asked to segregate damages by the instructions or by means of special interrogatories. See, also, *Sherrillo v. Stone & Webster Eng. Corp.*, 110 Cal.App.2d 785, 244 P.2d 70. In *Eckman v. Arnold Taxi Co.*, 64 Cal.App.2d 229, 148 P.2d 677, it was held that failure to segregate in the damage instructions was reversible error.

The instructions there involved were substantially similar to those here involved. The jury was told that if it found for the plaintiffs to award to them as heirs of the deceased employee compensation for the pecuniary loss suffered by the death of the employee, and was then told to award the insurance carrier of the employer the amount of the death benefit. The jury returned a verdict in separate sums. The court held that there was a double recovery involved, that such was prohibited, and then held that this was error even though the evidence had come in without objection. The court stated, 64 Cal.App.2d at page 234, 148 P.2d at page 680: "But the question here involved is not one of admissibility of evidence; nor is it merely one of segregation of damages. The question here presented is one involving the substantive right of the defendants in the case to protection against double indemnity for the damages caused by the wrongful death of decedent. While the damages assessed in favor of the respective plaintiffs might indicate that the jury, in assessing damages to the heirs, had taken into account the death benefits awarded as compensation, yet it is impossible upon the record to conclude that such was the case. In view of [the failure of] the instructions as given, to state that the amount of damages awarded the heirs represented merely the balance after deduction of the amount awarded the insurer, would be to indulge in pure speculation. It must be held, therefore, that the trial court erred to the prejudice of appellants in improperly instructing the jury upon the question of damages."

The court thereupon remanded the case for a new trial on the issue of damages alone.

It is apparent that under the instructions here given, the jury was not required to segregate the items of damage, and that some of such items could have been awarded to both plaintiff and intervenor, thus permitting a double recovery which is prohibited by law. This would normally require a reversal, and the ordering of a new trial. Such new trial, where no error has been committed on the issue of liability, should normally be restricted to the issue

of damages alone. But in the instant case the maximum double recovery suffered by defendant was the total of intervenor's judgment—that is, \$8,813.87. On the oral argument, counsel for plaintiff stipulated that, if the instructions were held to be prejudicially erroneous for the reason that they permitted double recovery, he preferred that this court reduce the \$50,000 verdict by the full amount of intervenor's judgment, rather than order a new trial on the issue of damages alone. Such solution fully protects the defendant and saves the parties the necessity of another trial of this lengthy litigation.

For the foregoing reasons the judgment is modified by reducing the award in favor of plaintiff from \$50,000 to \$41,186.13. The award in favor of the intervenor in the amount of \$8,813.87 shall remain unchanged. The interest on both awards shall run from October 26, 1951. Trial costs of \$441 are awarded to plaintiff. Each litigant shall bear his own costs on this appeal. As so modified, the judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



117 Cal.App.2d 319

STAFFORD v. RUSSELL et al.

Civ. 19420.

District Court of Appeal, Second District,
Division 2, California.

April 14, 1953.

Rehearing Denied May 1, 1953.

Hearing Denied June 11, 1953.

Action to quiet title to real property and for declaratory relief, accounting, and damages. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that where in prior actions title had been quieted in one of defendants and in others and same questions had been raised as were raised in present action and had been decided adverse to oil company, in which plaintiff had been principal stockholder and

guiding hand, adverse rulings in such prior actions were binding on plaintiff, even though he had not been nominal party to prior actions.

Judgment affirmed.

1. Judgment ⇨701

Where, in prior actions, title to certain property had been quieted in one of defendants and in others and same questions had been raised as were raised in action to quiet title and had been decided adverse to oil company in which plaintiff had been principal stockholder and guiding hand, adverse rulings in such prior actions were binding on plaintiff, even though he had not been nominal party to prior actions.

2. Judgment ⇨675(1)

A person who is not party to action, but who controls action, is bound by judgment where he has proprietary or financial interest in judgment or in determination of question of fact or law with reference to same subject matter or transaction.

3. Limitation of Actions ⇨175

Withdrawal by defendants of demurrer to complaint on ground that statute of limitations had run and filing of answer in which defendants pleaded statute of limitations did not operate as waiver of defendants' right to rely on statute of limitations.

4. Limitation of Actions ⇨180(2)

If defect appears on face of complaint, defendant may set up bar of statute of limitations by demurrer.

5. Limitation of Actions ⇨180(1)

Failure of defendant to urge bar of statute of limitations by way of demurrer does not deprive him of right to rely on such defense in his answer.

Guy N. Stafford in propria persona.

Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., Harold Arman, Vaughan, Brandlin & Wehrle, by Warren J. Lane and J. R. Vaughan, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury

in an action for declaratory relief, an accounting, damages and plea to quiet title to certain real property, plaintiff appeals.

The subject of this action is a parcel of land in Los Angeles County comprising 10 lots. Plaintiff, by reason of an alleged one-time ownership of one of the lots, contends that he is the successor to interests created under an oil lease executed in 1924 by the then owners of the lots. Defendants Mary Pratt Sanders, N. Louise Kimball, Joseph R. Vaughan, John and Anna Madsen, Bessie Weber, Lulu Reddish, Beatrice Achstetter and William and Catherine Van Beek are owners, part owners or one-time owners of one or more of the lots in question. Defendant Russell is an owner of an oil and gas lease executed and ratified by his co-defendants and a producer of oil and gas from a well located on one of the lots.

The facts pertaining to the ownership of the lots and plaintiff's connection therewith are fully set forth in Coburg Oil Co. v. Russell, 100 Cal.App.2d 200, 201 et seq., 223 P.2d 305 (hearing denied by the Supreme Court).

In a prior action in which the lots here in question were involved (L.A.Co.Sup.Ct. No. 478,480), title was quieted in Mary Pratt Sanders and others as against the Howard Park Company and Coburg Oil Company, the latter of which plaintiff herein was the principal stockholder and guiding hand. The above litigation also included an appeal wherein the question of the validity of the judgment in the quiet title action was questioned. (Sanders v. Howard Park Co., 86 Cal.App.2d 721, 195 P.2d 898.)

[1] In the present case plaintiff reiterates the allegations of the previous two actions and raises the same questions that were previously raised in the prior actions where the rulings were adverse to him. Such adverse rulings are binding upon plaintiff herein and need not further be considered for the reason that though he was not a nominal party to the prior actions the Coburg Oil Company was, and plaintiff had a proprietary and financial interest in the judgment and controlled the Coburg Oil Company's conduct in the actions.

[2] Therefore this rule is applicable: A person who is not a party to an action but who controls the action is bound by the judgment where he has a proprietary or financial interest in the judgment or in the determination of a question of fact or law with reference to the same subject matter or transaction. (Dillard v. McKnight, 34 Cal.2d 209, 216 [8], 209 P.2d 387, 11 A.L.R.2d 835.)

There is one question raised by plaintiff not decided in the actions mentioned above. It is:

[3-5] *Did certain of the defendants waive their right to rely on the statute of limitations because after having demurred to the complaint, on the ground among others, that the statute of limitations had run, they stipulated to the withdrawal of the demurrers and filed answers in which they pleaded the statute of limitations as a bar to plaintiff's cause of action?*

This question must be answered in the negative. It is the rule in California that a defendant may, if a defect appears on the face of a complaint, set up the bar of the statute of limitations either by demurrer or by answer. His failure to urge it by way of demurrer does not deprive him of the right to rely on such defense in his answer. (California Safe Deposit & Trust Co. v. Sierra, etc. Co., 158 Cal. 690, 697 et seq., 112 P.274.)

All other contentions raised by plaintiff in the decisions cited above have been answered in the previous cases adversely to his claims, or are trivial, unsupported by authorities, and must be disregarded under the provisions of Article VI, section 4½ of the Constitution of California which provides in part, "No judgment shall be set aside * * * in any case, on the ground of * * * the improper admission or rejection of evidence, or for any error as to any manner of pleading, or for any error as to any manner of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In the instant case an examination of the record discloses not only that there has not

been a miscarriage of justice but that plaintiff has over a period of years in various and sundry proceedings had full and fair trial before the trier of fact, whose findings and conclusions have been affirmed by the District Court of Appeal and the Supreme Court in each instance. It is a salutary rule that litigation should not be protracted indefinitely. In the present case no useful purpose would be served by further litigation between the parties involving the subject matter of the present action.

Affirmed.

MOORE, P. J., and FOX, J., concur.



117 Cal.App.2d 404

PEOPLE v. STEPHENS.

Cr. 4957.

District Court of Appeal, Second District,
Division 1, California.

April 22, 1953.

An accused was convicted of violating statute declaring the commission of willful and lewd acts upon child under age of 14 years with intent of arousing, appealing to, or gratifying lust or passions or sexual desires of such child, to be a felony, and he appealed from the judgment and order denying motion for new trial. The District Court of Appeal, Doran, J., held that evidence justified conviction.

Affirmed.

Infants Ⓒ20

Evidence justified conviction for violation of statute declaring the commission of willful and lewd acts upon child under age of 14 years with intent of arousing, appealing to, or gratifying lust or passions or sexual desires of such child, to be a felony. Pen.Code, § 288.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and order denying a motion for a new trial.

Defendant was accused by information with the violation of section 288 of the Penal Code. The victim of the offense was a 7-year-old girl. The alleged offense occurred in a store operated by defendant. A jury trial was duly waived and following the trial defendant was adjudged guilty.

It contended on appeal that,

"The errors of which the defendant and appellant Keet Stephens complains of and by which he was deprived of a fair trial may be stated as follows:

"1. That the evidence is insufficient because the testimony of the prosecutrix is inherently improbable;

"2. Errors of the Court in the introduction of evidence."

As recited in appellant's brief,

"It is the appellant's contention that the child was coached by her mother not only before the trial but during the trial. It is apparent from her own statements that she was trying to find out from her mother if she was testifying in the manner which her mother wanted her to testify and was attempting to remember what her mother had told her. It is apparent that she was not testifying from her own knowledge but was testifying at her mother's direction. There is no explaining what motive prompted the mother to coach the child or to give signals as to what answer she should give, whether it was through malice or prejudice against the accused or by reason of oversuspicion or misinformation."

The record reveals a situation which is not unusual; a situation with relation to which opinions may differ but where the trial judge's conclusion, if supported by substantial evidence, is final. In the circumstances presented by the record it appears that the evidence as a matter of law was sufficient to support the judgment.

G. Vernon Brumbaugh, Los Angeles, for appellant.

With regard to the argument that "the child was coached" it appears that this subject was covered not only by defendant's counsel but by the trial judge in the testimony of the child. It should be noted incidentally that the mother was not questioned by defendant's attorney on this subject.

There were no prejudicial errors committed by the court with relation to the introduction of testimony as contended by appellant.

The judgment and order are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



HENDERSON v. DRAKE.*

Civ. 15343.

District Court of Appeal, First District,
Division 2, California.

April 17, 1953.

Hearing Granted June 11, 1953.

Action wherein writ of attachment was levied on personal property of defendant and judgment subsequently entered for defendant. From an order of the Superior Court, City and County of San Francisco, refusing to discharge attachment, defendant appealed. The District Court of Appeal, Dooling, J., held that since plaintiff had not perfected appeal from judgment for defendant within five days after waiver of notice of entry of judgment, defendant was entitled to order discharging attachment, though plaintiff's motion for new trial had been granted.

Order reversed with directions.

1. Appeal and Error ⇨351(2)

An appeal is perfected by filing notice of appeal and furnishing required undertaking.

2. Statutes ⇨223.5(4)

There is a strong presumption that when the legislature re-enacts a statute which has been judicially construed, it

adopts the construction placed on statute by the courts.

3. Attachment ⇨270

Judgment ⇨276

Filing of notice by plaintiff of intention to move for new trial waived written notice of entry of judgment for defendant, and in absence of such notice, appeal had to be perfected within five days of such waiver of notice in order to keep attachment in force. Code Civ.Proc. §§ 553, 946.

4. Attachment ⇨270

Where plaintiff did not perfect appeal from judgment for defendant within five days after waiver of notice of entry of judgment by filing of notice of motion for new trial, defendant was entitled to order discharging attachment, though plaintiff's motion for new trial had been granted, since perfecting appeal is the only method provided by statute for continuing attachment in force after judgment for defendant. Code Civ.Proc. §§ 553, 946.

Erskine, Erskine & Tulley and J. Oscar Goldstein, San Francisco, for appellant.

H. W. Glensor, San Francisco, for respondent.

DOOLING, Justice.

Respondent, the plaintiff below, secured a writ of attachment which was levied upon certain personal property of defendant and appellant. After a trial on the merits judgment was entered for defendant on November 25, 1951. On December 4, 1951 plaintiff served and filed a notice of intention to move for a new trial. On January 3, 1952 defendant served and filed a notice of motion to vacate and dissolve the writ of attachment on the ground that no notice of appeal or undertaking had been filed as required by sections 553 and 946 of the Code of Civil Procedure.

Plaintiff's motion for new trial was granted on January 28, 1952 and on February 6, 1952 the motion to dissolve the attachment was denied. This appeal is from the order refusing to discharge the attachment.

* Subsequent opinion 264 P.2d 921.

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Section 553, Code Civ.Proc., provides:

"If the defendant recovers judgment against the plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section 946 of this code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, constable, or marshal and all the property attached remaining in such officer's hands, must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom."

The pertinent part of sec. 946, Code Civ. Proc., referred to in section 553, reads:

"An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected."

The legislature has made no provision for continuing an attachment in effect where a new trial is granted or the judgment for the defendant otherwise vacated. It has stated in clear terms in section 553 that after judgment has been rendered for defendant the attachment must be discharged unless an appeal is perfected and undertaking furnished as provided in section 946.

The effect of these sections was construed in *Clark v. Superior Court*, 37 Cal. App. 732, 174 P. 681. In that case a judgment of nonsuit was entered and later, on plaintiff's motion, the judgment of nonsuit was vacated. The court noted that no appeal had been perfected from the judgment of nonsuit as provided in section 946 and held that since that was the only method provided by the legislature for continuing the attachment in force after judgment had been entered for defendant the attachment was discharged. The court

said, 37 Cal.App., at page 734, 174 P. at page 682: "It is true the court on December 29th made an order granting plaintiff's motion to set aside and annul the order of nonsuit. But such order could not, in the absence of statutory provision therefor, revive the lien of the attachment which had theretofore been dissolved by the judgment in favor of defendants, and which, in so far as concerned the attachment, had become final."

[1, 2] An appeal is perfected by filing notice of appeal and furnishing the required undertaking. *Patterson v. Pacific Indemnity Co.*, 119 Cal.App. 203, 206, 6 P.2d 102; *Conniff v. Superior Court*, 90 Cal. App. 169, 174, 265 P. 555; *Hill v. Finnigan*, 54 Cal. 493, 494. The legislature has had ample opportunity since the decision in 1918 of *Clark v. Superior Court*, supra, to make provision for other methods of continuing an attachment in effect after judgment for defendant besides the perfecting of an appeal as provided in section 946, but it has not seen fit to do so although section 553 was amended in other particulars in 1933. Stats.1933, p. 1866. Indeed "There is a strong presumption that when the legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." *Armstrong v. Armstrong*, 85 Cal.App.2d 482, 485, 193 P.2d 495, 497; *Hunt v. Superior Court*, 93 Cal.App.2d 504, 507, 209 P.2d 411.

[3] Sec. 946 provides for the perfecting of the appeal in order to continue an attachment in force "within five days after written notice of the entry of the order". The record before us does not show that written notice was given. However on December 4, 1951 plaintiff served and filed a notice of intention to move for a new trial. Under the settled rule this amounted to a waiver of written notice. The court said in *Prothero v. Superior Court*, 196 Cal. 439, 444, 238 P. 357, 358: "By filing this notice of motion in the records and files of said action, the defendants revealed the fact that they had actual knowledge of the entry of said judgment. Under such circumstances the written notice of the entry thereof was waived." This has been the

uniform rule in California. 20 Cal.Jur. 176-177. At the latest the appeal was required to be perfected by sec. 946 within five days of this waiver of notice which occurred on December 4, 1951.

[4] Respondent's claim that section 553 is self-executing and hence the court properly refused to discharge the attachment seems hypertechnical. The appellant is entitled under sec. 553 to an order discharging the attachment.

The order appealed from is reversed with directions to the trial court to grant the motion to discharge the attachment.

NOURSE, P. J., and GOODELL, J., concur.



PEOPLE v. ROBARGE*

Cr. 4925.

District Court of Appeal, Second District,
Division 3, California.

April 23, 1953.

Hearing Granted May 21, 1953.

Prosecution for robbery while armed with a pistol. From a judgment of the Superior Court of Los Angeles County, Irvin Taplin, J., on a conviction of first-degree robbery, defendant appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to identify defendant as one of the perpetrators of the robbery.

Judgment affirmed.

1. Criminal Law ⇨741(2)

Any inconsistency in state's witness' testimony regarding height of man who robbed witness was matter for jury's consideration in determining sufficiency of witness' identification of defendant as such man in robbery trial.

2. Criminal Law ⇨566

Identification of a defendant as participant in commission of crime charged

need not be positive to sustain his conviction thereof.

3. Criminal Law ⇨741(2)

The sufficiency of state's witness' identification of defendant as one of participants in robbery charged was question for jury.

4. Robbery ⇨24(3)

Evidence was sufficient to identify defendant as one of men who committed robbery charged.

5. Constitutional Law ⇨266

Police officers' requirement that defendant put on dark glasses to assist state's witness in identifying him as participant in robbery charged was not violation of due process of law clause in constitution as requiring defendant to bear false witness against himself.

6. Witnesses ⇨268(3)

In robbery prosecution, where defendant presented evidence of alleged alibi, deputy district attorney properly asked alibi witnesses, on cross-examination, who were present at times and places mentioned by them.

7. Criminal Law ⇨706

In robbery prosecution, deputy district attorney's questions, on cross-examination of defendant's former wife, as to whether defendant came with his brother to cafe at which witness worked on night of crime, whether witness saw defendant's brother on that night, and whether she saw him when she and defendant were in front of witness' house, as testified by her in support of defendant's alibi, did not constitute misconduct as bringing out that defendant's brother was arrested in connection with offense charged.

W. W. Robarge, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In an information it was alleged that defendant committed robbery while armed

* Subsequent opinion 262 P.2d 14.

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with a pistol; and that prior thereto he had been convicted twice of robbery, and once of petty theft with prior conviction of a felony. He admitted the allegations of prior convictions. In a trial by jury, he was convicted of robbery in the first degree. He appeals from the judgment and the order denying his motion for a new trial. On a former appeal from a judgment of conviction on the charge herein, the judgment was reversed by reason of misconduct of the deputy district attorney. *People v. Robarge*, 111 Cal.App.2d 87, 244 P.2d 407.

Appellant contends that the evidence was insufficient to support the judgment. His principal argument is that the evidence was insufficient to identify him as one of the persons who committed the robbery.

A robbery was committed on March 5, 1951, about 3 a. m., in the office of the Clock Cafe, located near the intersection of Atlantic and Florence Avenues in Los Angeles County. The manager of the cafe, and George, the cook, were in the office. The manager had just finished counting the day's receipts of cash and checks, totaling about \$1,600, and had put them in a bag preparatory to putting them in the safe. Then the manager saw, through the office door which was ajar, a man (a stranger) who was approaching the office door. The manager asked him what he wanted, and he replied, "This is a stick up." Then the man pulled a revolver from his overcoat pocket and came into the office. The manager pointed to the bag of money and said, "There it is." The man then told him to open the safe, and told George to lie on the floor. George complied, lying face downward. After the manager opened the safe, the man told him to get on the floor next to George, face downward and cover his eyes. The manager complied. The man who had so entered the office was not the defendant. While the manager and George were on the floor, they did not see anyone or anything in the room, but they heard a commotion and some talking and mumbling outside the office door. Then Doc, the janitor at the cafe, and Henry, the dishwasher, were brought into the room and told to get on the floor, face down-

ward. The office was small and there was not enough space on the floor for the four persons to lie thereon, and Doc and Henry were commanded to lie on top of the manager and George. They complied. The manager and said other employees, while in that position on the floor, heard mumbling voices of other persons in the room, heard the telephone jerked from the wall, and heard the lights turned out. After a few minutes, when the victims got up from the floor, they found that the bag of money, and the other money which had been in the safe—about \$1,800, had been taken from the office.

Doc, the janitor, testified that on said March 5th, about 3:30 a. m., while he was in a hallway of the cafe on his way from the kitchen to the storeroom, he saw a man standing there near the door of the office and about 15 feet from him (witness); Henry, the dishwasher, was standing beside the man; the man pointed an automatic gun at Doc and said: "Fall in line"; Doc laughed, and the man stood there looking at him about five or six minutes; when Doc took a few steps toward him, the man came up, put the gun against Doc's side and told him to get into the office; when Henry and Doc went into the office the man was right behind Doc; at that time the manager and the cook were lying on the floor, and another man (a stranger—not the defendant) was behind the door; then in compliance with the order of the other man, Doc and Henry lay down on top of the manager and the cook; the defendant is the man who was in the hallway and who ordered Doc to go into the office. On cross-examination Doc said that the man, whom he had seen in the hallway, was wearing a black hat, dark glasses and a blue suit; the man was five feet four inches in height; Doc was the same height; at the police station, when the defendant was brought in for identification, he (Doc) could identify him, but Doc told the officers to put glasses on defendant, and then Doc "could tell more about him." On redirect-examination he said that four men were brought out for identification and that defendant was one of them; he noticed the checks, jaw and mouth of defendant; defend-

ant "looked like the same man I had seen out there" in the cafe, but he (Doc) was not quite sure so he asked the police to put glasses on defendant; after they put the glasses on him, he (Doc) saw him "the same way"—"Just the same man"—"As had me out there"; at that time he (Doc) was sure the defendant was the same man who held him up. When Doc was asked, at the trial, if there was any doubt in his mind as to whether the defendant was the man, he replied: "That is the man."

Henry, the dishwasher, testified that as he walked toward the washroom near the back of the cafe he met a man who pointed a gun toward him, and said: "This is a stick up"; then the man walked backward toward the office and required Henry to follow him to the office door; then Doc came from the back door, and the man ordered them to get into the office. Henry's testimony with respect to what occurred in the office was in substance the same as the testimony of Doc. Henry testified further that the height, cheeks and chin of the defendant "compare" with the man who held him up that night at the cafe; the features of the man who held him up are "the features of this man here [defendant]," but he (Henry) was not positive of the identification; the defendant looks like the man.

The defendant did not testify. A bartender, called as a witness by defendant, testified that on said March 5th, about 1:45 a. m., he saw the defendant at Top's Cafe (in Gardena), which is about 10 miles from the Clock Cafe, and defendant remained there about 20 minutes. A former wife of defendant, called as a witness by defendant, testified that on said March 5th, about 1:50 a. m., and about 2:20 a. m. (she being then married to defendant), she saw defendant in the Hitching Post Cafe (in Gardena), where she was a waitress; about 2:20 a. m., he took her to her home which was about eight blocks from the cafe; after arriving there they remained in the automobile about two hours. The mother of said last witness testified that she and her daughter lived in the same house; she saw the defendant and her daughter in

front of her house on said March 5th from approximately 2:30 a. m. to 4 a. m.

A police officer, called as a witness by the People, testified that it is about 10 miles from the Clock Cafe to Top's Cafe; that ordinarily, between midnight and dawn, the approximate time required for driving from one of those cafes to the other is 20 minutes; that about 10 days after the robbery he had a conversation with the former wife of defendant at her home wherein he told her that defendant claimed that he was not in the Clock Cafe robbery, and he (officer) asked her if she knew of anyone "who could put him [defendant] someplace away from that job"; that she replied that she did not know of anyone but she would inquire about it.

[1-4] Appellant argues, with reference to his claim of insufficiency of the evidence, that the only evidence presented to connect him with the offense was the testimony of Doc, who was impeached regarding his testimony as to the height of appellant; that the testimony of Doc was not sufficient to identify him. Doc testified with certainty that the appellant was the man who held him up. He also testified that the man was five feet four inches tall; and that the man was approximately the same height as Doc himself, whose height was five feet four inches. The deputy district attorney stipulated that the transcript of the preliminary examination shows that Doc testified in that proceeding that the man was "four" feet tall. Any inconsistency in his testimony regarding the height of the man was one of various matters to be considered by the jury in determining the fact as to identification. Under the circumstances here, where Doc estimated the height of the man to be about the same as his own height, the jury might well have concluded that the statement in the preliminary transcript that the man was "four" feet tall was an error in shorthand reporting or was an inadvertent statement of the witness. There was, however, further identification of appellant. Although Henry did not identify appellant positively, he did testify that the appellant and the robber were similar in appearance. It is not nec-

essary that identification of a defendant be positive. *People v. Hightower*, 40 Cal.App. 2d 102, 106, 104 P.2d 378; *People v. Waller*, 14 Cal.2d 693, 700, 96 P.2d 344. In *People v. Waller*, *supra*, it was said, 14 Cal.2d at page 700, 96 P.2d at page 348, "A conviction may be sustained, though the witnesses decline to swear positively, and testify merely that they believe the accused is the person whom they saw commit the crime." The question as to identification was for the determination of the jury. *People v. Best*, 43 Cal.App.2d 100, 103, 110 P.2d 504. The evidence herein as to identification was legally sufficient.

[5] Appellant also contends that the act of the police in requiring him to put dark glasses on, when Doc was attempting to identify the robber, was violative of the due process of law clause of the Constitution, in that, he was "made to bear false witness against himself." Doc testified that, when he was at the police station, he could identify the appellant without glasses being on appellant; that the appellant looked like the man, but he was not quite sure so he asked the police to put dark glasses on him—so he could tell more about him. In *People v. Clark*, 18 Cal.2d 449, 116 P.2d 56, it was held that it was not error for the court to require the defendants to rise in court for purposes of identification. It was also held therein that it was not error to require a defendant to remove the visor he was wearing in court, so that the witnesses attempting to identify him might have an unobstructed view. It was said therein, 18 Cal.2d at page 461, 116 P.2d at page 62 (citing a Texas case, *Rutherford v. State*, 135 Tex. Cr.R. 530, 121 S.W.2d 342) that: "It has been held that an order of the trial court directed to a defendant to stand up and remove his glasses was not error." In *Crenshaw v. State*, 225 Ala. 346, 142 So. 669, 671, a person who was suspected of the perpetration of a crime was required by officers to put his cap on. The court said therein: "That he was required by the officers to put his cap on was not requiring defendant to make evidence against himself in violation of constitutional guaranties." Appellant herein was not denied any con-

stitutional right by being required to put glasses on.

[6, 7] Appellant also contends that the deputy district attorney was guilty of misconduct, in that, he "brought out that defendant's brother, 'Jimmy,' was arrested in connection with the offense." Appellant quotes in his brief two excerpts from the transcript in an effort to support said contention. The said quotations do not state or indicate that one of the boys referred to therein was appellant's brother or that his brother was a participant in any crime. Appellant presented evidence of an alleged alibi, and it was proper for the deputy district attorney on cross-examination of the alibi witnesses to ask who were present at the times and places mentioned by them. When cross-examining the former wife of appellant, the deputy asked her questions which were in substance as follows: Whether appellant came to the Hitching Post Cafe with his brother, Jimmy? Whether she saw Jimmy that night? Whether she saw Jimmy when she and appellant were in front of her house? She answered those questions in the negative. There was no misconduct in such references to Jimmy or at all on the part of the deputy district attorney. This attempt to show misconduct on the part of the deputy district attorney is based, apparently, upon the fact that upon the former appeal herein the appellant's claim of misconduct—by reason of references to his brother—was upheld. The references therein, however, were very different from the incidents herein assigned as misconduct. In the former trial, a deputy district attorney requested that a man be brought into court, and thereafter when a man was brought in the judge said that somebody had been brought in from the county jail. Then the deputy asked the manager of the Clock Cafe, who was then a witness, if he recognized the man. He replied to the effect that he was the man who held him up at the cafe. On the next day, the deputy district attorney asked a deputy sheriff, who was a witness, if he knew the man who had been brought into court the day before "from the prisoners' room." After replying in the affirmative, the deputy district attorney asked

him to spell the man's name. He spelled it: "R-o-b-e-a-r-g-e." The court held that by reason of the similarity of names the jury might have inferred that the man was a brother of appellant, and therefore, in view of the circumstances under which he was brought into court from jail and the positive identification of him as one of the robbers, there was prejudicial misconduct. In the present case there was no implication that Jimmy was a participant in the robbery.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

record owner to operate automobile on highway, although grandfather knew record owner was incompetent to operate automobile, did not state cause of action against grandfather based upon his ownership of automobile but did under statute which imputes negligence of minor motorist to person having custody of him. Vehicle Code, § 352(b).

Morris B. Chain, Bakersfield, for appellant.

Arthur C. Fisher, Los Angeles, Mack, Bianco & King, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising from an automobile collision. The amended complaint named three defendants, and contained five causes of action. The court overruled a demurrer as to the first two defendants, and sustained the demurrer of the defendant Maurer without leave to amend. This appeal is from a judgment dismissing the action as to him.

The first cause of action alleges that on January 12, 1952, plaintiff's husband was driving an automobile along a street in Bakersfield; that at the same time and place the defendant Wardwell "was the owner and operator of a 1951 Ford Sedan automobile and was driving in a southerly direction along and upon" another street; that at a point where these streets intersect, the defendant Wardwell so carelessly and negligently operated, managed and controlled the said Ford car as to cause it to collide violently with the automobile being driven by plaintiff's husband; that as a proximate result of said negligence and carelessness of defendant Wardwell plaintiff's husband received injuries which resulted in his death on the next day; and that as a result of the carelessness and negligence of the defendant Wardwell the plaintiff has been damaged in specified amounts.

In a second cause of action all of the allegations of the first cause are repeated



117 Cal.App.2d 406

HUGHES v. WARDWELL et al.

Civ. 4623.

District Court of Appeal
Fourth District, California.

April 22, 1953.

Death action arising out of automobile collision. The Superior Court of Kern County, overruled demurrer of two defendants but sustained demurrer of third defendant, who was grandfather of record owner of automobile, and entered judgment dismissing action as to grandfather, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that allegations were sufficient to state cause of action based on theory that grandfather had custody and control of minor defendant within statute imputing negligence of minor, who drives with permission of person having custody of him, to such person.

Judgment reversed with directions.

Automobiles ⇐233(1)

Allegations that 15 year old record owner of automobile resided with and was under physical control of grandfather, who had purchased automobile, furnished gas and oil money, and negligently permitted

and realleged, and it is further alleged that at the time in question the defendant Sumalt was the driver of this 1951 Ford sedan, and that she was driving under the management and control and in the presence of the defendant Wardwell, the owner of said Ford car. The third and fourth causes of action repeat all of the allegations of the first and second causes, and further allege that at the time in question the defendant Sumalt was the agent of the defendant Wardwell, and was driving this Ford car with his permission.

In a fifth cause of action all of the allegations of the first cause of action are repeated and realleged, and it is further alleged, on information and belief, that defendant Wardwell is 15 years old, is the grandson of defendant Maurer and resides with him, and "is under the physical custody and control of said J. H. Maurer"; that on December 22, 1951, defendant Maurer "purchased and paid for one 1951 Ford sedan automobile" and knowingly permitted it to be registered in the name of defendant Wardwell for the purpose of avoiding liability for any negligent acts of said Wardwell; that Maurer furnished funds to Wardwell for the purchase of gasoline and oil for said vehicle; that Maurer knew that Wardwell was a reckless and careless driver and utterly incompetent to operate said vehicle; that Maurer negligently permitted Wardwell to drive and operate said automobile upon the highway; and that Maurer knew that Wardwell was not competent to operate said vehicle, and that he was not licensed to drive or operate an automobile.

The appellant contends that the allegations of the fifth cause of action are sufficient to state a cause of action against the respondent Maurer under the provisions of Subdivision (b) of Section 352 of the Vehicle Code; and also that these allegations are sufficient to state a cause of action for negligence against this respondent, without reference to any specific code section. It is argued that the allegations that Maurer purchased the vehicle and permitted it to be registered in the name of Wardwell, knowing that he was a reckless and careless driver and not li-

censed to drive, were sufficient to bring this case within the rule announced in *McCalla v. Grosse*, 42 Cal.App.2d 546, 109 P.2d 358, 360, "that one who knowingly permits an unfit driver to use his automobile is liable for damages caused by the negligent acts of the unfit driver in the operation of the car." It is also argued that the allegations of uncertainty set forth in the demurrer are not well taken since any further facts relating to the nature of Maurer's custody over Wardwell would be either surplusage or not ultimate facts, depending upon the theory of liability which is ultimately accepted.

The respondent contends that no cause of action is stated against him since it is not alleged that he was the owner of this car, but on the contrary it is directly alleged that Wardwell was the owner; that the allegations are not sufficient to show that he had legal custody of the defendant Wardwell, citing *Hathaway v. Siskiyou Union High School District*, 66 Cal.App.2d 103, 151 P.2d 861, in which it was held that the person having custody of a minor, within the meaning of Subdivision (b) of Section 352, means a person having the permanent legal custody and not one whose control is limited in time and scope; and that no liability appears since it is alleged in the second, third and fourth causes of action that Wardwell was not driving the car.

While inconsistent causes of action are set up in the amended complaint, that fact is immaterial here. Regardless of any other causes of action, the question here is as to whether or not a cause of action against this respondent is stated. It is expressly alleged that the minor and not the respondent was the owner of the car, and it seems clear that the allegations are not sufficient to show any liability based upon the respondent's ownership of this car. A different situation existed in the case of *McCalla v. Grosse*, *supra*, which involved a person driving a car with the permission of the owner. It was there held that the allegations were sufficient to bring the case within the provisions of Section 402 of the Vehicle Code. By way of dicta, it was further stated that allegations similar to

those here involved, charging an owner with negligence, were sufficient to bring the case within the rule that an owner who knowingly permits an unfit driver to use the owner's car is liable for the negligence of the unfit driver in the use of that car. This was merely a statement of the statutory rule first applied.

We think, however, the allegations are sufficient to state a cause of action based on the theory that the respondent had custody and control of the minor defendant, within the meaning of Subdivision (b) of Section 352 of the Vehicle Code, and that he improperly exercised such control. That section imputes the negligence of a minor who drives with the permission of "the parents or the person or guardian having custody of the minor" to "such parents or such person or guardian". In the Hathaway case, relied on by the respondent, it was held that the limited custody of a schoolmaster was not within the intended scope of this statute. The situation disclosed by the complaint here is considerably different, it being alleged that the minor grandson of the respondent resides with him, and is under his "physical custody and control". The real intent of this statute, in imputing such negligence, is to impose liability on another because of that person's right to control the actions of the minor.

While the complaint here is not as definite as might be desired, with respect to the matter of custody, it alleges a kind of custody and certain facts which normally indicate a considerable right of control. Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent actually had. Apparently, the mother of the minor was living, as she was appointed guardian ad litem in this case. Whether she had some sort of custody of the minor, and whether she was also residing with the respondent, does not appear. The allegations were sufficient to raise an issue of fact, and to state a cause of action against the respondent, based upon Section 352(b) of the Vehicle Code.

The judgment is reversed, with directions to allow the respondent a reasonable time in which to answer.

GRIFFIN and MUSSELL, JJ., concur.



117 Cal.App.2d 391

MARKUS v. JUSTICE'S COURT OF
LITTLE LAKE TP. et al.

Civ. 8282.

District Court of Appeal, Third District,
California.

April 21, 1953.

Petition for writs of mandate and prohibition requiring justice's court to refrain from further proceedings in, and to expunge existing record in, proceeding in which petitioner had been convicted of violating county ordinance regarding keeping and control of dogs. The Superior Court, Mendocino County, Gibson, J., denied relief sought, and petitioner appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that county ordinance prohibiting owner from allowing dog to roam away from "premises where same is kept" sufficiently describes area to which dogs are to be confined, and hence is constitutional.

Affirmed.

1. Counties ⇐23

Question of reasonableness or unreasonableness of county ordinance is for county legislative body, except where quality of unreasonableness shows violation of some constitutional right.

2. Animals ⇐48

Under police power, legislative bodies may restrict rights of dog owners to allow dogs to run at large.

3. Counties ⇐55

County ordinance prohibiting owner from allowing dog to roam away from "premises where same is kept" sufficiently describes area to which dogs are to be confined, and hence is constitutional.

4. Counties ⇨21½

A county ordinance is void which prohibits same acts forbidden by state law to extent of duplication.

5. Counties ⇨21½

A county ordinance is void to extent that it prohibits what state law authorizes.

6. Counties ⇨21½

A county ordinance is invalid if it invades a field already so fully occupied by state legislation that there is no room for local regulation, for then its provisions are deemed to conflict with State law, even though particular regulation set forth in ordinance does not directly duplicate or otherwise directly conflict with any express provision of state law.

7. Counties ⇨21½

County ordinance absolutely prohibiting dogs from running at large off premises where they are kept does not conflict with state law prohibiting such activity as to untagged dogs or to tagged dogs running upon any farm where livestock or domestic fowls are kept is valid. Gen.Laws, Act. 384; Const. art. 11, §§ 6, 11.

8. Counties ⇨21½

Where county ordinance generally and statutes specifically prohibited dog owners from permitting their dogs to roam upon farms whereon livestock or domestic fowls are kept, and penalty provisions differed, ordinance would be inoperative as to offenses coming within statutory provision. Gen.Laws Act 384; Const. art. 11, §§ 6, 11.

9. Animals ⇨57

Complaint alleging that defendant willfully and unlawfully allowed a dog to run upon property of another and kill sheep thereon sufficiently stated violation of county ordinance prohibiting any person to cause, permit, or allow any dog owned, harbored, controlled, or kept by him to roam, run, or stray from premises where same is owned, harbored, or kept.

10. Animals ⇨48

Word "allow" is synonymous with "permit" and both words when used in conjunction with county ordinance pro-

hibiting any person to cause, permit, or allow any dog owned by him to roam or stray from premises where same is kept connotes positive duty, failure to perform which will constitute violation of ordinance.

See publication Words and Phrases, for other judicial constructions and definitions of "Allow" and "Permit".

Kasch & Cook, Ukiah, for appellant.

Edmund G. Brown, Atty. Gen., and Gail A. Strader, Dep. Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

Appeal from a judgment of the Superior Court for Mendocino County denying petition for writs of mandate and prohibition which appellant asked be issued and directed to the Justice's Court of Little Lake Township, requiring that court to refrain from further proceedings in, and to expunge the existing record in, a proceeding therein in which appellant had been accused and convicted of violating Section 5 of Mendocino County Ordinance No. 285 regarding the keeping and control of dogs. A complaint was filed in the said Justice's Court against appellant, charging violation of the referenced ordinance in that appellant had wilfully and unlawfully allowed a dog to run on the property of Elmer H. Brown and to kill one ewe and two lambs. Appellant pleaded guilty in the Justice's Court and was fined \$50 and ordered to pay to Brown the value of the sheep killed. Not having complied therewith appellant was threatened with process in enforcement of the judgment and thereupon petitioned the Superior Court for the aforesaid writs.

Appellant contends that the county ordinance was and is void for the reasons that: 1. It places unreasonable restrictions upon the ownership and possession of dogs in rural and sparsely inhabited areas; 2. It is so vague and uncertain as to be invalid in that the word "premises" on which dogs are required to be kept by the terms of the ordinance has no definite or ascertainable meaning; 3. The ordinance at-

tempts to legislate in a field completely occupied by State statute. Appellant also contends that the complaint in the Justice's Court failed to state a cause of action.

In support of his claim that the ordinance places unreasonable restrictions upon the possession and ownership of dogs, appellant argues that Mendocino County is largely rural, mountainous in topography and sparsely inhabited, of which facts he urges this Court to take notice. He asserts the county's 3,500 square miles of territory contains 40,000 inhabitants of whom about 13,000 reside within the four incorporated areas; that the county has but 5% of its area under cultivation or within the incorporated areas; that half the total area is timber land and that aside from lumbering the main industry of the county is stock raising; that vast areas are unfenced and that many of the inhabitants live in areas remote from areas containing any considerable density of population. The section of the ordinance for violation of which appellant was convicted reads as follows:

"It shall be unlawful and a misdemeanor for any person to cause or permit, or allow any dog or dogs, owned, harbored, controlled or kept by him, to roam or run or stray away from the premises where the same is or are owned, harbored or kept, at any time, except in the custody and control of the owner or some responsible person, thereunto by the owner duly authorized."

Referring to the well-known proclivity of dogs to roam the countryside, appellant argues that the effect of these ordinance provisions is to compel a dog owner to either keep his dog perpetually chained or kenneled or maintain a dog-proof fence about his property or area, or a dog attendant to be in charge of the dog at all times; and that except in a few incorporated areas within the county such restrictions are so unreasonable as to amount in practical effect to prohibiting the ownership of dogs if the owner is to have any assurance that he can avoid violating the law. As appellant puts it, "Even if dogs could read, they would be unable to comply with the law because so much of Mendocino County

is not fenced, nor does it bear trespass signs."

[1] These arguments are indeed most persuasive, for this ordinance does place such harsh restrictions upon the keeping and controlling of dogs that if it were in fact faithfully, rigorously and generally enforced against all residents of the county keeping and owning dogs, the probable result would be that dogs would largely disappear since people would not dare to keep them. But these arguments, forceful as they are, must be addressed to the legislative body that passed the ordinance, for the power of a court to strike down a law for unreasonableness is and ought to be severely limited. In truth, save where the quality of unreasonableness shows the violation of some constitutional right, the power is non-existent. "The constitutional power and authority to enact a statute appearing, the question of its mere reasonableness or unreasonableness is for the legislature alone. If the legislature abuses its power—the power to make laws, and to judge of their necessity and reasonableness—the remedy lies, under our form of government, with the people, through the ballot-box; * * * or the right which the people have to change their form of government, whenever it becomes oppressive or fails to afford that security for the rights of men which it was intended to provide. But when the legislature has spoken, the question before the court is not the propriety of the legislation, but its power to legislate. If the intention is clear, however unjust and absurd the consequences may be, it must prevail, unless it contravenes a constitutional provision, for it is obviously not the province of the court to approve good and condemn bad legislation." 5 Cal.Jur. "Constitutional Law", section 63, p. 636.

[2] As to the right to legislate it is now and for long has been well settled that legislative bodies have the power to impose restrictions on the rights of dog owners to allow their animals to run at large, the power generally being upheld as a valid exercise of the police power, 49 A.L.R. Annotation, p. 852; and this power we think exists even though it be exercised under conditions of sparsity of population

as opposed to ordinances passed by municipalities where the population is dense. For example, stock raising is often an important industry in sparsely-settled territory and the proclivity of roaming dogs to worry livestock and even to kill them is well known. Such stock often graze untended for long periods of time in remote areas and dogs can do great damage yet remain undetected; the responsibility for the damage is often impossible to fix. The board of supervisors of the county had the power to legislate upon the subject-matter and that being so it is not for courts to declare the legislation invalid because it appears to be unnecessarily severe.

[3] Appellant contends that the ordinance in question is unconstitutional because the word "premises" as used therein is vague and uncertain, leaving the meaning of the ordinance to conjecture. This contention cannot be sustained. The section of the ordinance in question prohibits an owner allowing his dog to roam away from "the premises where the same is * * * kept." This is a sufficient description of the area to which the dogs are to be confined to enable any dog owner to understand that part of the law. If the owner lives on a farm then the farm becomes the premises where he keeps his dog. If he lives in a trailer on a rented space then the rented space and the trailer become the premises on which he must keep his dog. We think there is no lack of clarity in the terms of the ordinance.

[4-7] And appellant contends that the ordinance conflicts with the State statute. 1 Deering's Gen.Laws, Act 384. The State law makes unlawful the keeping of a dog over three months old without placing upon it a substantial collar on which is fastened a metallic tag containing the name and address of the owner, or a tag issued by the authority of a county, city or other municipal corporation; it prohibits the running at large of dogs not wearing tags; it prohibits an owner permitting a dog to run at large on any farm where livestock or domestic fowls are kept without the consent of the farm owner; it contains provisions for killing dogs found worrying livestock or

poultry on lands not owned or possessed by the dog owner; it provides a proceeding whereby persons sustaining damage to livestock or poultry by dogs may have an action to recover their damages; it provides that on petition the board of supervisors of any county must provide for the issuance of dog tags and directs such boards without petition to provide for taking up and impounding and disposing of dogs found running at large in violation of the statute; and from the fees collected for tags and fines collected for violations it provides a fund to be known as a "live stock indemnity fund" which must be used in the enforcement of the statute and of ordinances passed pursuant thereto and in the payment of damages to owners of livestock killed by dogs. An ordinance is void which prohibits the same acts which are forbidden by a State law to the extent of the duplication. *People v. Commons*, 64 Cal.App.2d Supp. 925, 148 P.2d 724; *In re Sic*, 73 Cal. 142, 14 P. 405; *In re Mingo*, 190 Cal. 769, 214 P. 850; *Pipoly v. Benson*, 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515. An ordinance is to that extent void in so far as it prohibits what a State law authorizes. *People v. Commons*, supra; *In re Iverson*, 199 Cal. 582, 587, 250 P. 681. An ordinance is invalid if it invades a field already so fully occupied by State legislation that there is no room for local regulation, for then its provisions are deemed to conflict with the State law even though the particular regulation set forth in the ordinance does not directly duplicate or otherwise directly conflict with any express provision of the State law. *People v. Commons*, supra; *Pipoly v. Benson*, supra; *Natural Milk, etc., Ass'n v. City & County of San Francisco*, 20 Cal. 2d 101, 109, 124 P.2d 25; *Ex parte Daniels*, 183 Cal. 636, 643, 192 P. 442, 21 A.L.R. 1172. Applying these general rules to the two enactments before us, we see at once that on the subject of dogs running at large the State statute prohibits such activity only as to untagged dogs, or to tagged dogs running upon "any farm whereon livestock or domestic fowls are kept". But the ordinance absolutely prohibits dogs running at large off the premises where the same are kept. The ordinance greatly extends the

statutory restriction. It is not, therefore, within the field of the extension, either a duplication of the State statute or in conflict therewith unless the State has fully occupied the field. This we think the State has not done. The content of the State statute makes this clear. Running at large is not forbidden except for dogs without tags, or on farms where livestock or domestic fowls are kept. These restrictions, though they may have been deemed adequate as state-wide restrictions, clearly are so constricted as to leave to counties full right under the police power to declare additional restrictions deemed advisable to meet and control situations existing in the various counties. (It is not claimed by respondent, and we think could not be properly claimed, that regulating the care and control of dogs within the county was a municipal affair so that the county regulations would be superior to the provisions of the State statute if there was conflict between the two.) Const. Art. XI, sec. 6; Ex parte Helm, 143 Cal. 553, 77 P. 453. The power of the county therefore is limited only by the constitutional provision authorizing its legislative body to make and enforce within its boundaries such local regulations as would not be in conflict with the provisions of general law. Const. Art. XI, sec. 11. Nor can it be said the statute expressly or impliedly makes lawful that which the ordinance prohibits. Its terms on this subject matter are entirely restrictive.

[8] However, there is a conflict between the statute and the ordinance to this extent, that the statute expressly and the ordinance generally prohibits dog owners from permitting their dogs to roam upon farms whereon are being kept livestock and domestic fowls; and as to offenses coming within the statutory inhibition the ordinance may not operate. In re Sic, supra; In re Mingo, supra. The conflict here is more apparent than is usual because not only do the provisions overlap but the State law fixing the penalty at fine or imprisonment provides that all fines collected under its provisions shall be paid into a special fund and disbursed as directed by the statute. However, the foregoing considerations do not aid appellant, for it is not made to ap-

pear and does not appear from the charge that the crime to which he pleaded guilty was within the embrasure of the statute and therefore without the effective provisions of the ordinance.

[9, 10] Appellant contends that the complaint to which he pleaded guilty did not state a public offense in that it failed to allege that he had "owned, harbored, controlled or kept" the dog in question and in that it failed to allege that the particular dog roamed, ran or strayed away from the premises where kept. The record presents and of course could present in this proceeding no more than the form of the complaint and the question is therefore whether or not, though perhaps inartificially stated, the complaint met the fundamental requirements of such a charge. We hold that it did. It expressly charged a violation of Section 5 of the Ordinance committed by the defendant's having wilfully and unlawfully allowed a dog to run upon the property of Elmer H. Brown and kill sheep thereon. The essence of the charge was not the killing of the sheep but the allowing of the dog to run, that is, to roam, off the property where kept. This is sufficiently stated by the statement that the dog was allowed to run on the property of other than the defendant. Substantial statement of a violation of an ordinance is enough. People v. Smith, 36 Cal.App.2d Supp. 748, 92 P.2d 1039. The use in the pleadings of the word "allow" implies the charge that defendant was sufficiently in control, ownership or possession of the dog as to be chargeable with regulation of his conduct in accordance with the ordinance. The word is synonymous with "permit", Webster's Int.Dict., and both words when used in conjunction with a statute charging a duty to the owner of a dog to regulate his activities connote positive duty, failure to perform which will violate the ordinance. The plaintiff promptly pleaded guilty to the charge made and it is unlikely that he could have misunderstood the gravamen of the charge.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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SECOND SERIES

WEISS et al. v. STATE BOARD OF EQUALIZATION et al.

L. A. 22697.

Supreme Court of California, in Bank.

April 28, 1953.

Rehearing Denied May 21, 1953.

Mandamus proceeding to review refusal of State Board of Equalization to issue plaintiffs an off-sale beer and wine license at their delicatessen. The Superior Court, Los Angeles County, Frank G. Swain, J., gave judgment for the board, and plaintiffs appealed. The Supreme Court, Carter, J., held that board's decision that public welfare and morals would be jeopardized by granting of license at premises within 80 feet of some of the buildings on a school ground, was not unreasonable, and denial of license was not arbitrary, notwithstanding there were other liquor licensees operating in school's vicinity, since board may have concluded that another license would be too many in vicinity of the school.

Judgment affirmed.

Prior opinion 251 P.2d 712.

1. Intoxicating Liquors ⇐69

The State Board of Equalization, in exercising its power to deny, in its discretion, any liquor license if it should determine for good cause that granting of such license would be contrary to public welfare or morals, performs a quasi-judicial function similar to local administrative agencies, and board's discretion is not absolute, but its decisions must be based on sufficient evidence and must not be arbitrary. St.1935, p. 1123, § 1 et seq., as amended; Const. art. 20, § 22.

2. Intoxicating Liquors ⇐59(2)

Although immediate proximity to a school is not a statutory ground for denial of an off-sale liquor license, as it is for denial of an on-sale liquor license, never-

theless, proximity of licensed premises to a school may supply an adequate basis for denial of a license as being inimical to public morals and welfare. St.1935, p. 1123, § 13, as amended; Const. art. 20, § 22.

3. Intoxicating Liquors ⇐59(2)

Decision of State Board of Equalization that public welfare and morals would be jeopardized by granting of an off-sale liquor license at premises within 80 feet of some of the buildings on a school ground was not unreasonable, and denial of such license was not arbitrary, notwithstanding that other liquor licensees were operating in vicinity of school, since board may have concluded that another license would be too many in the school's vicinity. Const. art. 20, § 22.

4. Intoxicating Liquors ⇐59(2)

Where State Board of Equalization determined that granting of an off-sale license at premises within 80 feet of some of the buildings on a school ground would jeopardize public welfare and morals, contention that the neighborhood was predominantly Jewish and that applicant intended to sell wine to customers of Jewish faith for sacramental purposes was immaterial. Const. art. 20, § 22.

Riedman & Silverberg and Milton H. Silverberg, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondents.

CARTER, Justice.

Plaintiffs brought mandamus proceedings in the Superior Court to review the refusal of defendant, State Board of Equalization, to issue them an off-sale beer and wine license at their premises and to compel the

issuance of such a license. The court gave judgment for the board and plaintiffs appeal.

Plaintiffs filed their application with the board for an off-sale beer and wine license (a license to sell those beverages to be consumed elsewhere than on the premises) at their premises where they conducted a grocery and delicatessen business. After a hearing the board denied the application on the grounds that the issuance of the license would be contrary to the "public welfare and morals" because of the proximity of the premises to a school.

According to the evidence before the board, the area concerned is in Los Angeles. The school is located in the block bordered on the south by Rosewood Avenue, on the west by Fairfax Avenue, and on the north by Melrose Avenue—an 80-foot street running east and west parallel to Rosewood and a block north therefrom. The school grounds are enclosed by a fence, the gates of which are kept locked most of the time. Plaintiffs' premises for which the license is sought are west across Fairfax, an 80-foot street, and on the corner of Fairfax and Rosewood. The area on the west side of Fairfax, both north and south from Rosewood, and on the east side of Fairfax south from Rosewood, is a business district. The balance of the area in the vicinity is residential. The school is a high school. The portion along Rosewood is an athletic field with the exception of buildings on the corner of Fairfax and Rosewood across Fairfax from plaintiffs' premises. Those buildings are used for R. O. T. C. The main buildings of the school are on Fairfax south of Melrose. There are gates along the Fairfax and Rosewood sides of the school but they are kept locked most of the time. There are other premises in the vicinity having liquor licenses. There are five on the west side of Fairfax in the block south of Rosewood and one on the east side of Fairfax about three-fourths of a block south of Rosewood. North across Melrose and at the corner of Melrose and Fairfax is a drug store which has an off-sale license. That place is 80 feet from the northwest corner of the school property as Melrose is 80 feet wide and plaintiffs' premises are

80 feet from the southwest corner of the school property. It does not appear when any of the licenses were issued, with reference to the existence of the school or otherwise. Nor does it appear what the distance is between the licensed drug store and any school buildings as distinguished from school grounds. The licenses on Fairfax Avenue are all farther away from the school than plaintiffs' premises.

Plaintiffs contend that the action of the board in denying them a license is arbitrary and unreasonable and they particularly point to the other licenses now outstanding on premises as near as or not much further from the school.

[1] The board has the power "in its discretion, to deny * * * any specific liquor license if it shall determine for good cause that the granting * * * of such license would be contrary to public welfare or morals." Cal.Const., art. XX, § 22. In exercising that power it performs a quasi judicial function similar to local administrative agencies. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 173 P.2d 545; *Reynolds v. State Board of Equalization*, 29 Cal.2d 137, 173 P.2d 551, 174 P.2d 4; *Stoumen v. Reilly*, 37 Cal.2d 713, 234 P.2d 969. Under appropriate circumstances, such as we have here, the same rules apply to the determination of an application for a license as those for the revocation of a license. *Fascination, Inc., v. Hoover*, 39 Cal.2d 260, 246 P.2d 656; *Alcoholic Beverage Control Act*, § 39; *Stats.1935*, p. 1123, as amended. In making its decision "The board's discretion * * * however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." *Stoumen v. Reilly*, *supra*, 37 Cal.2d 713, 717, 234 P.2d 969, 971.

[2] Applying those rules to this case, it is pertinent to observe that while the board may refuse an on-sale license if the premises are in the immediate vicinity of

a school, Alcoholic Beverage Control Act, supra, § 13, there is no such provision or regulation by the board as to off-sale licenses. Nevertheless, proximity of the licensed premises to a school may supply an adequate basis for denial of a license as being inimical to public morals and welfare. See *Altadena Community Church v. State Bd. of Equalization*, 109 Cal.App.2d 99, 240 P.2d 322; *State ex rel. Higgins v. City of Racine*, 220 Wis. 107, 264 N.W. 490; *Ex parte Velasco*, Tex.Civ.App., 225 S.W.2d 921; *Harrison v. People*, 222 Ill. 150, 78 N.E. 52.

[3] The question is, therefore, whether the board acted arbitrarily in denying the application for the license on the ground of the proximity of the premises to the school. No question is raised as to the personal qualifications of the applicants. We cannot say, however, that it was unreasonable for the board to decide that public welfare and morals would be jeopardized by the granting of an off-sale license at premises within 80 feet of some of the buildings on a school ground. As has been seen, a liquor license may be refused when the premises, where it is to be used, are in the vicinity of a school. While there may not be as much probability that an off-sale license in such a place would be as detrimental as an on-sale license, yet we believe a reasonable person could conclude that the sale of any liquor on such premises would adversely affect the public welfare and morals.

Plaintiffs argue, however, that assuming the foregoing is true, the action of the board was arbitrary because there are other liquor licensees operating in the vicinity of the school. All of them, except the drug store at the northeast corner of Fairfax and Melrose, are at such a distance from the school that we cannot say the board acted arbitrarily. It should be noted also that as to the drug store, while it is within 80 feet of a corner of the school grounds, it does not appear whether there were any buildings near that corner, and as to all of the licensees, it does not appear when those licenses were granted with reference to the establishment of the school.

Aside from these factors, plaintiffs' argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: "Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. Perhaps the best authority for this observation is *F.C.C. v. WOKO*. [329 U.S. 223, 67 S.Ct. 213, 215, 91 L.Ed. 204.] The Commission denied renewal of a broadcasting license because of misrepresentations made by the licensee concerning ownership of its capital stock. Before the reviewing courts one of the principal arguments was that comparable deceptions by other licensees had not been dealt with so severely. A unanimous Supreme Court easily rejected this argument: 'The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.' In rejecting a similar argument that the SEC without warning had changed its policy so as to treat the complainant differently from others in similar circumstances, [*Shawmut Ass'n v. Securities and Exchange Comm.*, 1 Cir., 146 F.2d 791, 796], Judge Wyzanski said: 'Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination of the problems of security regulation. * * * The administrator is expected to treat experience not as a jailer but as a teacher.' Chief Justice Vinson, speaking for a Court of Appeals, [*Courier Post Pub. Co. v. Federal C. C.*, 70 App.D.C. 80, 104 F.2d 213, 218], once declared: 'In the instant case, it seems to us there has been a departure from the policy of the Commission ex-

pressed in the decided cases, but this is not a controlling factor upon the Commission.' Other similar authority is rather abundant. Possibly the outstanding decision the other way, unless the dissenting opinion in the second Chenery case [Securities and Exchange Comm. v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995] is regarded as authority, is *N.L.R.B. v. Mall Tool Co.* [7 Cir., 119 F.2d 700, 702.] The Board in ordering back pay for employees wrongfully discharged had in the court's opinion departed from its usual rule of ordering back pay only from time of filing charges, when filing of charges is unreasonably delayed and no mitigating circumstances are shown. The Court, assuming unto itself the Board's power to find facts, said: 'We find in the record no mitigating circumstances justifying the delay.' Then it modified the order on the ground that 'Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.' From the standpoint of an ideal system, one can hardly disagree with the court's remark. But from the standpoint of a workable system, perhaps the courts should not impose upon the agencies standards of consistency of action which the courts themselves customarily violate. Probably deliberate change in or deviation from established administrative policy should be permitted so long as the action is not arbitrary or unreasonable. This is the view of most courts." Davis, *Administrative Law*, § 168; see also Parker, *Administrative Law*, pp. 250-253; 73 C.J.S., *Public Administrative Bodies and Procedure*, § 148; *California Employment Comm. v. Black-Foxe Inst.*, 43 Cal.App.2d Supp. 868, 110 P.2d 729. Here the board was not acting arbitrarily if it did change its position because it may have concluded that another license would be too many in the vicinity of the school.

[4] The contention is also advanced that the neighborhood is predominantly Jewish and plaintiffs intend to sell wine to customers of the Jewish faith for sacramental purposes. We fail to see how that has any bearing on the issue. The wine to be sold is an intoxicating beverage the sale of which requires a license under the

law. Furthermore, it cannot be said that wine for this purpose could not be conveniently obtained elsewhere.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



40 Cal.2d 682

HOUSING AUTHORITY OF CITY OF LOS ANGELES v. CITY OF LOS ANGELES et al.

L. A. 22211.

Supreme Court of California, in Bank.

April 17, 1953.

Proceeding on order to show cause why city and others should not be held in contempt for failing to comply with writ of mandate. The Supreme Court, Traynor, J., held that where city had entered into contract with housing authority providing that city would cooperate with authority in construction of housing projects, and authority had selected and city council had approved site for housing project, but annexation of county strip of realty surrounded by city was necessary for development of site, city would be ordered to annex such strip.

City and others ordered to annex realty in question.

Shenk, Edmonds, and Schauer, JJ., dissented.

I. Statutes ☞219

Where statutes providing that Housing Authority of city has power to execute contracts necessary to exercise of its powers and that city has authority to do all things necessary to aid and cooperate in construction of housing project and cooperation agreement, pursuant to statutes, between city and authority for construction of housing project had been consistently interpreted by city as authorizing proceedings for annexation of certain realty, such course of conduct constituted interpretation of statutes which was entitled to great weight, in contempt proceeding for failure to obey

mandate to perform cooperation agreement. Health and Safety Code, §§ 34311, 34516.

2. Municipal Corporations ◊29(4)

Statutes providing that city has authority to do all things necessary to aid and cooperate in construction of housing project and that Housing Authority of city has power to execute contracts necessary to exercise of its powers and cooperation agreement, pursuant to statutes, between city and housing authority for construction of housing project authorized necessary annexation proceedings by city of strip of county realty surrounded by city and located within site selected for housing project. Health and Safety Code, §§ 34311, 34516.

3. Mandamus ◊185

Where city had entered into contract with Housing Authority of city providing that city would cooperate with authority in construction of housing project, authority had selected and city council had approved site for project, and, after city had attempted to rescind agreement, Supreme Court had directed city and others to perform agreement, but annexation by city of strip of county realty surrounded by city was necessary for development of site, city would be ordered to comply with writ of mandate by annexing such strip. Health and Safety Code, §§ 34200 et seq., 34500 et seq.; Code Civ.Proc. § 1097.

TRAYNOR, Justice.

The Housing Authority of the City of Los Angeles, by petition filed on August 4, 1952, seeks to have the members of the City Council of the City of Los Angeles held in contempt of this court for their alleged failure to comply with the terms of a peremptory writ of mandate issued by this court on June 27, 1952. Housing Authority v. City of L. A., 38 Cal.2d 853, 243 P.2d 515, certiorari denied, 344 U.S. 836, 73 S.Ct. 46. That proceeding will be referred to in this opinion as the mandate proceeding.

The mandate proceeding was brought to test the validity of the City's action of December 26, 1951, attempting to abrogate, cancel, and rescind the agreements authorized by Ordinance No. 95,222 adopted on August 8, 1949. By that ordinance the City approved construction of a ten thousand unit low rent housing project in cooperation with the Housing Authority of the City and the Public Housing Administration of the United States pursuant to the State Housing Authorities Law and Housing Cooperation Law, Health and Safety Code, §§ 34200-34368, 34500-34521. The Housing Authority successfully sought to have this court declare invalid the City's attempted withdrawal of its approval of the project and the attempted cancellation of its agreements, and to compel the City to perform the acts required by the cooperation agreement and other agreements entered into by it with the Housing Authority for carrying out the contemplated project. We determined that since the City had approved the project, and the Housing Authority and the Public Housing Administration had made binding contractual commitments and advances in respect to the project, the City was without power, in the absence of express statutory authority, to withdraw its approval or to abrogate its agreements. A writ of mandate issued "directing the respondents to perform the terms of the agreements entered into with the petitioner and to proceed in the fulfillment of its obligations thereunder."

In the present proceeding the Housing Authority alleged various matters as to

Faries & McDowell, Los Angeles, Stanley A. Furman, Beverly Hills, McIntyre Faries, Leonard S. Janofsky, Herman F. Selvin and Loeb & Loeb, Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Frank P. Doherty, Special Counsel, William H. Neal, Bourke Jones and John L. Flynn, Asst. City Attys., Weldon L. Weber, Deputy City Atty., Jerome Weber, Henry F. Walker, Bodkin, Breslin & Luddy, Michael G. Luddy, William H. Rosenthal, Nat Rosin, Joseph Ostrow, Garner, Lillie & Bryant, Cameron L. Lillie, Los Angeles, and H. P. McCarthy, San Pedro, for respondents.

which it was claimed the City had agreed to take action and as to which it had refused to proceed, in violation of this court's order in the mandate proceeding. An order was issued directing the individual members of the City Council to show cause why they should not be adjudged in contempt of this court for failing, neglecting, and refusing to obey the peremptory writ of mandate. By reason of a stipulation of the parties on the return to the order to show cause, the only charge remaining to be considered is the failure of the City to complete annexation proceedings that would include in the site selected for the West Los Angeles (Cal. 4-21) project a county strip entirely surrounded by incorporated territory. The facts relating to the failure to complete the proceeding to annex the county "island" are undisputed.

On November 22, 1950, the City Council approved and adopted a report of its Veterans' Affairs and Housing Committee recommending approval of the Authority's proposal to acquire eleven sites including the one now in question. The map of that site, submitted by the Authority with its proposal, showed the presence of the county island. Thereafter, an application to the Planning Commission for a conditional use of the site for a housing project was made. The description of the site recited that it lay "partly in unincorporated territory of the County of Los Angeles," and an attached report pointed out that there should be no difficulty in acquiring title to the county strip and annexing it to the City. On April 26, 1951, the application was granted by the Planning Commission. An appeal was taken to the City Council and denied by that body on June 26, 1951. Thereafter the Authority acquired title to the property comprising the county island and requested that the City Council annex it. The usual procedure was promptly instituted, and after receiving reports from various city departments, the Coordinating Board unanimously recommended approval of the proposed annexation. The Council referred this recommendation to its Planning Committee, which reported back on October 24, 1951. It reported that the Coordinating Board had recommended an-

nexation "as requested by the Los Angeles Housing Authority," and had advised that "the annexation of this strip would conform to the City's policy of absorbing county islands, thereby creating a more regular city boundary line * * *." The Council then adopted its committee's report recommending annexation, and ordered proceedings to that end commenced. Thereafter, however, the City attempted to rescind its cooperation agreement and terminate the development of all public housing projects thereunder.

The City contends not only that it has not contracted to annex territory, but that under the provisions of the Housing Authorities Law, Health and Safety Code § 34200 et seq. and the Housing Cooperation Law, Health and Safety Code § 34500 et seq. it has no power to do so. The City relies on section 34208 of the Health and Safety Code limiting the Authority's area of operation to the City and section 34509 permitting the City to cooperate in the planning, construction, and operation of housing projects only when they are located "within the area in which it is authorized to act." It also points out that there is no express statutory provision authorizing a city to annex territory pursuant to a cooperation agreement with a housing authority.

It may be conceded that under the foregoing provisions the City and the Authority do not have power to contract to develop a housing project completely outside the city limits or agree that the City shall annex territory for such a project. In the present case, however, approximately 37 of the 43 acres selected for the site lie in the City. The county territory consists of a strip approximately 150 feet wide by 1200 feet long that is entirely surrounded by the City and divides the site into two separate and approximately equal parts. It is entirely uninhabited and unimproved. Unless this island, which is an integral part of the site, is annexed, the project cannot be built. Thus the purpose of annexation is not to develop a project outside of the City, but to make possible a project within the City in accordance with the slum-clearance and low-rent housing objectives contemplated by the housing legislation. The questions

presented, therefore, are whether the City has contracted or legally can contract to annex such territory as is necessary for the development of a project within its limits.

The Authority has the power to "Make and execute contracts and other instruments necessary or convenient to the exercise of its powers" Health and Safety Code § 34311, and the City has authority to "Do any and all things, necessary or convenient, to aid and cooperate in the planning, undertaking, construction, or operation of" a housing project. Health and Safety Code § 34516. Pursuant to this provision the City agreed "to cooperate with the Authority * * * by such other lawful action or ways as the Authority may find necessary in connection with the development and construction of the Projects." Before this controversy arose, these provisions of the housing acts were consistently interpreted by those charged with their administration and interpretation as authorizing the necessary annexation proceedings under the quoted contract provision.

[1] The consistent course of conduct followed by the City before it attempted to abrogate the entire housing program makes clear that it agreed to annex the county island as a necessary step in the development of a project located in the City. *Woodbine v. Van Horn*, 29 Cal.2d 95, 104, 173 P.2d 17; *Davenport v. Davenport Foundation*, 36 Cal.2d 67, 73-74, 222 P.2d 11. That course of conduct, however, amounted to more than a practical construction of the contract between the parties; it also constituted an interpretation of the statutes upon which the contract was based. "'(T)he contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.'" *Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 921, 156 P.2d 1, 2 * * *." *Richfield Oil Corp. v. Crawford*, 39 Cal.2d 729, 249 P.2d 600, 604.

[2] We have concluded that the interpretation heretofore placed upon the statutes and contract by the parties is correct.

The Authority is not attempting to expand its territorial jurisdiction by developing a project outside of the City. It is seeking only to effectuate its purposes within the City. As pointed out by the City Planning Department, "Annexation, as proposed, would permit the consolidation of the housing program entirely within the limits of the City of Los Angeles, absorb an island which is presently located within the County of Los Angeles, surrounded entirely by the City limits of Los Angeles, and permit the construction of the necessary sewers to serve the residences within the proposed housing development which cannot be constructed if the narrow strip of County land is not annexed to the City of Los Angeles * * *."

It is now settled that the City has no right to abrogate the contract here involved or to withdraw its approval of the development and construction of these projects. "[H]aving taken the initial discretionary action to bring the housing authority into operation and having approved a project and entered into a cooperation agreement, there was nothing left to be done by either contracting party but to perform administratively whatever was necessary to carry the agreement into effect. * * * [T]he law enjoins upon the city the duty to perform the terms of the agreements entered into with the housing authority and to go forward with the exercise of the powers which it has agreed to undertake in cooperating with that authority." *Housing Authority v. City of L. A.*, 38 Cal.2d 853, 862, 871, 243 P.2d 515, 519, 524.

There is nothing in the statutes governing the territorial jurisdiction of the City and the Authority that permits the City to evade its duty pro tanto by departing from its established policy of annexing unincorporated islands. The Authority selected, and the City Council approved, a site selected in the City. To develop a project on that site it is admittedly necessary that the county island be annexed. Both the City and the Authority have power to do what is necessary to develop projects in the City, and the City has contracted to exercise such power when requested by the Authority to do so.

[3] Since the question of annexation was not specifically presented in the mandate proceeding, we are of the opinion that respondents should not be fined for contempt. Petitioner seeks no more at this time than to have respondents ordered to complete annexation of the county island. We may make such an order under section 1097 of the Code of Civil Procedure.

Respondents are ordered to comply with the writ of mandate heretofore issued by annexing the territory in question.

GIBSON, C. J., and SPENCE, J., concur.

CARTER, Justice (concurring).

I concur in the reasoning and the conclusion in the opinion prepared by Mr. Justice TRAYNOR that the action of the City Council of the City of Los Angeles in refusing to annex the strip of land (county island) embraced within the West Los Angeles Housing Authority Project constituted a violation of the agreement between the Authority and the City which the city was directed to perform by the writ of mandate issued by this Court in *Housing Authority v. City of L. A.*, 38 Cal. 2d 853, 243 P.2d 515, but I do not agree that no punishment should be imposed for the refusal of the City to obey said writ.

While I think there is no question that the contract between the City and the Authority clearly contemplated the annexation of land which might be considered necessary for the contemplated project, it is clear that under the factual situation disclosed by the agreed statement of facts in this proceeding, the City is estopped to deny annexation of the area here involved by its conduct which induced the Authority to believe that the annexation proceeding would be consummated and the Authority was therefore justified in acquiring the area.

There can be no question that the City has the power to annex the area in question under the Annexation of Uninhabited Territory Act of 1939, Gov.Code, § 35300 et seq. It is authorized to exercise that power in aid of the development of a housing project as the Housing Cooperation Law expressly provides that the City may "Do

any and all things, necessary or convenient, to aid and cooperate in the planning, undertaking, construction, or operation of" a housing project. H. & S. Code, § 34516. It is clear from the record before us that the plan and design of the present housing project contemplated the annexation of this small parcel of land which was entirely surrounded by territory within the boundaries of the City of Los Angeles, and there can be no doubt that the City Council had knowledge that the West Los Angeles site included the county island and that annexation of that island was contemplated. With this knowledge the City approved acquisition and use of the site for a housing project. In reliance on this approval the Authority acquired the property. The City Council on November 22nd, 1950, approved the proposal to acquire the site and the request of the Housing Authority relating thereto.

The Council's approval, however, was more than approval of the acquisition of the site, it was also an express concurrence in the Authority's plan to use the site for a housing project. But the matter did not rest there. After the Authority had proceeded with its design for the project to the point where the number and ground locations of the proposed project had been determined, it applied to the City Planning Commission for a conditional use of the site for a housing project. That application described the site as "*lying partly in unincorporated territory of the County of Los Angeles.*" It was also accompanied by maps and other data clearly showing the existence of this county island in the middle of the site, and the contemplated location on it of some of the buildings. It was also accompanied by a copy of the Authority's "Development Program" which embraced a narrative description of the proposed project. In it appeared the following statement: "It (the proposed site) is situated around a small slum area in the county owned by four private individuals. There should not be any difficulty in acquiring the county strip and annexing it to the City."

There can be no doubt that the Planning Commission was fully aware of this situa-

tion and of the necessity for annexation. It must, of course, be assumed that the Commission was familiar with the record upon which it acted. In addition, in the Planning Department's report approving and recommending this annexation, it is said with reference to the Commission's previous acts, that the Planning Commission had "approved the site for a housing project, which included the property under consideration (the county island)." Furthermore the sites selected by the Authority were reported to the City Planning Department, and on June 26, 1950, the Director of Planning reported on the compatibility of the West Los Angeles site with the City's zoning plan. With that knowledge the Planning Commission approved the Authority's application on April 26, 1951. On June 26, 1951, the City Council having before it all the data and exhibits which were before the Planning Commission, concurred in the latter's grant of a conditional use of the West Los Angeles site for a housing project. In its resolution of concurrence the Council recited that this site was "fully described in the application for a conditional use." The description referred to the site as "lying partly in unincorporated territory of the County of Los Angeles." This action of the City clearly indicated its approval of a housing project on the proposed West Los Angeles site. Such action was taken with full knowledge of, and without objection or exception to, the fact that a small part of the proposed site lay outside of the City, and it was taken after the Planning Commission and the Council had been told that acquisition of the property and its annexation were contemplated. In these circumstances there was ample justification for the Authority's belief that whatever was necessary and could be lawfully done to bring this county island into the City and, therefore, make it usable as part of the whole project, would be done. It was not until this action had been taken that the Authority bound itself to the acquisition of title to the county island.

It is clear that all of the elements of estoppel are present—with knowledge of the facts the officials of the City approved

acquisition of the site and its use for public housing, upon which actions the Authority relied in acquiring the property. Knowing that annexation was necessary to enable the Authority to use the site thus acquired for the Housing Project, may it not be said that a legal duty was imposed upon the City officials to consummate the annexation proceeding. Admittedly there is no legal barrier against such action—the City Council has the power to annex the area. Then why should the doctrine of estoppel not apply in such a case?

It has been said generally that a governmental agency may not be estopped by the conduct of its officers or employees, 10 Cal. Jur. 650-651, but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323; *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002; *Fresno v. Fresno Canal & Irrigation Co.*, 98 Cal. 179, 32 P. 943; *Sacramento v. Clunie*, 120 Cal. 29, 52 P. 44; *Brown v. Town of Sebastopol*, 153 Cal. 704, 96 P. 363, 19 L.R.A., N.S., 178; *Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547; *Sutro v. Pettit*, 74 Cal. 332, 16 P. 7, 5 Am.St.Rep. 442; *City of Los Angeles v. County of Los Angeles*, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 P. 189; *County of Los Angeles v. Cline*, 185 Cal. 299, 197 P. 67; *La Societe Francaise De Bienfaisance Muttuelle v. California Emp. Comm.*, 56 Cal.App.2d 534, 133 P.2d 47; *McGee v. City of Los Angeles*, 6 Cal. 2d 390, 57 P.2d 925; *Ernst v. Tiel*, 51 Cal. App. 747, 197 P. 809; *People v. Gustafson*, 53 Cal.App.2d 230, 127 P.2d 627; *Hewel v. Hogin*, 3 Cal.App. 248, 84 P. 1002. A few instances may be pointed out in which the justice of invoking estoppel is present as much or even less than here. In *Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547, the City of Los Angeles was held estopped to abandon eminent domain proceedings where, in reliance thereon, defendant property owner had acquired other property and constructed a building thereon. It was there said, (3 Cal.2d at page 330, 44 P.2d at page 557), "If the city had express-

ly agreed by its officers with defendants' grantors, even in parol, that a certain line should constitute the boundary line between the street and the grantor's property, and upon the faith of such agreement the grantors had erected a block of buildings flush with the line of the street, as agreed upon by all parties, it would be a hard law that would allow the city to repudiate that agreement, and destroy the grantor's property. No court should countenance such a thing, and an estoppel *in pais* will rise up in the pathway of a city, to bar it and its principal, the people, from the commission of such a grievous wrong; and, to give the acts of this city a very limited meaning, we think its conduct in the present case at least equivalent to an oral agreement as to the location of the true boundary line of the street." To the same effect, see *McGee v. City of Los Angeles*, 6 Cal.2d 390, 57 P.2d 925. In *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002, the city was estopped to claim property which it owned but said it did not and in reliance thereon the person who had been in possession thereof built a building on it. The same situation, except it was a canal through a city, was involved in *Fresno v. Fresno Canal & Irrigation Co.*, 98 Cal. 179, 32 P. 943. Land claimed by the city as streets was considered in *Sacramento v. Clunie*, 120 Cal. 29, 52 P. 44. In *City of Los Angeles v. County of Los Angeles*, 9 Cal.2d 624, 72 P.2d 138, a county was held estopped to collect from a railroad company additional payments for use of its land when it had been accepting certain payments for 15 years. In *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 P. 189, the city was held liable for water it received and was estopped to deny liability on the claim that its ordinance providing for payment was invalid. In *Tyra v. Board of Police etc., Com'rs*, 32 Cal.2d 666, 197 P.2d 710, it was held that the city was estopped to plead the statute of limitation in an action by an employee for a pension where the pension commissioners had erroneously told him he could not receive a pension while he was receiving workmen's compensation. *Baird v. City of Fresno*, 97 Cal.App.2d 336, 217 P.2d 681, is particularly applicable. It was there held that the

city was estopped, when a pension was claimed, to rely on the invalidity of its determination made many years before that its employee should be credited with 9 years of service with the city. Mention is made in some of these cases that where there is general power authorizing action by a governmental body in a particular field, the government may be estopped to assert irregularity in the exercise of that power. None of the foregoing authorities presents a clearer case for estoppel than the case at bar.

I desire particularly to call attention to the very pertinent language used by Mr. Justice Shenk in speaking for this Court in *Housing Authority v. City of Los Angeles*, 38 Cal.2d 853 at pages 869 and 870, 243 P.2d 515 at page 524. "In *Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547, the city of Los Angeles attempted to withdraw from and abandon condemnation proceedings to acquire land and properties of the *Times-Mirror Company* for use in a contemplated civic center. In the meantime the *Times-Mirror* had constructed a building on another location. The writ of mandamus issued in effect to prevent abandonment by the city of the pending condemnation proceedings by directing the respondent court to proceed with the trial of the condemnation action. The issuance of the writ was indicated by the application even as against the public body of the equitable doctrine of estoppel. This court, citing *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002, observed, 3 Cal.2d at page 330, 44 P.2d 547, that there are limits beyond which even a city in representing the rights of the public might not go. That and the *Cohn* case constitute authority that the court is not bound by precedent in determining what facts and circumstances compel the issuance of the writ but that the writ will issue as against a city or other public body or officer wherever law and justice require such action. The present matter involves more than equity and justice. As has been noted the statutory provisions impose the duty upon the city to perform the administrative acts contemplated by the state legislative action in a matter of state concern. The policy of that law is not a matter of ju-

dicial concern or control. Both the Congress of the United States and the legislature of this state have provided for the cooperative effort evidenced by the contracts between the city and the housing authority. Each of these entities as governmental agencies of the state was authorized to enter into the contracts here sought to be enforced as a public duty on the part of the city." The foregoing is particularly applicable here as it correctly applied the doctrine of estoppel rule of the Times-Mirror Co. and Cohn cases to the factual situation then before this Court which is identical with that disclosed by the record now before us.

The record in this case presents a sordid picture of political intrigue and chicanery and resort to fine-spun legal theories on the part of a majority of the City Council of the City of Los Angeles to abrogate its contract with the Housing Authority and thus obstruct, delay and defeat the housing project contemplated by said contract. A narration of the official acts contained in the "Stipulation of Facts re Contempt" and the briefs of counsel should demonstrate to any unprejudiced mind that after December 4, 1951, a majority of the City Council undertook to wreck and destroy the Housing Project here involved. The following appears without contradiction: On September 14, 1951—only two days after the Authority had acquired title to all of the county island, and, therefore, as soon as it could do so without affecting the interests of private owners in the area—the Authority requested the Council to annex this county island pursuant to the Annexation of Uninhabited Territory Act of 1939. That request expressly directed attention to and quoted the provisions of paragraph 7 of the cooperation agreement relating to the City's promise to cooperate with the Authority by "such other lawful action or ways as the Authority may find necessary in connection with the development and construction of the Project"; stated that this county strip should be annexed to the City; and requested that the necessary proceedings be taken to accomplish that result.

Promptly upon receipt of this request the Council began the processing procedure customarily followed in such matters. The

first step was to refer the matter to the Coordinating Board of the City of Los Angeles, composed of representatives of various of the City's departments and of which the City Director of Planning is Chairman. That Board received reports on the annexation question from: the Street Widening and Opening Division of the Department of Public Works; the Board of Public Utilities and Transportation; the Health Department; the Planning Department; and the Department of Water and Power. Each of these departments approved and recommended annexation, several of them pointing out that annexation of county islands was in keeping with the City's policy of absorbing them and creating regular boundary lines. Accordingly, on October 11, 1951—less than a month after the Authority's request—the Coordinating Board made its report to the Council unanimously recommending and approving the proposed annexation.

The Council referred this report to its Planning Committee. That Committee reported back on October 24, 1951. The Committee's report stated that the Coordinating Board had recommended annexation "as requested by the Los Angeles Housing Authority"; and had advised "that the annexation of this strip would conform to the City's policy of absorbing county islands, thereby creating a more regular city boundary line * * *." Approval of the proposed annexation was, therefore, recommended in accordance with the Coordinating Board's recommendation. On November 14, 1951, the Council adopted the Committee report and ordered preparation of a Resolution of Intention under the Annexation of Uninhabited Territory Act of 1939.

Between November 14 and November 29, 1951, the City Attorney prepared the Resolution of Intention and transmitted it to the Planning Department. That department approved the resolution on November 29, 1951. On December 4, 1951, the City Attorney transmitted it to the Council and the Council referred it to its Planning Committee. There it rested until after the rendition of this Court's original decision in the instant cause.

On July 21, 1952, the Planning Committee reported the resolution out to the Council, but a motion to adopt it failed. On the following day that action was reconsidered and the matter postponed to August 1, 1952. The Council, however, failed to meet on the latter day for want of quorum. On August 4, 1952, another motion to adopt the resolution of intention failed. This action was also reconsidered on the next day and the matter postponed to August 15, 1952. On that day the Council amended the proposed draft so as to recite that the reason for the annexation was the compulsion of this Court's mandate and the desire of the Council to comply "in the event it should be judicially determined that compliance therewith requires annexation of this territory." The resolution was further amended by changing the date of public hearing from September 4 to September 19, 1952.

The public hearing called for by the resolution of intention was held on September 19, 1952. No protests, oral or written, against the proposed annexation had been or were received. The Council then ordered preparation of an ordinance approving annexation. That was done and the ordinance was introduced for adoption on September 25, 1952. Unanimous consent to act on it that day was requested and refused, respondent Harby objecting. The ordinance was, therefore, laid over one week. Then ensued a series of attempts to procure adoption of the ordinance. All of them failed, the only action which the Council would take being further postponement to November 10, 1952. In the meantime the application for a writ of certiorari had been denied on October 13, 1952, so there was no longer any basis for delay on the ground of the pendency of that proceeding.

This refusal to annex a small, contiguous uninhabited county island, annexation of which had been recommended and approved by all City departments concerned, and to which there is no public protest, is unprecedented in the history of the City. Not one request for such an annexation—and there have been some thirty-four of them from private owners and from government-

al agencies—has been refused since enactment of the Annexation of Uninhabited Territory Act of 1939. The City's policy was always to annex and absorb such islands in order to create more regular city boundaries.

The decision of this Court ordering the issuance of a peremptory writ of mandate was filed on April 28, 1952, 38 Cal.2d 853, 243 P.2d 515 and the writ was issued on June 27, 1952, after one stay had been granted and another refused by this Court and by a Justice of the United States Supreme Court. Decision of the cause brought no immediate change in the respondents' attitude, notwithstanding that at the hearing on the mandate petition the Court was told by the City Attorney that all that was needed or wanted by respondents was a determination of the basic question of the City's duty to proceed with performance of the cooperation agreement. The same attitude of defiance and refusal to act which compelled the Authority to apply for mandate in the first instance persisted even after that determination had been made. As a result, no substantial action in aid of the projects was taken, although there were then pending previously filed requests for cooperation by way of street closing, inspection and review of plans and specifications, conveyance of tax-deeded lands, and annexation of the West Los Angeles county island.

This attitude on the part of the City Council was not merely the result of holding matters in suspense pending action on the application to the United States Supreme Court for a writ of certiorari. It was rather an attitude prompted by a refusal to accede to and comply with the writ of mandate. That is best shown by a resolution, adopted by the Council on June 25, 1952 (one month after this Court's decision had become final and two days after a further stay had been refused) in which it was said:

"* * * this Council action constitutes notice to all persons and parties, including the Mayor; the City Housing Authority, its officers and agents, that this Council will resist any efforts

at furtherance of the public housing program * * *."

It is further shown by the continuous efforts of respondents to effect abandonment of that program, notwithstanding the judgment of this Court. Thus, the Council persisted in holding an election on that question, even though on several occasions the City Attorney informed this Court that decision of the basic question would settle that issue too. Again, on May 7, June 19 and June 20, 1952, the Council formally requested the state Legislature and the Congress to enact legislation permitting abandonment or cancellation of the program.

It is interesting and significant to contrast the expeditious way in which this matter was handled before December 4, 1951, with the tortuous, delaying actions of the respondents after that time. Of course, before December 4, 1951, respondents were cooperating in good faith in the common objective of developing and constructing these projects. After that time, and notwithstanding this Court's mandate, they were doing their best to prevent accomplishment of that objective.

It has been aptly said: "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." 48 Harv.L.Rev. 1299.

Frankly, I am not impressed with the contention of any of the respondents that their refusal to cooperate with the Authority by consummating the annexation proceeding was motivated by a conscientious desire to perform his official duty. The duty to cooperate cannot be distorted into a power to frustrate. The mandate issued by this Court was clear and unambiguous. Any person who honestly desired to comply with it would have cooperated in consummating the annexation proceeding and thus enable the Housing Authority to complete its project. I cannot, therefore, see any justification for the tortuous, delaying, and frustrating actions of respondents as disclosed by the record before us.

It is my opinion, therefore, that those respondents who have refused to cooperate in consummating the annexation proceeding here involved, have wilfully violated the mandate of this Court issued on June 27th, 1952, in the original mandamus proceeding, and that an appropriate fine should be imposed upon each of them for this violation.

SHENK, Justice (dissenting).

I dissent.

It is a fundamental principle of law that a municipality may not contract away its legislative functions without authority from a competent superior power. Here the legislature has authorized a municipality in this state to surrender certain legislative discretion with reference to public housing to the will of a housing authority of that city. This may be done on certain conditions which are: that the housing authority be first created by the city; and secondly, that a contract of cooperation be entered into between the housing authority and the city with reference to public housing. Those conditions have long since been met in this case; and it has been established by prior decisions of this court that the city has thereby surrendered its legislative discretion to the city housing authority in matters concerning which it is competent for the housing authority to proceed, and that it is the duty of the city to cooperate with the housing authority concerning such matters.

But it is not the law and it cannot rightly be held that the city may be compelled to cooperate with the housing authority in matters concerning which it is beyond the power of the housing authority to undertake. That is what the majority opinion is directing the city to do. The city housing authority has no jurisdiction to conduct housing operations outside of the limits of the city, whether the territory be large or small. The jurisdiction in that territory, under the statute, is within the exclusive jurisdiction of the existing county housing authority. That authority is not a party to this proceeding and its jurisdiction over the territory sought to be annexed cannot, under these circumstances, be taken away

by the conduct of the city or of the city housing authority on any theory. Estoppel does not reach it. That theory is a false quantity in this case. It is an equitable doctrine available only to a party who is in a position to rely upon and assert it. It cannot be employed in this case as a means to confer jurisdiction on the city housing authority to operate in county territory; a power which is denied to it by the statute and is therefore wholly lacking.

What the majority is here doing is to compel the city to surrender its legislative power to decide whether or not to annex county territory (a conceded legislative power) to the discretion of the city housing authority in a matter over which that housing authority has no jurisdiction. This it should not be required to do. The cooperation of the city in this particular matter should come only from the voluntary action of the city in the exercise of its still retained and unsurrendered legislative discretion and power to annex contiguous unincorporated territory.

The question presented in this case is of great importance in the conduct of public housing operations in this state and I am disposed to elaborate rather fully on my views concerning it.

As indicated in the majority opinion this is a proceeding to have it adjudged that the members of the city council of the city of Los Angeles are in contempt for their alleged failure to comply with the provisions of a peremptory writ of mandate issued by this court on June 27, 1952. The history of the controversy is contained in the opinion filed April 28, 1952, 38 Cal.2d 853, 243 P.2d 515; certiorari denied Oct. 13, 1952, 344 U.S. 836, 73 S.Ct. 46. The proceeding in which that opinion was filed and the peremptory writ was issued will be referred to as the mandate proceeding.

The purpose of the mandate proceeding was to test the validity of the city's action of December 26, 1951, attempting to abrogate, cancel and rescind the agreements authorized by Ordinance No. 95,222 adopted on August 8, 1949. That ordinance indicated the approval by the city of the construction of a ten thousand unit low rent housing project in cooperation with

the Housing Authority of the City and the Public Housing Administration of the United States pursuant to the State Housing Authorities Law and Housing Cooperation Law, Secs. 34200 et seq. and 34500 et seq., Health & Saf.Code. In that proceeding the Housing Authority successfully sought to have this court declare invalid the attempted withdrawal of the city's approval of the project and the attempted cancellation of agreements, and to compel the city to perform the acts required by the cooperation and other agreements entered into by it with the Housing Authority for carrying out the contemplated project.

In the mandate proceeding this court determined that since the City had approved the project, and the Housing Authority and the Public Housing Administration had made binding contractual commitments and advances in respect to the project the city was without power, in the absence of express statutory authority, to withdraw its approval or to abrogate its agreements, but was under the statutory duty to perform them. In summarizing the duty enjoined by the statute upon the City it was said, 38 Cal.2d at page 871, 243 P.2d at page 524: "It is concluded that the law enjoins upon the city the duty to perform the terms of the agreements entered into with the housing authority and to go forward with the exercise of the powers which it has agreed to undertake in cooperating with that authority. On this record a direction that the city so proceed will afford the relief expedient to accomplish the purpose of the proceeding. It is of no concern that the mandate does not issue directing the specific powers to be exercised—since in many respects the details thereof are subject to the discretionary cooperative action of the city. The city does not contend that it will not go forward with the performance of the contracts if under the law it had no right or power to rescind the approval of the project or to cancel and abrogate the agreements." Thereupon the order of the Court required the issuance of a writ of mandate "directing the respondents to perform the terms of the agreements entered into with the petitioner and to proceed in the fulfillment of its obligations thereunder."

In the present proceeding the Housing Authority alleged various particulars as to which it was claimed the city had agreed to take action and as to which it had failed and refused to proceed, all in violation of this court's order in the mandate proceeding. An order was issued directing the individual members of the City Council to show cause why they should not be adjudged in contempt of this court for failing, neglecting and refusing to obey the peremptory writ of mandate issued on June 27, 1952, wherein they were ordered and commanded to perform the terms of the agreements entered into with the Housing Authority and to proceed in the fulfillment of their obligations thereunder.

It is at once apparent that the basis for any charge and finding of contempt herein must be the failure and refusal of the city to perform an act which under the statute it may lawfully agree to perform and which by agreement it has bound itself to perform in the cooperative undertaking. On the return to the order to show cause it was stipulated that the city had completed performance of a separate written agreement to acquire and convey to the Housing Authority tax-deeded lands within the eleven sites selected for the construction of the project; and had vacated and closed streets and alleys in those areas as provided in the cooperation agreement. The only charge remaining to be considered on the return is the alleged failure of the city to complete annexation proceedings for the purpose of including in the site selected for the West Los Angeles (Cal. 4-21) project a county strip entirely surrounded by incorporated territory—a so-called unincorporated or county "island." As alleged good cause why it should not be compelled to complete the annexation proceeding the City Council contends that the Authority has no power to proceed in respect to unincorporated territory; that the statute does not authorize, nor has the city entered into an agreement for the annexation of unincorporated territory, and that the acts of the City Council with reference to the annexation thereof commenced heretofore may not be held to estop the city from denying such authorization or agreement.

The facts relating to the alleged failure to complete the proceeding to annex the county "island" in the West Los Angeles, Cal. 4-21 project, are stipulated. The record shows the following undisputed facts:

As noted, Ordinance No. 95,222 approving the 10,000 unit low-rent housing project was adopted on August 8, 1949. Prior to that time, and from 1938, there existed and there still exists both a Housing Authority of the city of Los Angeles and a Housing Authority of the county of Los Angeles. In the Cooperation Agreement approved by the ordinance, the Housing Authority of the city of Los Angeles agreed to undertake, develop and administer the low rent housing project on sites to be selected by the authority in the city of Los Angeles. The city agreed to cooperate with the authority by vacating streets, by accepting dedication of land for new streets, by zoning or re-zoning areas to appropriate classifications, and "by such other lawful action or ways as the Authority may find necessary in connection with the development and construction of the Projects."

On August 17, 1950, the Housing Authority advised the city council concerning the sites that had been selected, with tentative names of each site including the West Los Angeles area, Project Cal. 4-21. Project site maps accompanied the letter, but the map of the West Los Angeles area did not designate the strip in controversy as county territory. On November 16, 1950, in a letter to the Veterans' Affairs and Housing Committee the Housing Authority requested that its proposal to acquire the land indicated in the selected sites be approved by the City Council. The map of Cal. 4-21 project accompanying this letter showed the 43 acre project bisected by a strip of unincorporated territory comprising about six acres, or as stipulated a strip approximately 150 feet wide by 1200 feet long.

On November 22, 1950, the city council approved and adopted a report of its Veterans' Affairs and Housing Committee concerning the eleven proposed sites. The report recommended approval of the Authority's proposal to acquire the sites conditioned on the awareness that cooperative

action affecting construction, planning, zoning, and the opening and closing of streets would be involved. In April 1951, when the authority was in the process of acquiring land in the site, it applied to the City Planning Commission for conditional use permits. For the first time a surveyor's legal description of the West Los Angeles site boundaries expressly delineated the project as lying partly in unincorporated territory of the county and partly within the city. The accompanying architectural plans showed sixty-two residential buildings, four of which were to be wholly located in the unincorporated strip and six partly so. A copy of the Housing Authority's development program for that project for submission to the United States Public Housing Administration also accompanied the application. In that program it was stated by the Housing Authority that the proposed West Los Angeles site was situated around a small county slum area in a strip containing four parcels which should not be difficult to acquire and annex to the city. On June 26, 1951, the Planning Commission granted the application for the conditional use permit. In subsequent private negotiations consummated on September 12, 1951, the authority acquired the title to the four parcels and now holds the strip as uninhabited county territory.

On September 14, 1951, the authority requested the city council to take proceedings on its own motion to annex the county strip. In doing so the authority expressly invoked the language of the Cooperation Agreement whereby the city agreed to cooperate with the authority "by such other lawful action or ways as the Authority may find necessary in connection with the development and construction of the project." On September 20th, the council referred the request to the City Coordinating Board, which in turn received reports from various city departments. The Coordinating Board reported back to the council on October 11, 1951, recommending annexation of the county strip. The council on October 24, 1951, referred the authority's request to its Planning Committee, which on the same day reported back to the council. On November 8, 1951, the Boundary Commis-

sion of the county approved a description of the county strip. On November 14th the council adopted the Planning Committee report which recommended (1) annexation as conformable to the city's policy of absorbing "county islands" to create a more regular city boundary line; and (2) that the city attorney be instructed to present the necessary Resolution of Intention pursuant to the Annexation of Uninhabited Territory Act of 1939. The city attorney prepared the draft of a resolution which was presented to the City Planning Commission and approved by it on November 29, 1951. On December 4th, the city attorney transmitted the draft to the city council which in turn referred it to its Planning Committee.

As shown in the opinion filed in the mandate proceeding, the city council attempted to withdraw the approval of and to abrogate the various agreements relating to, the housing projects covered by Ordinance 95,222; and the question of the city's power to do so was litigated to the ultimate determination indicated. Thereupon, on July 21, 1952, at the request of the city council, the Resolution of Intention in the annexation proceeding was reported out of the Council's Planning Committee and its adoption moved. The motion failed of passage. On July 22nd, the council voted to reconsider its action. A motion to postpone action to August 1, 1952, was adopted by a majority vote of eight. On August 1st, there was no quorum. On August 4th, with a quorum present, a motion to approve the resolution failed of passage. On August 5th, the council again reconsidered its action and a motion to postpone to August 15th was adopted by the vote of eight councilmen. On August 15th the council, with a full membership present, amended the resolution to include a change in the hearing date and unanimously adopted it as amended. A public hearing was held on September 19, 1952. No one protested the matter and the city attorney was directed to prepare an ordinance approving the annexation. On September 25, 1952, the ordinance was introduced for adoption. The required vote failed. On October 2nd, motion for adoption again failed of passage.

A motion carried to continue consideration to October 16, 1952. On the latter date, by the vote of eight councilmen, a motion was adopted to continue the matter to October 20th. There was no quorum on October 20th, and on October 21st the matter by the same vote was continued to November 10th.

On November 6, 1952, the city made its return to the order to show cause in this contempt proceeding. The issues are submitted on the return, the record including the stipulated facts, and the arguments and briefs of the parties.

The contention that neither the Authority nor the city had any extraterritorial power and that the City Housing Authority may not operate in county territory is unquestionably correct. In fact, the parties concede that the City Housing Authority may not develop any portion of the project construction program in county territory in the circumstances of the present case.

Both the authority and the city, in relation to low-rent housing project developments, are governed by the Housing Authorities Law and the Housing Cooperation Law. Under the statutes they are operating as arms of the state in a matter of state-wide concern. This status and the controlling effect of the statutes were settled by this court's decision in the mandate proceeding. There it was said, 38 Cal.2d at page 862, 243 P.2d at page 519: "Each functioning body, the city and the housing authority, is a separate body politic vested with specific duties and powers under the Housing Authorities Law and Housing Cooperation Law to effect a state objective. Neither is functioning independently of that state law. In pursuing the state objective each is governed by the state law and neither may exercise powers not vested or recognized by that law. The city and the housing authority function as administrative arms of the state in pursuing the state concern and effecting the legislative objective. * * * Upon the formation of the housing authority the state law thereupon and thereafter controlled the city and the housing authority and no other law concerning the acquisition, operation or disposition of property is applicable to the au-

thority except as specifically provided. § 34320, Health & Safety Code. * * * [The City] having approved a project and entered into a cooperation agreement, there was nothing left to be done by either contracting party but to perform administratively whatever was necessary to carry the agreement into effect. *Kleiber v. City and County of San Francisco*, supra, 18 Cal.2d 718, 724, 117 P.2d 657; *Housing Authority v. Superior Court*, supra, 35 Cal.2d 550, 558, 219 P.2d 457."

True, as the text continues, the city may not refuse to cooperate in the ways that the statute and the agreements require. But this is not to say that either the statute or the cooperation agreement requires the city to cooperate with reference to an operation by the City Housing Authority in territory outside of the city which the authority had no power to initiate.

Section 34208 of the Health and Safety Code defines the "Area of operation" of a city authority and a county authority. That section provides that the "Area of operation" of a city authority does not include any area which lies within the unincorporated area of any county for which an authority has been authorized to transact business. At all times here involved the Los Angeles County Housing Authority has been and is in existence and authorized to transact business. By section 34209, the "Area of operation" by a county authority includes all of the county except the area within the territorial boundaries of any city for which an authority has been authorized to transact business. In the absence of a county authority, the "Area of operation" of a city housing authority includes the city and the area within five miles of its territorial boundaries. Thus it may be assumed that if there were no county authority annexation would be unnecessary to give jurisdiction to the City Housing Authority to initiate operations in the county strip in question.

It must be clearly apparent that the powers given in the matter of cooperation relate, as specified in section 34509 of the Health and Safety Code, to "housing projects located within the area" in which the public body is authorized to act under the

statute. As bearing on the city's duty to annex territory the Housing Authority relies on section 34514. That section provides that any city "may change its map." But since there is neither power nor requirement that the Housing Authority operate outside the territorial confines of the city but in fact is prohibited from doing so, the provision does not imply a duty to annex territory as cooperation on the part of the city.

It was made clear in the opinion filed in the mandate proceeding that the city may agree to conduct authorized proceedings involving the legislative function, such as for the opening and closing of streets within the city, which may be necessary or desirable in the completion of a project, and that such authorized proceedings pursuant to agreement come within the category of the administrative acts indicated by the statute as desirable in the consummation of the state objective. See *Op.*, 38 Cal.2d at page 868, 243 P.2d 515.

The Housing Authority contends that the city has made an agreement to annex such county territory as the authority finds necessary for inclusion in the city housing project. The authority points to the quoted language of the cooperation agreement whereby the city agreed to cooperate "by such other lawful action or ways as the Authority may find necessary in connection with the development and construction of the project." This provision in the agreement refers to matters as to which the authority may lawfully make the decision of desirability or necessity. Here the matter of including county territory in a city housing project is in the first instance a question for submission to the city council for its determination as to necessity or desirability. The authority may not be deemed to have the power of direction to the city council as to what territory should be annexed to the city. Nor in any event may the city by agreement surrender that power in the absence of express statutory authorization. If as here a county authority is in existence, that authority has jurisdiction in the county territory. And the city is the body to determine in this instance, as in the initial determination of the ne-

cessity for a city housing authority, what territory should be added to the city for the purpose of the operations of the city housing authority. The court will not read into the statute an implied surrender of the city power to make the determination of desirability for the annexation. Since the statute does not authorize such surrender, the question of contractual obligation becomes immaterial. It follows that since the city does not have the power to surrender its discretion in the matter involved, and the authority does not have the right to make the determination for the city, there can be no conduct on the part of the city which will confer either.

The case of *Times Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547, is inapplicable. In that case both the private corporation and the city of Los Angeles were performing acts within their respective rights and powers. Here we are concerned with two public bodies, each of which is controlled by express statutory provisions as to the powers and rights which each may exercise. There is no injury to the authority by the claimed deprivation of a right which it does not have, and which in fact the city could not confer under the statute. There is no justice nor equity in favor of the authority within the meaning of the decisions upon which it relies. Estoppel may not be invoked when the statute is the measure of the power. *County of San Diego v. California Water etc. Co.*, 30 Cal.2d 817, 822, 186 P.2d 124, 175 A.L.R. 747. As in the cited case, there is in this instance no appropriate statutory authority pursuant to which an agreement as invoked by the authority could be made by the city. Consequently no legal duty of annexation has arisen. Whatever action has been taken by the city departments and the city council in connection with the proposed annexation must be deemed to be no more than acts in the determination that annexation might be desirable and should be accomplished.

In my opinion this court has no proper function to perform in the present proceeding either to direct the city council to cooperate by annexing the territory designated by the housing authority, or to hold

the members of the city council in contempt for not so cooperating. I would dismiss the proceeding.

EDMONDS, J., concurs.

SCHAUER, Justice (dissenting to opinion by TRAYNOR, J.)

I did not concur in the reasoning or the result in the preceding mandate proceeding (*Housing Authority v. City of Los Angeles* (1952), 38 Cal.2d 853, 243 P.2d 515) and I do not agree with any implication therein or in either the majority opinion or Justice SHENK'S dissent herein that the people (whether by direct vote, or through their governmental representatives, the city councilmen) may by contract irrevocably bargain away their legislative prerogatives. The right of the people to legislate whether by initiative or through elected representatives is the right of self-government. It means freedom instead of subservience to a master. The right to legislate must include the right to augment, to repeal and to amend as well as to enact. And the right of a city as a legal entity to contract should, as in the case of any other individual, natural or corporate, include the right to rescind on equitable grounds, or to breach and be subject to a suit for specific performance or to an action for ensuing damage liability.

The City of Los Angeles and the Housing Authority of the City of Los Angeles are, respectively, separate corporate entities. They entered into a contract and a dispute has arisen between them as to the performance of that contract. Their reciprocal rights and obligations and liabilities should be determined by the same judicial processes and by the same general laws as are applicable to other contracting parties.

The holding in the preceding mandate proceeding is in my view inherently contrary to sound public policy and in some re-

spects I think it trenches on our most fundamental governmental and political institutions. I think that inevitably, if the theory that the people can by contract irrevocably surrender to an entity their right to legislate or otherwise govern themselves is persisted in and expanded (as politicians and sometimes courts are wont to do with attractively garbed theories) this seemingly isolated departure from accepted standards and procedures can prove to be a sorry breach in our constitutional dike.¹ But since the judgment in that case has become final, whether I like it or not, if it has any validity at all, it must be accepted and dealt with insofar as it clearly controls. However, assuming some area of validity and no disposition on the part of any of the justices to sap fundamentals, the judgment definitely should not be extended in implications or to ends which appear to be obnoxious to constitutional enterprise or which would transgress both democratic and republican concepts of the permissible functions of government.

If I assume for the prior judgment the full scope of validity, and give it all the virtue which its learned and respected author attributes to it, then I agree with that author as he dissents today in protest against the monstrosity which has been made of his opinion. That the mandamus opinion as construed and applied by the majority here seems monstrous to its author is evidenced by his dissent. That it should be so regarded by any lover and defender of our traditional constitutional processes is to me made apparent by the majority and concurring opinions. Such opinions, directly or impliedly, hold that:

a. The members of the council of the city of Los Angeles, although elected by the citizens as their representatives, have by contract with a corporation abdicated all legislative power within the field of the contract.

1. That the theory is already being expanded is made evident by the fact that the majority today, over the formal dissent of Mr. Justice SHENK who authored the mandamus opinion, are construing and applying the basic opinion

to enforce acts not contemplated by its author and believed by him to be unlawful because related to property beyond the territorial jurisdiction of either of the contracting parties.

b. Within the contractual field the councilmen are bound to consider not the interests or will of the people but instead to obey implicitly the command of the contracting corporation.

c. The contract is irrevocable on the part of the citizens. Hence, the corporate dynasty has perpetual power.

d. The territory affected is not confined to the city of Los Angeles. The contracting and subservient city may be compelled to annex territory from other jurisdictions. (Whether the area of annexation may extend beyond county or state or national lines is not stated.)

e. If the councilmen dare to respect the will of the people who elected them, and disobey the orders of the corporate master, they shall be fined or imprisoned.

f. Within the field of contract the city must perpetually "co-operate" with the contracting corporation. And "co-operate," as used by the majority, means implicitly obey.

It is regrettable that in the affairs of men good ends are sometimes sought by unwise means. Here, no one questions the desirability of better housing in place of poorer housing; certainly, better housing is a desirable end. But to alert defenders of the hard won constitutional freedoms no betterment of housing can justify a means which exchanges a city's—or a person's—freedom for subservience in a substantial area of government.

Whether we agree with the original mandate judgment or not, this proceeding should be dismissed.



40 Cal.2d 732

**PEOPLE ex rel. SKELLY v. CITY OF
GLENDALE.
L. A. 22500.**

Supreme Court of California, in Bank,
April 24, 1953.

Quo warranto proceeding to contest validity of annexation of certain districts to mu-

nicipal corporation. The Superior Court, Los Angeles County, Daniel N. Stevens, J., gave judgment for defendant, and plaintiffs appealed. The Supreme Court, Shenk, J., held that publication of notice of annexation election complied with statutory requirement that such notice must be published at least once a week for the four weeks prior to election.

Judgment affirmed.

Schauer and Carter, JJ., dissented.

Prior opinion, 250 P.2d 635.

1. Municipal Corporations ¶34

Under statute requiring publication of notice of annexation election at least once a week for the four weeks prior to election, the weeks designated must be the four successive periods of seven days each next preceding election and notice must be published at least once in each of such weeks. Government Code, § 35123.

2. Municipal Corporations ¶34

Publication of notice of annexation election on four consecutive Thursdays next preceding Tuesday election met statutory requirement that notice of such election must be published at least once a week for the four weeks prior to election, though 28 days did not elapse between first publication and election. Government Code, § 35123.

Edmund G. Brown, Atty. Gen., Kenny & Morris, Edward J. Skelly and Robert W. Kenny, Los Angeles, for appellant.

Henry McClernan, City Atty., John H. Lauten, Asst. City Atty., Glendale, O'Melveny & Myers, James L. Beebe, Sidney H. Wall and Bennett W. Priest, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the defendant City of Glendale in a quo warranto proceeding which questions the validity of the annexation to the city of certain outlying districts under the Annexation Act of 1913.

For the purpose of the appeal the parties have stipulated to the facts, from which it appears that on October 18, 1951, the council of the city adopted a resolution de-

claring its intention to call special elections in each of three districts to determine whether they should be incorporated within the boundaries of the city; that on November 10, 1951, the council duly adopted three resolutions ordering the special elections to be held within the districts on December 11, 1951; that notices of the three elections were published in a proper form and in a proper newspaper on the four Thursdays (November 15th, 22nd, 29th, and December 6, 1951) next preceding the elections held on Tuesday, December 11, 1951; that the vote was in favor of annexation by a majority in each district; and that since January 28, 1952, the city has extended its government and control over each of the three districts as parts of the City of Glendale.

The plaintiff urges that the annexation proceedings are invalid because the provision of the Annexation Act of 1913 which requires publication of notices of elections imposes a jurisdictional requirement which was not complied with. The pertinent language of this provision is set forth in Section 35123 of the Government Code as follows: "The city legislative body shall cause notice of the election to be published at least once a week for the four weeks prior to the election, in a newspaper of general circulation * * *." The plaintiff contends that the quoted language requires that a full period of four weeks, totaling twenty-eight days, must elapse between the first publication and the date of the election. In the present case there was a total of twenty-six days between the publication of the first notice and the date of the election. The defendant contends, and the trial court held, that the statute requires that notice be published once in each of the four weeks prior to the election and that it is sufficient if the publications are made on any day of the respective week.

The result reached by the trial court appears to be supported by the decisions of this court. *Fostler v. City of Los Angeles*, 1918, 179 Cal. 263, 176 P. 438, 439, involved the forerunner of this same statute. Notice of an annexation election at that time was required to be published "at least once a week for a period of four successive weeks

next preceding" the election. The notice was published five times at weekly intervals and the election was held three days after the last publication. In holding the election valid the court stated, 179 Cal. at page 264, 176 P. at page 439: "The notice was published once a week for five weeks, and the last date of publication was within one week of the date of the election. This was sufficient. * * *" By a parity of reasoning a publication "within" a week of the date of the election would be a sufficient publication for the week next preceding the election. Since the statute required publication for "four successive weeks next preceding" the election, the first publication which occurred more than four weeks in advance of the election would not appear to be a publication meeting statutory requirements. The remaining four publications took place within a period of 24 days prior to the election. The publication requirement was held to be sufficient. In the present case four publications took place within a period of twenty-six days prior to the election.

The conclusion of the trial court is also supported by the decision of this court in *City of Lindsay v. Mack*, 1911, 160 Cal. 647, 117 P. 924, 925, where the construction of language similar to that in Government Code Section 35123 was required. There the Municipal Bonding Act, St.1901, p. 27, stated that an ordinance calling an election for the authorization of bonds should be published "once a week for two weeks * * * and one insertion each week for two succeeding weeks shall be a sufficient publication * * *." The court held that the statute did not require that fourteen days elapse between the publication of the first notice and the date of the election and that an election held on the 26th of the month after publication of notices on the 14th and 21st of the month was valid.

The plaintiff would distinguish the *Lindsay* case on the ground that the statute there under consideration was a "number of insertions" statute whereas the present case, it is claimed, is one concerned with the duration of the publication of the notice. If "'one insertion each week for two succeeding weeks'" refers only to a spe-

cific number of insertions, then a publication "once a week for the four weeks" must likewise have reference to a specific number of insertions. Both provisions require that a specified number of notices be published during a designated period of time.

The plaintiff attaches considerable importance to the use of the word "for" and argues that the word "in" would have been used had the legislature intended the construction given the statute by the trial court. The statute in that event would have read, "once a week in the four weeks prior to the election." In the *City of Lindsay* case the court construed the requirement of one insertion each week "for two succeeding weeks" to mean an insertion in or during each week. Moreover, speculation that the statute might have been framed more clearly to state the defendant's position is not significant in view of suppositions that the plaintiff's position could have been more clearly stated as well. For example, Section 6064 of the Government Code, not applicable here, provides that "Publication of notice pursuant to this section shall be once a week for four successive weeks. * * * The period of notice commences upon the first day of publication and terminates at the end of the fourth week thereafter."

The plaintiff relies upon two cases which, it is asserted, construed language similar to that of Government Code, Section 35123, contrary to the trial court's decision herein. In *County of Los Angeles v. Payne*, 1927, 82 Cal.App. 210, 255 P. 281, 282, the County Water Works District Act, Gen.Laws, Act 9123, provided that notice for a hearing of a petition for the formation of a district shall be "published at least once a week for two consecutive weeks * * *." The District Court of Appeal held that a publication on a particular day would constitute a publication for the following seven day period, and that it required an elapsed period of fourteen days following the first publication to meet the requirements of the statute. In *Secombe v. Roe*, 1913, 22 Cal.App. 139, 133 P. 507, a provision in a deed of trust stated that notice of a sale thereunder was to be published "at least

once a week for four successive weeks." The court held that a sale could not properly take place until twenty-eight days had elapsed after the first publication.

[1] Those cases are distinguishable. Neither contained language to indicate, with relation to the event noticed, the particular weeks in which the publication was to take place. The only requirement was that the weeks be "consecutive" or "successive." Under these circumstances the court in each case took the view that the day of publication established the beginning of the week. But in the present case Section 35123 establishes the particular weeks. It calls for publication "at least once a week for *the* four weeks prior to the election". (Emphasis added.) It is clear that the weeks designated must be the four successive periods of seven days each next preceding the election. At least once in each of *these* weeks the notice must be published. In the *Payne* and the *Secombe* cases the courts were called upon to determine in which week the publication of a notice was effective. In the present case that determination is precluded by the language of the statute.

Neither of those cases made reference to the similarity of the language in the *Lindsay* case and in neither was a hearing sought in this court.

Both parties rely upon the decision in *Early v. Doe*, 1853, 16 How. 610, 57 U.S. 610, 14 L.Ed. 1079. A statute in that case required the publication of a notice "once in each week, for at least twelve successive weeks." The Supreme Court held that "when the legislator has used the words, for at least twelve successive weeks we cannot doubt that the words, at least as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks, or eighty four days." However, the court made it clear that the significant words were "at least." In speculating on the omission of those words from the statute, the court stated: "We do not doubt if the statute had been 'once in each week for twelve successive weeks' * * * that it might very well be concluded, that twelve notices in different successive weeks, though the last insertion of notice for sale

was on the day of sale, was sufficient." In the present case the statute requires publication "at least once a week for the four weeks". The "at least" has reference only to the number of publications in each of the four weeks and does not set a minimum period of at least four weeks between the first publication and the event noticed. The statute is of the nature supposed by the Supreme Court in its hypothetical case. Furthermore, the language used in the Early case required publication for twelve "successive" weeks rather than for the twelve weeks prior to the event noticed, a distinction previously shown to be significant.

[2] No sufficient reason has been advanced why the decisions of this court in the Foster and the City of Lindsay cases should be departed from. The language of the present statute furnishes at least as strong grounds for upholding the election thereunder as in those cases. We therefore conclude that the statute has been complied with.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I would reverse the judgment. The elections here questioned were special elections. It is fundamental that in special election proceedings the giving of the notice prescribed by statute is jurisdictional. (See *Stumpf v. Board of Supervisors* (1901), 131 Cal. 364, 368, 63 P. 663; *People ex rel. McKune v. John B. Weller* (1858), 11 Cal. 49, 62.) The notices which were given did not meet the statutory requirements. This court has no power to lessen the period of notice fixed by the Legislature. The annexation elections were therefore void and of no effect.

Insofar as it is urged that this court has already adopted a policy of tolerating departures from the legislative minimums I think examination of the cases cited in the majority opinion discloses that they are not authority for the holding reached. In the first place, from a reading of the controlling statute (Gov.Code, § 35123) it is at once apparent that the notice required

is of the duration type, rather than the "number of insertions" type which the court was considering in *City of Lindsay v. Mack* (1911), 160 Cal. 647, 117 P. 924. The statute here relevant specifies that "The city legislative body shall cause notice of the election to be published *at least once a week for the four weeks prior to the election*, in a newspaper * * *, or if there is none, by posting it *at least four weeks next preceding the election* in three public places within the territory." (Italics added.)

We are dealing here with a newspaper publication but the equally carefully worded alternative requirement (in the sentence above quoted) that if there is no newspaper in which publication can be made the notice must be posted for a period four weeks in duration next preceding the election seems to me to leave no doubt of the legislative intent that a full four-weeks period of time must elapse between the first giving of the notice (whether it be by publication or by posting) and the date of the election. The notice in each case is a duration notice; in each case the period is four weeks; and in each case the four weeks is to run "prior to" or "next preceding" the election. Since the elapsed period here was only twenty-six days, it follows that the statute was not complied with, and I think this court should unhesitatingly so hold. I do not believe that it is a proper function of courts to whittle down a jurisdictional requirement. If by judicial construction two days can be eliminated from the statutory period, then why not four or six or perhaps eight, when occasion arises? But that is beside the point. The controlling consideration to me is that it is the function of the Legislature to fix the duration and character of notice and that it is the function of this court to uphold the law as enacted. The law as enacted requires twenty-eight days.

Foster v. City of Los Angeles (1918), 179 Cal. 263, 176 P. 438, is cited as support for the view that the twenty-six day notice here given was sufficient. In that case the applicable statute required notice to be published "at least once a week for a period of four successive weeks next preceding" the

election. The notice was published *five* times at weekly intervals and the election was held three days after the *fifth* publication. Obviously the publication at weekly intervals for each of *five* successive publications provided not less than the *four* weeks' notice required by the statute, and consequently that case furnishes no justification for a holding that publication covering a period less than four weeks in duration is adequate.

As early as *Early v. Doe* (1853), 16 How. 610 (57 U.S. 610), 14 L.Ed. 1079, we find the United States Supreme Court dealing with a statute using language so similar to that with which we are concerned that its decision cannot by the facts and on principle be distinguished. It cogently supports the view that the requirement that publication be "at least once a week for the four weeks prior to the election" contemplates an elapsed time of twenty-eight days. In the *Early* case the language of the statute was that publication must be made "once in each week, for at least twelve successive weeks." The holding of the court was clear and specific; it said the words "mean a duration of the time that there is in twelve successive weeks, or eighty-four days."

Until the holding of the instant case I thought it could be accepted as settled as to both law and fact that a week is made up of seven days and that "at least once a week for the four weeks prior to the election" or "at least four weeks next preceding the election" must encompass at least twenty-eight days. Admittedly the electors received notices of only twenty-six days. I would therefore hold the elections void and reverse the judgment.

1. "The vote in the New York Avenue annexation district was 1641 for annexation and 1525 against annexation. The total number of qualified electors of the New York Avenue annexation district was 4430 and the number of electors who voted at said election was 3166, or 71.4% of the total qualified electors.

"The vote in the Honolulu District annexation district was 205 for annexation and 141 against annexation. The total number of qualified electors of the Honolulu Avenue annexation district was 433 and the number of electors who voted at

CARTER, Justice.

I agree with the views expressed by Mr. Justice SCHAUER, but I wish to call attention to one salient point overlooked by the majority, and that is that *notice* of the holding of an election is only one element to be considered. There is a time element which is of equal, if not of greater, importance than the element of notice. It may be conceded that a substantial and not a strict compliance with the statute provides adequate *notice* of the election.

But *notice* merely informs the electorate when and where an election is going to be held. The *duration of the period of time* between the giving of notice and the date of the election is the important element which permits the full functioning of the democratic process.

There can be no such thing as substantial compliance with the *element of duration*. The statute required a minimum of twenty-eight days to elapse before the election was held. Only twenty-six days were permitted to elapse and at oral argument counsel for defendant admitted that under his view of the statute this time could even have been further shortened to twenty-two days. This must be conceded.

The full *duration* of the prescribed time represents the Legislature's decision as to the minimum period required for the completion of the opinion-forming process. It must be conceded that this was a "close" election.¹ Who can say what number of minds might have been changed one way or the other during the two days which defendant cut off the statutory period by allowing only 26 days after the first publication of the notice.

said election was 346, or approximately 80% of the total qualified electors.

"The vote in the Chevy Chase Drive annexation district was 15 for annexation and 11 against annexation. The total number of qualified electors of the Chevy Chase Drive annexation district was 25 and the number of electors who voted at said election was 26, representing 104% of the total qualified electors. (One elector, residing close to but outside the boundaries of said district was erroneously permitted to vote.)" (Agreed Statement on Appeal.)

The voters may have been given notice of the election even though the time had been shortened but they should not be legally deprived of their right to the full statutory period in which to persuade others to their point of view. When the statute prescribed four weeks, it must have been the intention of the framers that those interested in the outcome of the election would have at least 28 days within which to present the pros and cons of the propositions to the voters. The fixing of a shorter period is a violation of both the spirit and letter of the statute.

I would reverse the judgment.



117 Cal.App.2d 303

ERVIN v. CITY OF LOS ANGELES.

Civ. 19100.

District Court of Appeal, Second District,
Division 1, California.

April 14, 1953.

Rehearing Denied May 4, 1953.

Hearing Denied June 11, 1953.

Action by pedestrian for injuries sustained when boulevard stop sign, which allegedly had been damaged nine or ten months prior to accident, fell on pedestrian. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for pedestrian, and city appealed. The District Court of Appeal, White, P. J., held that evidence sustained findings that city had knowledge or notice of dangerous condition of stop sign post and that city for reasonable time after having acquired such knowledge had failed to take action reasonably necessary to protect public.

Judgment affirmed.

1. Appeal and Error ⇨996

On appeal all legitimate and reasonable inferences must be indulged toward upholding findings or verdict of trier of facts.

2. Appeal and Error ⇨996

In searching record and exploring inferences arising therefrom, appellate court should be realistic and practical.

3. Trial ⇨140(1), 143

Where evidence was conflicting, credibility of witnesses and weight to be given to their testimony were for jury. Government Code, §§ 53050, 53051.

4. Appeal and Error ⇨996

In action by pedestrian for injuries sustained when boulevard stop sign fell on pedestrian, where reasonable minds could differ regarding question whether defective condition of signpost had existed for sufficient length of time to charge municipality with constructive notice thereof, conclusion of jury in that regard would not be interfered with on appeal. Government Code, §§ 53050, 53051.

5. Municipal Corporations ⇨819(6)

In action by pedestrian for injuries sustained when boulevard stop sign, which had been struck by automobile nine or ten months prior to accident, fell on pedestrian, evidence sustained findings that city had knowledge or notice of dangerous condition of stop signpost and that city for reasonable time after having acquired such knowledge had failed to take action reasonably necessary to protect public. Government Code §§ 53050, 53051.

6. Municipal Corporations ⇨847

Under statute providing that local agency is liable for injuries to persons resulting from dangerous condition of public property if person authorized to remedy condition had knowledge or notice of condition and for reasonable time after acquiring knowledge failed to remedy condition, each case must rest upon its particular circumstances in determining whether city is liable. Government Code, §§ 53050, 53051.

7. Appeal and Error ⇨1052(2)

In action by pedestrian for injuries sustained when boulevard stop sign fell on pedestrian, admission of testimony of expert witness for pedestrian concerning discernibility of fracture extending about one-half way through 4 inch, painted redwood post was not prejudicial error, although not properly subject of expert testimony, in view of fact that city's expert witnesses were permitted to testify on same subject

and that city was unable to produce post at trial. Government Code, §§ 53050, 53051; Code Civ.Proc. § 1870, subd. 9.

8. Appeal and Error ⇐1048(5)

Where questions are asked expert witness that do not call for expert evidence, but answers are correctly given, there is no prejudice. Code Civ.Proc. § 1870, subd. 9.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, Deputy City Atty., and Weldon L. Weber, Deputy City Atty., for appellant.

Betts, Ely & Loomis, by Forrest A. Betts, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant City of Los Angeles appeals from a judgment entered upon a verdict in favor of plaintiff who was injured by a falling boulevard stop sign located on the southeast corner of Hollywood Boulevard and Sycamore Avenue in said city. The action is predicated upon the Public Liability Act of 1923, formerly Statutes 1923, page 675, § 2, now Government Code, §§ 53050 and 53051.

The boulevard stop sign in question was a redwood post about 4" x 4" in girth and approximately 8 feet high. It was embedded in the concrete of the sidewalk on the southeast corner of the aforesaid intersection. A 24 inch octagonal metal sign was attached to the top of the post with the word "stop" printed in black letters on its face.

On November 12, 1948, at about 4:00 P.M., plaintiff walked west on the south side of Hollywood Boulevard to a point on the southeast corner of the intersection of the aforesaid streets. As she was about to step down on to Sycamore Avenue the traffic stop sign embedded in the sidewalk on that corner fell upon and injured her very seriously.

The cause proceeded to trial before a jury resulting in a verdict for plaintiff in the sum of \$37,774.50. Defendant's motions for nonsuit and a directed verdict were denied, as was its motion for a new

trial. This appeal from the judgment followed.

Appellant city strenuously insists that the record is barren of any evidence to bring home to it a neglect of its duty of inspection or knowledge of facts which would have put it upon inquiry, *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 367, 368, 54 P.2d 725. That the record fails to disclose any showing that the city possessed either actual or constructive notice of a dangerous condition in respect to the stop sign above referred to. And, that the record is bereft of any evidence showing the lapse of a reasonable time within which the city could have remedied the defect had it possessed such knowledge.

Respondent, on the other hand, contends that the record discloses evidence that the sign post had been damaged for quite some time (9 or 10 months) prior to the happening of the accident, and that the damage had left approximately one-half of the pole cracked or fractured prior to the time it fell upon her. That the photographic pictures of the post revealed an indentation several inches above the fracture line, and that from these pictures the jury could conclude that the indentation had been painted over at some time prior to the date of the accident. That the conclusion naturally follows that the employee of the city who last painted the post had actual knowledge of the damage thereto, or at least, that the jury was entitled to conclude that the city employees "whose duty it was, according to the testimony of the defendant in this case, to report defects to the post, had such knowledge of the damage as to create constructive knowledge in the defendant City of the defect and of the danger which necessarily would be incident to a half broken post, carrying at its upper end a very heavy metallic boulevard stop sign".

The post in question was not produced at the trial. To explain its disappearance, defendant city offered the testimony of Maynard Trebil, a senior paint foreman in its employ, who testified that there are thousands of these signs throughout the city; that Walter A. Hudson, a paint foreman, brought the sign into the city shop where there was attached to it a white tag giving

the location of the stop sign and marked "hold"; that he had the post in his possession in the sign room for nine or ten months after the accident; that he had twenty or thirty people working around the warehouse and from time to time more people came; that some of them were not too well educated and could hardly read. That when in February, 1951, he was asked to produce the post, he made a thorough search for it, but was unable to locate it and did not know what happened to it.

Since the post could not be produced, the parties, jury and trial court were forced to rely entirely upon oral testimony and photographs for proof as to whether it was maintained in a defective condition occasioned by an old fracture of the post.

[1,2] It is axiomatic that on appeal, all legitimate and reasonable inferences must be indulged toward upholding the findings or verdict of the trier of facts. If there be any reasonable doubt as to the sufficiency of the evidence to sustain the findings or verdict, appellate courts should resolve that doubt in favor of such findings or verdict. And, in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

Having in mind the foregoing principles and remembering that it is the contention of appellant city herein that as a matter of law, no prima facie case was presented, viewing the factual situation in a light most favorable to respondent as we are required to do, we cannot hold that as a matter of law, appellant city possessed neither actual nor constructive notice of the existence of a dangerous condition in respect to the stop sign or that there was no lapse of a reasonable time within which appellant city could have remedied the defect had it possessed such knowledge.

There is in the record direct testimony that the sign post had been struck by an automobile 9 or 10 months prior to the happening of the accident here in question. This would support the conclusion by the jury that the indentation, which is established by the pictures of the post, possibly

occurred some 9 or 10 months prior to November 12, 1948. While the jury might have concluded that the testimony of the witness who testified as aforesaid was weakened under the force of cross-examination and could have rejected it, nevertheless, the verdict would indicate that they accepted the testimony, as was their right in the capacity of triers of fact. An employee of appellant city testified that on February 17th and 18th, 1948, he was at the intersection in question and painted the post involved in the accident.

Another witness testified that she was walking easterly on the south side of Hollywood Boulevard and when "about 4 or 5 doors" beyond the corner she heard a scream, turned and saw respondent lying on the sidewalk. This witness went immediately to the aid of respondent and with reference to the appearance of the sign post, testified that the break therein was "a dull, jagged break instead of perhaps long splinters". That about one-half of the bottom of the post stump appeared to be "sort of weathered —dull in color". Police Officer McDonald, a witness called on behalf of appellant city, was asked on cross-examination:

"Q. (By Mr. Betts, counsel for respondent): Did you make any observation whatever of that post above the black line for the purpose of determining whether or not there were old indentations or other marks of applied force to the post? A. Yes, I did.

"Q. Were there any? A. Yes, there were.

"Q. Can you describe them to us, Mr. McDonald? A. As I recall it, above the fracture on the post there *was an indentation* and also a discoloration that appeared to be the soot from the exhaust of a car." (Emphasis added.)

Another witness, Fred L. Wilke, testified that because of his business of "handling loans on construction jobs for most of my life", and checking upon such jobs, he was familiar with wood. He saw the post on the evening of the accident and again on the next day. The witness testified that the portion of the post in the ground pro-

truded possibly 6 or 8 inches, and from his examination, "it showed a definite fracture * * *". He was then asked:

"Q. (By Mr. Betts): Well, *can you describe the color of it?* A. It appeared on one side of it to be darker in color than the other, and on one portion of the post in the ground it looked like a fresh break, fresh wood, like fresh wood would appear if you snap a piece of lumber. (Emphasis added.)

"Q. Fresh wood? A. Yes, like a fresh break.

"Q. And on the other side? A. On the other side it was discolored quite dark."

Stanley McDonald, a witness called on behalf of respondent, testified that he was a lumber man of 31 years' experience and that he had become familiar with redwood used for boulevard stop signs. Because the post in question had been lost as heretofore noted, neither end of the fractured portion thereof was available so that the jury might themselves determine whether or not the fracture was a visible one before it was painted over.

Over objection, this witness answered the following question:

"Q. May I ask you then this question—assuming that you had such a post and that it was placed in a cement sidewalk installation, such as the sidewalk here, and assume that it was painted with the regular black and white paint stripes, and that it had a portion at the bottom of it which would appear to me to be about 18 inches or two feet which was black; in other words, the stripes run down to a black solid portion at the bottom. A. Yes.

"Q. Now, assuming that you had such a post, and assume that at some time there was an accident in which the post was struck on the side so as to leave an indentation such as appears on the right-hand side of this post as we look at it, and several inches above the broken-off portion, and assume, however, that that blow did not knock the post down but assume that it did fracture and shatter the post so that it

was broken at least halfway through the 4-inch square portion of it—I don't know what you call it, but half of it. Now, assume such circumstances. Now, can you tell us from your experience whether or not that fracture would be readily discernible by ordinary observation of the post, looking, standing close enough to it to see the post itself?

"The Court: The answer to that, Mr. McDonald, would be yes or no. You can tell whether or not it would be observable under the circumstances stated. A yes or no answer, please.

"A. Yes.

"Mr. Betts: Assume the same facts now, Mr. McDonald, and assume that the specific purpose of a person was to inspect the post to determine whether or not it had any defects in it, what would your answer be with reference to whether or not such an inspection would reveal the fracture? A. It would be readily observable.

"Q. (By Mr. Betts): And suppose that when you started out the upper part of it at least was painted, what would be the condition with reference to whether or not the fracture line would show through the paint—and assuming the same example that I have given, that you fractured the board—would the fracture line show through the paint? A. Do you mean could you put it back in such a way that you could not see the fracture?

"Mr. Betts: Yes. A. I don't believe so, sir."

From the foregoing testimony it follows that if, as the jury had a right to find, there was a fracture through one-half of the post at the point of ultimate entire fracture, and if the one-half post fracture existed as of February 17th and 18th of 1948, there was no reason for the city painter Reed not to have seen it when he painted the post and for him not to have reported it as was his conceded duty.

The city painter, Mr. Reed, testified that he painted the yellow zone curbs adjacent to the post in question some 2 or 3 days

prior to the accident, but as to whether or not he made any inspection of the stop sign post his answer was, "I cannot say definitely but I usually do that. I may have checked it." (Emphasis added.)

Concerning the question of appellant city's care in the inspection of the boulevard stop sign here in question, Maynard Trebil, senior paint foreman, testified that the records failed to show any inspection of that post at any time between 1937 and the happening of the accident on November 12, 1948. That there were approximately seventy painters in his department, that only six were charged with the duty of supervision and inspection of boulevard stop signs in the entire City of Los Angeles. That each individual post is inspected, "Yes, maybe each ten years. It is hard to say". That, "unless something appears to be wrong" as the inspector rides by he does not "get out" of his vehicle and examine the post.

Regulo Rodriguez, a painter for appellant city, replaced the broken stop sign post. He testified that when he arrived at the intersection in question he found, "a stub sticking out of the curb about 4 inches * * * I found the stub in very good condition". He further testified that it appeared to him "that the stub had a fresh break, and a clean break, with jagged ends sticking on the sides * * *". On cross-examination, however, he testified:

"Q. (By Mr. Betts): Now, what do you mean by you don't recall—that you didn't see it or you don't recall whether it was or was not there. A. I didn't pay much close attention to the post.

"Q. That is what I thought. You don't know whether it showed a weatherbeaten appearance or not, do you, Mr. Rodriguez? That is the truth of the matter isn't it? Just take your time on that. A. What I meant was, 'I didn't pay much attention to the post whether it was weatherbeaten or not.'

"Mr. Betts: That is right. I am trying to help you out on that proposition, that is exactly what I had in mind. You didn't pay enough attention to tell whether any portion of it was or

was not weatherbeaten. That is the truth, isn't it? A. Yes."

With reference to the testimony of other witnesses that the mark about 6 inches above the break was an indentation, Police Officer Wagnon testified that it appeared not to be a fresh break and looked like a condition that was caused by "somebody that was down on their knees whittled on the post". The verity of this testimony was of course a question for the jury.

Walter A. Hudson, a traffic zone painter for appellant city, testified he had been handling redwood for six or seven years and had observed broken redwood posts. That the broken portion of the post here in question was "strong and in good condition"; that the break was "nice and clean", and that he saw no evidence of weathering.

[3] Dean Harold Larson, a news boy fifteen years of age, testified that he had worked on the corner with which we are here concerned for six months prior to the accident. That he customarily leaned against the post to relieve pressure caused by poliomyelitis, and had leaned against the post on the night before the accident. His weight was 145 pounds. The post always held his weight and did not appear to be broken or cracked until the morning of the day of the accident. On the morning of the day of the accident Larson, on his way to school, went to this corner in regard to his newsbox. He found it all broken up, pieces of it were lying beside the stop sign and some pieces were in the street. He also noticed for the first time that the post was cracked clear through and a piece of "grass string" was tied around it. He also testified that he saw automobile tire marks on the curb and on the street on the morning of the accident. That the tire marks on the street were two feet from the stop sign and were about six inches to a foot in length. He was an eyewitness to the accident and in his testimony stated that respondent was walking from west to east, while her testimony was that she was proceeding westerly to the point of the accident. It was also brought out in cross-examination of this witness that he had never seen the damage and indentation on the post that is revealed in one of the pic-

ures. The conflict in the evidence given by this witness with that of other witnesses was a question for the jury, as judges of the credibility of witnesses and the intrinsic weight of all the evidence.

The case of *Nicholson v. City of Los Angeles*, supra, we are persuaded is not controlling here. In the case just cited the court said, 5 Cal.2d at pages 367, 368, 54 P.2d at page 728, "Because of the plaintiff's failure to bring home to the defendant city a neglect of its duty of inspection or knowledge of facts which would have put it upon inquiry, the city cannot be held to have had constructive notice of the defect, and the judgment must be reversed."

In the case now engaging our attention there is in the record evidence from which the jury could have concluded that the stop sign post had been damaged by an automobile colliding with it some nine or ten months before respondent was injured; that when in February, 1948, appellant city's painter, Mr. Reed, painted the post, the city acquired constructive, if not actual knowledge, of the post fracture. That the fracture had existed for a length of time sufficient to create a darkened and weathered appearance of one-half of the fracture line of the post; that there was a negligent failure on the part of the city to furnish an adequate method of inspection, or a sufficient number of inspectors.

[4] While there was evidence in conflict with the foregoing, the jury, as they were entitled to do, resolved the conflict in favor of respondent. We believe the true rule on appeal to be that when reasonable minds may differ regarding the question as to whether defective conditions have existed for a sufficient length of time under the particular circumstances of a case, to charge a municipality with at least constructive knowledge thereof, the conclusion of the jury in that regard may not be interfered with by an appellate tribunal.

As was said by the trial judge in the case at bar when denying a motion for a directed verdict:

"The only effect, as I see it, of the defendant's case, is to increase the conflict that exists in the evidence. There

still remains within the evidence this testimony to the effect that there was a portion of that post not in a rotten condition but in a condition from which the jury can draw an inference that a break was there and that it had existed for some considerable time. There is evidence in the record to the effect that there was discoloration in at least half of the break in that post which indicated weathering. Now, from that the jury can draw an inference that that had existed for a considerable length of time. From the nature of the picture, Exhibit 14, they can draw that inference, and they can take the testimony of Mr. Wilke. Mrs. Wilke's testimony was a little vacillating after counsel for the defendant got through cross-examining her, but there is the testimony of Mr. Wilke to the effect that that was an old break. There was also that indentation on the face of the post, which the photograph clearly shows, and there is testimony to the effect that that indentation was on there at a time before the post was painted. I have forgotten who testified to that but it is in the record, that that indentation was painted over, whatever it may have been. So from that there is an inference that that thing had existed and there is an inference that at least half of the break had existed for a time previous to the time that the indentation was made. While the post was not rotten—and no one has contended that it was rotten, although the pleadings set that up—yet a 4 x 4 post that is not rotten does not break and fall over unless some force is applied to it. As to the time when that force might have been applied to it, there is plenty in the plaintiff's case from which the inference could be drawn that it had been there for some time. I think it is a question of fact, * *."

Appellant's contention that to find the city liable for damages under the facts of this case is to make it an absolute insurer of the safety of persons using the public streets and sidewalks, is answered by the following language used by the court in the case

of Fackrell v. City of San Diego, 26 Cal.2d 196, 209, 157 P.2d 625, 632, 158 A.L.R. 773:

"Obviously, the city is not being held as an insurer of anything but it is being held to the standard of ordinary care in planning, constructing, and maintaining its streets and sidewalks. Liability for its failure in that regard is not due to the whimsy of court or jury; it is imposed by the public liability statute."

[5] We are satisfied that the record herein supports the findings of the jury that appellant city had knowledge or notice, at least constructive, of the defective or dangerous condition of the boulevard stop sign post, and for a reasonable time after acquiring such knowledge, failed to take action reasonably necessary to protect the public against the condition. Fackrell v. City of San Diego, supra, 26 Cal.2d at page 206, 210, 157 P.2d 625; Boyce v. San Diego High School District, 215 Cal. 293, 294, 295, 10 P.2d 62; Rafferty v. City of Marysville, 207 Cal. 657, 660, 280 P. 118; Maddern v. City and County of San Francisco, 74 Cal. App.2d 742, 749, 750, 752, 753, 169 P.2d 425; Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345; Heath v. Manson, 147 Cal. 694, 701, 82 P. 331; Kirack v. City of Eureka, 69 Cal. App.2d 134, 136, 137, 138, 140, 158 P.2d 270; Edwards v. City of San Diego, 126 Cal.App. 1, 3, 14 P.2d 119; Christy v. City of Alhambra, 9 Cal.App.2d 499, 501, 50 P.2d 454; Scarpaci, etc., v. City of Chicago, 329 Ill. App. 434, 69 N.E.2d 100.

[6] We have already referred to and distinguished the case of Nicholson v. City of Los Angeles, supra, mainly relied upon by appellant. Since each case must rest upon its particular circumstances in deciding whether a municipality can be charged with liability under sections 53050 and 53051 of the Government Code, suffice it to say, that we find nothing in the remaining cases cited by appellant which militates against what we have herein held, under the factual background here presented.

Finally, appellant earnestly urges that it was prejudicial error for the trial court to admit, over the former's objection, the testimony of Stanley McDonald. The testimony given by this witness has been hereto-

fore narrated and need not now be repeated.

It is appellant's contention that the questions propounded to Mr. McDonald were not properly the subject of expert testimony. That the facts from which his conclusion was to be drawn were not peculiarly within the knowledge of an expert but were matters of common knowledge, and that they were not facts which although they might be clear to the jury, the conclusions to be drawn therefrom depended upon knowledge or skill possessed only by an expert. Long v. John Breuner Co., 36 Cal. App. 630, 172 P. 1132; Fonts v. Southern Pac. Co., 30 Cal.App., 633, 159 P. 215; C.C. P. § 1870, subd. 9.

[7,8] It is not easy to draw a clear line of demarkation between the field in which experts may give their opinions, and the field which is reserved exclusively for the jury. However, in the instant case, even though it be conceded that the testimony given by the witness McDonald does not come within the rule under which an expert may give his opinion, nevertheless, no prejudice to appellant resulted therefrom. Witnesses for the latter were permitted to answer questions of the same tenor as those propounded to Mr. McDonald. Appellant city qualified some of its employees as experts in the field of timber and what could be determined from the observation of redwood. Police Officer McDonald was so qualified and thereafter testified concerning the sheen of redwood and the breaking off of a piece of redwood from the very post involved, and comparing it with the fracture he saw. Appellant's senior paint foreman, Maynard Trebil, was qualified as an expert and testified concerning the post in question—to the effect that there was no discoloration of the post, thus placing upon respondent the necessity of establishing the visibility of the fracture should the jury believe that it had existed for any considerable length of time. Walter A. Hudson, a traffic zone painter for appellant city, gave like testimony, such as, "I just looked at both ends (of the post) and I said, 'There is a nice clean break'"; that the post was "just a good clean color of redwood", and that, "it (the post) apparently looks per-

fectly O.K. to me, sir". That the broken portion of the post "appeared to be a good strong post". In the light of the foregoing testimony, coupled with the inability of appellant to produce the post at the trial, we are unable to say that the admission of Mr. McDonald's testimony amounted to prejudicial error. *Hurwit v. Prudential Ins. Co. of America*, 45 Cal.App.2d 74, 81, 113 P.2d 691; *Bowen v. Sierra Lumber Co.*, 3 Cal.App. 312, 318, 84 P. 1010; *Humiston v. Hook*, 86 Cal.App.2d 101, 105, 194 P.2d 122. Frequently it happens that under the form of expert evidence answers are given that are so clearly a part of common knowledge that no injury results. When questions are asked that do not call for expert evidence, and the answers, as in this case, are correctly given, clearly, in the nature of things, no harm is worked. *People v. Durrant*, 116 Cal. 179, 217, 218, 48 P. 75.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



117 Cal.App.2d 489

**SAFWAY STEEL PRODUCTS, Inc. et al.
v. LEFEVER et al.**

Civ. 19385.

District Court of Appeal, Second District,
Division 3, California.

April 29, 1953.

Action by renters of steel scaffolding against customers for balance allegedly due under oral contract for use of such scaffolding or for reasonable rental value of such scaffolding. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered judgment in favor of customers and renters appealed. The District Court of Appeal, Vallée, J., held that renters who had negligently misled customers into believing that price quoted for use of scaffolding was for duration of job and not by the month were estopped from recovering from customers the reasonable rental value of the scaffolding,

and could recover only the price quoted, even though the trial court found that there had been no contract.

Judgment affirmed.

1. Estoppel ⇨52

The doctrine of equitable estoppel may be applied where, but only where party to be estopped was apprised of facts and intended that his conduct should be acted upon, or acted so that party asserting estoppel had right to believe it was so intended, and where other party was ignorant of true state of facts, and relied upon party to be estopped to his injury. Code Civ.Proc. § 1962, subd. 3.

2. Estoppel ⇨53

An estoppel may arise although there was no designed fraud on part of person sought to be estopped.

3. Estoppel ⇨96

Negligence, that is, careless and culpable conduct, is equivalent to an intent to deceive and will satisfy element of fraud necessary to an estoppel.

4. Estoppel ⇨72

Where one of two innocent parties must suffer, he who committed the mistake must bear the loss.

5. Estoppel ⇨119

The existence of an estoppel is a question of fact.

6. Estoppel ⇨96

Renters of steel scaffolding who negligently misled customers into believing that price quoted for use of scaffolding was for duration of job and not for month's use, were estopped from recovering from customers the reasonable rental value of the scaffolding, and could recover only price quoted, even though the trial court found that there had been no contract. Code Civ.Proc. § 1962.

7. Appeal and Error ⇨1011(1)

Where evidence was in conflict, trial court's finding could not be disturbed on appeal.

Brown & Brown, Los Angeles, for appellant.

Thelen, Marrin, Johnson & Bridges, and Robert G. Irvin, Los Angeles, for respondent.

VALLÉE, Justice.

The complaint in this action alleged a breach of an oral contract for the rental of steel scaffolding for the construction of bridges. The first count alleged that defendants, Lefever & Bing, referred to as defendants, agreed to pay plaintiff \$780 a month for the use of the scaffolding, that a total of \$4,412 became due, of which \$780 had been paid. The second count alleged that the reasonable rental value of the scaffolding was \$4,412, of which \$780 had been paid.

The court found there was no oral contract between plaintiff and defendants; that neither plaintiff nor defendants intended to enter into a contract for the rental of the scaffolding which the other contemplated, and that there was "no meeting of minds of the parties and no contract." The court also found that plaintiff quoted defendants a price of \$390 for the use of scaffolding for each of two bridges; that in quoting the price plaintiff did not advise defendants that it was based on a monthly rental, but that plaintiff, "by his statements and conduct misled the defendants into believing that the steel scaffolding was to be rented for the job"; that defendants, believing the price to be \$390 a bridge or \$780 for the job, agreed to use the scaffolding; that plaintiff knew or should have known that defendants were proceeding on the belief that the scaffolding would cost \$780 for the job; that defendants' belief was reasonable and they were not negligent; plaintiff was negligent in leading defendants to believe the full rental to be \$780.

The judgment awarded plaintiff \$60 for additional materials ordered by defendants which is not in dispute; it did not give plaintiff any other relief since defendants had paid plaintiff the \$780.

Plaintiff contends that because the court found there was "no contract" it should have been awarded the reasonable rental value of the scaffolding. We do not agree.

[1-5] The facts found established an estoppel. Section 1962(3) of the Code of Civil Procedure provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; * * *." "In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury." 10 Cal.Jur. 627, § 14. An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. *Benner v. Industrial Accident Comm.*, 26 Cal.2d 346, 349, 159 P.2d 24. Negligence, that is careless and culpable conduct, is, as a matter of law, equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel. *Parke v. Franciscus*, 194 Cal. 284, 297, 228 P. 435. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. *McGee v. Stone*, 9 Cal. 600, 607. The existence of an estoppel is a question of fact. *Pike v. Rhienhart*, 112 Cal.App.2d 530, 533, 246 P.2d 963.

[6] Plaintiff, having negligently misled defendants into believing that the price for use of the scaffolding was \$780 for the job, may not now say that it was \$780 a month. Cf. *Creighton v. Gregory*, 142 Cal. 34, 75 P. 569; *Mitchell v. Reed*, 9 Cal. 204.

[7] It is argued that defendants knew after they began use of the scaffolding that plaintiff expected to be paid on a monthly basis, but that they continued to use the scaffolding for the purpose of lying in wait for plaintiff and springing the point they had when the use terminated. The evidence of this issue was in conflict and the

court's finding may not be disturbed on appeal.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



117 Cal.App.2d 400

MADEMANN et al. v. SEXAUER et al.

Civ. 19380.

District Court of Appeal, Second District,
Division 1, California.

April 22, 1953.

Hearing Denied June 18, 1953.

Action to quiet title and to cancel certain deed from plaintiff's wife to her mother. The mother intervened to quiet title to a claimed undivided half interest in realty involved. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered judgment adverse to intervenor, and intervenor appealed. The District Court of Appeal, Doran, J., held that evidence sustained trial court's findings that despite fact that title was taken by husband and wife as joint tenants it was their intention that title should be taken as community property, that husband intended to make gift of community interest in the property to wife, that in signing and acknowledging deeds purporting to convey title to wife's mother, wife intended and attempted to make testamentary disposition thereof and not to divest herself of title, and that there was no consideration for such deeds.

Affirmed.

1. Husband and Wife ⇨262(1)

A declaration in a deed or other instrument that spouses are to take as joint tenants raises presumption that legal title is in parties in accordance with such language, and destroys statutory presumption that the property is community.

2. Evidence ⇨426

Evidence may be admitted to establish that realty is community property even though title has been acquired under deed executed in form that ordinarily creates a common-law estate with incidents unlike those of community property.

3. Deeds ⇨210

Husband and Wife ⇨264, 266

Wills ⇨93

In action to quiet title, evidence sustained trial court's findings that despite fact that title was taken by husband and wife as joint tenants, it was their intention that title should be taken as community property, that husband intended to make gift of community interest in the property to wife, that by signing and acknowledging deeds purporting to convey title to wife's mother, wife attempted to make a testamentary disposition thereof and not to divest herself of title, and that there was no consideration for such deeds.

4. Deeds ⇨90

In determining nature of deed, real nature of particular transaction rather than verbal form in which it is cast must be decisive factor.

P. E. Durkee, Los Angeles, for intervenor and appellant.

George L. Hampton, Van Nuys, for respondent Herbert E. Mademann.

DORAN, Justice.

The complaint herein seeks to quiet title to five pieces of real estate claimed to have been held in joint tenancy by the plaintiff Herbert D. Mademann and wife Frances Mademann at the time of the wife's death on November 1, 1950, and to cancel certain deeds.

Between February 1, 1937 and December 1, 1944, the husband purchased the real estate in question, residential property in Los Angeles County, with money owned by the husband before the marriage to decedent in November, 1936. Title was taken in the names of the husband and wife as joint tenants on the advice of the wife's brother, to the effect that joint tenancy and community property were the same thing with the added advantage that if the joint tenancy form was used probate proceedings would be unnecessary upon the death of one of the spouses. Thereafter, on July 20, 1948, while in a hospital for leg amputations, the wife, without the husband's

knowledge, signed and acknowledged deeds purporting to convey the properties in question to the intervenor-appellant, Mary Kulas, the wife's mother, said deeds being recorded July 22, 1948. On October 22, 1948, Mrs. Mademann executed an holographic will which bequeaths certain community personal property to relatives but does not mention any real property.

Thereafter, on January 12, 1949, at Mrs. Mademann's request, the appellant, Mrs. Kulas, signed and acknowledged three deeds purporting to re-convey the real estate to Mrs. Mademann. These deeds were kept in Mrs. Kulas' safe deposit box in Winona, Minnesota until November, 1949, when Herbert Mademann discovered that the wife had deeded the property to Mrs. Kulas. Mrs. Mademann then requested Mrs. Kulas to return the deeds that the former had made to the latter, which deeds were then given to Mr. Mademann and recorded on December 7, 1949.

As hereinbefore indicated, Mrs. Mademann died November 1, 1951, and the defendant Benjamin F. Sexauer was appointed administrator with will annexed. Herbert Mademann then brought this action against the administrator to quiet title and appellant Mrs. Kulas intervened to quiet title to a claimed undivided half interest in the property. Mr. Mademann and Mrs. Kulas are the only heirs of the decedent Frances Mademann.

The trial court found that despite the joint tenancy form of the conveyance, it was the intention of Mr. and Mrs. Mademann "that said title should be taken by them as their community property; that plaintiff intended to make a gift to his wife of a community interest in said property; and that plaintiff never at any time intended to transmute said property from community property to any other kind of property".

It was further found "That in signing and acknowledging said deeds purporting to convey the title to said property to said Mary Kulas, said Frances Mademann intended and attempted to make a testamentary disposition thereof; that she did not intend or attempt thereby to divest herself of any title or interest therein; that there was no consideration given for said deeds

or any of them". Judgment was therefore entered that the real estate was community property, and that "subject to the administration of the Estate of Frances Mademann, deceased, plaintiff Herbert E. Mademann is the owner in fee simple and is entitled to the possession of all that real property described in said plaintiff's complaint".

Mary Kulas, decedent's mother and intervenor-appellant, maintains that the findings are "without support in the evidence", averring that it was the parties' intention to place the property in joint tenancy, and that such joint tenancy had been severed by the wife's act. In this connection appellant argues that "Title taken in joint tenancy may be severed by the acts of either of the parties without the consent of the other; that "The distinguishing incident of joint tenancy is the right of survivorship". It is also contended that "The secret intention to hold property other than granted is not effective", and that "Taking title to property in joint tenancy is conclusive in the absence of fraud, mistake, or undue influence".

The respondent Herbert E. Mademann, answers the above contentions by admitting that a joint tenancy may be terminated by either party, and that the secret intention of one tenant, not disclosed to the other, is not effective, but denies that the findings and judgment are not supported by the evidence.

[1,2] Respondent's brief calls attention to Estate of Jamesson, 93 Cal.App.2d 35, 208 P.2d 54, and Sandrini v. Ambrosetti, 111 Cal.App.2d 439, 244 P.2d 742, holding that although "A declaration in a deed or other instrument that spouses are to take as joint tenants raises the presumption that the legal title is in the parties in accordance with such language, * * * and destroys the statutory presumption that the property is community" [93 Cal.App.2d 35, 208 P.2d 58], nevertheless, under the holding in Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, 906, "evidence may be admitted to establish that real property is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike

those under the law of community property".

[3] The contention made by appellant that the form of the deed placing title to the property in joint tenancy, must govern in the present controversy, is untenable in the light of the above cases and other like decisions. As said in *Re Estate of Wilson*, 64 Cal.App.2d 123, 126, 148 P.2d 390, 392, it is well settled that "in spite of the mold into which a deed would seemingly press a title, * * * property which, measured by the deed, would not be community property, nevertheless may be just that". And, as held in the *Wilson* case, the trial judge had ample justification for concluding that the property here in question was intended to be and was community property.

The trial judge was confronted with a question of fact as to the nature of the property, and the decision contrary to appellant's contention finds substantial support in the record. Such being the situation, and regardless of the fact that there is also evidence from which appellant's argument might find support, the findings of the trial court must be sustained.

[4] In this connection it may be observed that the intricacies of the law and the subtle distinctions in respect to real estate titles, community property in particular, are not generally understood by the Layman. Certainly the real nature of a particular transaction rather than the verbal form in which it is cast, must always be the decisive factor in cases of this nature.

The record herein discloses substantial evidence that Mr. and Mrs. Mademann intended the real estate, whatever its source, to be community property, and that the joint tenancy deed was executed because of certain advice given by a person not a lawyer, and under the belief that this procedure would simplify the steps necessary to be taken upon the death of one spouse.

Likewise, there is substantial support for the finding that in making the deeds to Mary Kulas, decedent's mother, "Frances Mademann intended and attempted to make a testamentary disposition thereof; that she did not intend or attempt thereby to divest herself of any title or interest therein;

that there was no consideration given for said deeds". In this connection it will be recalled that the deeds to Mary Kulas were made July 20, 1948; that Mary Kulas signed deeds back to Mrs. Mademann on January 12, 1949, which latter deeds were not recorded until December 7, 1950. Appellant's assertions that a joint tenancy may be terminated by either party, and that the secret intention of one tenant is not effective, although true, are inapplicable to the present situation.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



PACIFIC HOME v. COUNTY OF LOS ANGELES et al. *

Civ. 19274, 19275 and 19276.

District Court of Appeal, Second District,
Division 3, California.

April 20, 1953.

Rehearing Denied May 11, 1953.

Hearing Granted June 18, 1953.

Actions brought by corporation maintaining home for aged and infirm persons to recover taxes paid under protest. The Superior Court, Los Angeles County, rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that since the plaintiff's articles of incorporation did not permit the present use of plaintiff's assets for non-exempt purposes, and since the trial court had found that upon liquidation, dissolution, or abandonment, of plaintiff, its property would inure to benefit of fund, foundation, or corporation organized and operated exclusively for religious, hospital, or charitable purposes, there had been irrevocable dedication of the organization's property to exempt purposes.

Reversed with directions.

I. Taxation $\S$ 241(2), 251

The Revenue and Taxation Code section enumerating conditions of entitlement for welfare exemption is to be given a

* Subsequent opinion 264 P.2d 539.

strict but reasonable construction, and party claiming tax exemption has burden of showing that it clearly comes within statutory terms, with any doubt resolved against its right to exemption. Revenue and Taxation Code, § 214(1-6).

2. Appeal and Error ⇨878(1)

Court considering plaintiff's appeal could not review or consider any errors committed against defendants, who had not appealed, but would have to accept findings adverse to defendants as a true determination of facts so found.

3. Charity ⇨11

Aid to aged or infirm is charitable.

4. Charities ⇨40

Statement of objects or purposes in articles of charitable corporation results in defining scope of authorized corporate activity and in limiting powers of corporate officers and agents, and is controlling over both powers stated in articles and those given by statute. Corporations Code, § 803.

5. Charities ⇨40

All of powers given to charitable corporation are to be construed as incidental to purposes or ends of corporation; are to be employed to advance authorized objects and purposes of corporation; and are to be exercised in subordination to them as means to enable corporation to accomplish its objects and purposes. Corporations Code, § 803.

6. Charities ⇨40

Statement, in articles of charitable corporation, that enumeration of specific powers should not be held to limit or restrict in any manner powers of corporation, was not a general grant of power but merely meant that incidental powers reasonably necessary to effectuate corporation's main purposes should not be limited by specific enumeration of them.

7. Taxation ⇨241(1)

It would not follow from fact that charitable corporation had had income during tax years that its property was not irrevocably dedicated to exempt purposes. Revenue and Taxation Code, § 214(1-6).

8. Taxation ⇨241(2)

Effective date for determining whether there is an irrevocable dedication, within welfare tax exemption statute, is tax-lien date. Revenue and Taxation Code, § 214(1-6).

9. Taxation ⇨241(2)

With regard to whether irrevocable dedication had been made, within welfare tax exemption statute, articles of incorporation of organization maintaining home for aged and infirm persons could not reasonably be construed so as to permit it to operate a non-charitable home or so as to permit diversion of all or any part of organization's property to non-exempt purposes. Const. art. 13, § 1c; Revenue and Taxation Code, § 214.

10. Taxation ⇨241(2)

Where articles of incorporation of organization maintaining home for worthy aged and infirm persons did not permit present use of its assets for non-exempt purposes, and where property of such organization would, upon liquidation, dissolution, or abandonment, inure to benefit of fund, foundation, or corporation organized and operated exclusively for religious, hospital, or charitable purposes within meaning of welfare tax exemption statute, organization's property was irrevocably dedicated to exempt purposes. Revenue and Taxation Code, § 214, Corporation Code, §§ 801, 802, 9002, 9501.

11. Appeal and Error ⇨1176(1)

Where facts were undisputed, parties had stipulated as to amounts in controversy, and only question of law was involved, it would be appropriate for appellate court to reverse judgments with directions.

Newby, Holder & Newby and Charles R. Newby, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Louis A. Babior, Deputy City Atty., Harold W. Kennedy, County Counsel, and Arvo Van Alstyne, Deputy County Counsel, Los Angeles, for respondents.

VALLÉE, Justice.

Plaintiff brought these three actions to recover taxes paid under protest, claiming specific properties were exempt from taxation under the welfare exemption law. Cal. Const., Art. XIII, § 1c; Revenue & Taxation Code, § 214. The properties were duly assessed for the tax years 1946-1947, 1947-1948, and 1948-1949. Plaintiff filed its claim for the exemption, which was denied, and paid the taxes under protest. One action seeks recovery of the taxes paid for 1946-1947; one, those paid for 1947-1948; the other, those paid for 1948-1949. Defendants had judgment in each action. Plaintiff appealed. The appeals are here consolidated.

Plaintiff is a nonprofit California corporation whose membership consists exclusively of the members of the Southern California-Arizona Annual Conference of the Methodist Church. It has no capital stock. It is organized to establish, maintain, support, and operate a charitable home or homes for worthy aged and infirm persons. It is operated in furtherance of authority granted by the discipline of the Methodist Church. During the tax years in question plaintiff operated and maintained a home for worthy aged and infirm persons in Los Angeles, who numbered from 350 in 1946 to 375 in 1948. Admission to the home is on a single-fee life-care contract. The rate is determined by the life expectancy of the person and the accommodations selected. The rate is fixed so that plaintiff will "break even" on the operation. Preference for admission to the home is given to inactive members of some church and, if possible, to members of the Methodist Church who are selected primarily because of their record of service as missionaries, ministers, teachers, and social workers. Plaintiff operated at a loss during the years in question.

Revenue and Taxation Code, section 214, in relevant part provides: "Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: (1)

The owner is not organized or operated for profit; (2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual; (3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted; * * * (5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose; (6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes". This exemption is known as the "welfare exemption."

The parties stipulated and the court found that plaintiff is not organized for profit; that no part of its net earnings inures to the benefit of any private shareholder or individual; and that the properties were used exclusively in the maintenance and operation of a home for the aged and to house the members and necessary employees of the home. The court also found that the properties were not used or operated by plaintiff or by any other person for profit regardless of the purposes to which the profit is devoted; and that the properties on liquidation, dissolution, or abandonment of plaintiff would have inured to the benefit of a fund, foundation, or corporation organized and operated exclusively for religious, hospital, or charitable purposes within the meaning of section 214(6). If found, however, that on the first Mondays of March of 1946, 1947 and 1948, the properties were not irrevocably dedicated to religious, charitable, or hospital purposes.

The parties agree that plaintiff and the subject property met the requirements of subdivisions (1) to (5) inclusive, of section 214, on the tax-lien dates in question. The dispute is as to whether the property quali-

fied for the exemption under subdivision (6).

[1] Section 214 is to be given a strict but reasonable construction, and plaintiff has the burden of showing that it clearly comes within the terms of the exemption. *Pasadena Hospital Ass'n v. County of L. A.*, 35 Cal.2d 779, 785, 221 P.2d 62; *Cedars of Lebanon Hosp. v. County of L. A.*, 35 Cal.2d 729, 734, 221 P.2d 31, 15 A.L.R.2d 1045. Any doubt must be resolved against the right of exemption. *Sutter Hospital v. City of Sacramento*, 39 Cal.2d 33, 39, 244 P.2d 390.

The question is whether the subject property was irrevocably dedicated to religious, charitable, or hospital purposes on the tax dates in question. Defendants contend that plaintiff, at any time during its corporate life, may divert all or any part of its property to nonexempt purposes, and that, therefore, it is not irrevocably dedicated to exempt purposes.

Pasadena Hospital Ass'n v. County of L. A., 35 Cal.2d 779, 221 P.2d 62, set up a number of guideposts for determining whether property is irrevocably dedicated to exempt purposes. They are:

1. The requirement is concerned with ultimate purposes rather than with present uses.

2. The requirement, in itself, is not necessarily "affected by any diversion, through sale or otherwise, of any particular piece or portion of the property to nonexempt uses provided the proceeds of such sale or nonexempt uses are irrevocably dedicated to exempt purposes."

3. Whether the requirement has been met is ordinarily to be determined by ascertaining the powers of the owner with respect to its assets, including its properties and the proceeds thereof.

4. "[P]laintiff's manner of operation and plaintiff's use, past or present, of its properties are wholly immaterial. The sole consideration in determining the question of irrevocable dedication of its properties is that of plaintiff's powers with respect thereto."

5. The extent of the powers of a corporation is to be determined from its articles of incorporation.

6. Where such powers permit the present use of its properties for, or the ultimate and permanent diversion of all of the corporation's assets to, nonexempt purposes, the requirement of irrevocable dedication to exempt purposes has not been satisfied.

[2] The finding that the properties upon liquidation, dissolution, or abandonment of plaintiff would have inured to the benefit of a fund, foundation, or corporation organized and operated exclusively for religious, hospital, or charitable purposes, is impliedly condemned by defendants. Defendants did not appeal. They cannot impugn this finding; it is binding upon them and they are now precluded from questioning the sufficiency of the evidence to support it. This court may not review or consider any error committed against the defendants. We must, therefore, accept the findings adverse to defendants as a true determination of the facts so found. *Ray v. Parker*, 15 Cal.2d 275, 281, 101 P.2d 665; *California C. P. Growers v. Williams*, 11 Cal.2d 233, 238, 78 P.2d 1161; *Heden v. Point Reyes Land Co.*, 185 Cal. 121, 122, 196 P. 44; *Turner v. East Side Canal, etc., Co.*, 168 Cal. 103, 108, 142 P. 69; *Kern Oil Co. v. Crawford*, 143 Cal. 298, 302, 76 P. 1111, 3 L.R.A., N.S., 993; *In re Estate of Olmsted*, 122 Cal. 224, 229, 54 P. 745; *MacDonald v. Pacific Nat. Bank*, 66 Cal.App.2d 357, 363, 152 P.2d 360; *Bank of America of California v. Granger*, 115 Cal. App. 210, 219, 1 P.2d 479; *Todd v. Temple Hospital Ass'n, Inc.*, 96 Cal.App. 42, 48, 273 P. 595; *Garibaldi v. Grillo*, 17 Cal.App. 540, 541, 120 P. 425; 4 Cal.Jur.2d 413, § 552.

The question compels analysis of plaintiff's articles of incorporation as they existed on the tax-lien dates in question. They read:

"That the purposes for which said corporation is formed are:

"(a) To establish, maintain, support and operate a home or homes for worthy aged and infirm persons; to provide for and carry on such other activities in connection therewith as may be necessary and convenient properly to

establish, maintain and operate said home or homes; to provide for and carry on such other charitable work in connection therewith as may be consistent with the history and purposes of the corporation.

"(b) To provide from its funds and pay over annually to the Board of Trustees of Southern California-Arizona Annual Conference of the Methodist Church for the benefit of the retired ministers of the said Annual Conference, their widows and dependents, a sum of money, the amount of which shall be determined at intervals of five years, or more frequent intervals if mutually agreed upon by the Directors of this corporation and the Board of Trustees of the Southern California-Arizona Annual Conference of the Methodist Church, beginning in May, 1943, by a joint conference of the directors of this corporation with the Board of Trustees of the said Annual Conference, subject to ratification by the membership of the said Conference at its next ensuing annual session; provided, however, that in the interval between the adoption of these Articles of Incorporation and May, 1943, the sum for Thirty-five Hundred and Forty (\$3,540) Dollars shall continue to be paid annually under the agreement now in effect.

"(c) To buy, sell or otherwise acquire, hold, own, use, manage, improve, develop, lease, rent, mortgage or otherwise encumber, and to exchange or transfer real property and personal property of every kind and of any interest therein, and as is necessary, auxiliary, incidental or convenient to the needs and purposes of this corporation.

"(d) To borrow and lend money, either with or without security and to make and issue promissory notes, bills of exchange, bonds, debentures and obligations, and evidence of indebtedness of all kinds, either secured by mortgage, pledge, deed of trust or otherwise, and to secure the same by mortgage, pledge, deed of trust or otherwise.

"(e) To make and enter into contracts of every sort and kind with any individual, firm, corporation or association, convenient or necessary to carry out the purposes and objects of this corporation;

"(f) To receive bequests and devises for its own use and upon trust and to appoint attorneys-in-fact;

"(g) To do all and everything necessary, suitable and proper for the accomplishment of the foregoing purposes and anything which the Board of Directors of the corporation may deem conducive or expedient for the proper conduct of said Home and for the carrying out of purposes of the corporation.

"The foregoing clauses shall be construed both as objects and powers and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation. This corporation shall be conducted in accordance with the laws of the State of California, and insofar as permitted by the laws of the State of California, subject to the uses and Discipline of the Methodist Church as from time to time authorized and declared by the General Conference of said Church and by the Annual Conference within whose bounds the said corporation is located. In the event this corporation shall abandon the conducting of any Home under its control or management and shall be dissolved voluntarily or involuntarily, all of the corporation assets of said corporation, wherever situated, remaining after the payment of all its obligations in the manner provided by law, shall be subject to the disposition and control of the Southern California-Arizona Annual Conference of the Methodist Church or its successors."

[3] We are of the opinion it is manifest from plaintiff's articles that the objects and purposes for which it is organized and exists is to establish, maintain, support, and operate a charitable home or homes for worthy aged and infirm persons. Its articles, taken as a whole, are not fairly or

reasonably subject to the construction that it may maintain, support, or operate a non-charitable home for the aged or infirm. "As was pertinently said in *Estate of Henderson*, supra, 17 Cal.2d 853, at page 857, 112 P.2d 605, at page 607: 'Since the enactment of the Statute of Charitable Uses during the reign of Elizabeth, aid to the aged and infirm has been recognized as charitable.'" *Fredericka Home for the Aged v. County of San Diego*, 35 Cal.2d 789, 794, 221 P.2d 68, 71. Plaintiff's objects and purposes are exclusively charitable.

[4] The statement of the objects or purposes in the articles results in defining the scope of authorized corporate activity and limits the powers of the corporate officers and agents, and is controlling over the powers, both those stated in the articles and those given by statute.

The powers of a charitable corporation are construed with reference to the objects and purposes of its corporate existence. The powers, while not limitations assertible against third persons, are limitations on the actual authority of the representatives of the corporation as between it and its officers and members, or as between it and the state. Corporations Code, § 803. Powers are to be deemed as ancillary to the objects and purposes and are limited thereby. *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 P. 411; *Ballantine*, California Corporation Laws, 171, §§ 184, 187; 46 Harv.L.Rev. 1337.

[5] All of the powers given are to be construed as incidental to the purposes or ends of the corporation; are to be employed to advance the authorized objects and purposes; and are to be exercised in subordination to them as means to enable the corporation to accomplish its objects and purposes. In *General Conference of Free Baptists v. Berkey*, supra, 156 Cal. 466, at pages 469, 470, 105 P. at page 412, it was said of the charter of a nonprofit religious corporation:

"It seems clear that the plaintiff herein is a corporation similar in character to those whose creation is authorized by section 593 of the Civil Code. That section

authorizes incorporation of persons for any purpose 'where pecuniary profit is not their object.' The purposes for which the plaintiff was organized are defined in its charter as 'religious, missionary, educational and charitable,' and the power granted to it to acquire and sell property is a power to be exercised in subordination to the main purposes for which the corporation is created. The act of incorporation does not confer any power to enter into the business of buying and selling property for the purpose of advancing the pecuniary profit of the incorporators. The corporation is therefore, in all essential particulars, similar in character to those described in section 593. * * * As we have said, in another connection, its charter plainly indicates that the power conferred upon it to make such purchase and sale was not granted for the purpose of enabling it to do such acts as a means of making a profit thereon. The buying and selling permitted to it were merely incidental to the carrying on of the main purposes of the corporation. A distinction is to be drawn between the purposes of a corporation and its powers. (*Floyd v. Perrin*, 30 S.C. 1, 12, 8 S.E. 14, 2 L.R.A. 242). The purposes of the plaintiff, as defined in the articles of incorporation, are 'religious, missionary, educational and charitable.' As incidental to these purposes, it is granted a variety of powers, i. e., the power to prosecute and defend suits at law, the power to use a common seal, the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation may require to be sold and conveyed. All of these powers are to be exercised in subordination to the main purposes as first declared. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends. Property is to be acquired only for the objects of the corporation, and to be sold only when the interests of the corporation require such sale. The power to sell property by a corporation of this character is as purely incidental to the prosecution of its main

purposes as are the other powers enumerated in the charter, as, for example, the power to prosecute and defend suits at law."

[6] Applying the rules stated, we are of the opinion the enumerated powers in plaintiff's articles include only those activities that are incidental to and reasonably necessary to the accomplishment of the charitable purposes and usefulness for which plaintiff is organized and exists: "to establish, maintain, support, and operate a home or homes for worthy aged and infirm persons." It was stipulated below and the court found, which finding is conclusive on defendants (see authorities cited supra), that the authority to make contributions to the retired ministers' fund of the Conference was charitable within the meaning of section 214. Plaintiff is empowered to acquire and dispose of property as is "auxiliary, incidental or convenient" to its needs and purposes; to borrow and lend money; to make contracts of every sort and kind "convenient or necessary" to carry out its purposes and objects; to receive bequests and devises; to do all and everything "necessary, suitable and proper" for the accomplishment of those purposes, and anything which its Board of Directors "may deem conducive or expedient for the proper conduct of said Home and for the carrying out of [the] purposes of the corporation." The power to buy and sell property, to make contracts, to receive devises and bequests, to borrow money, to contract debts, and to do "all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation," are all powers which a nonprofit corporation has by statute, and which plaintiff would possess without their recital in its articles. Corp.Code, §§ 9501, 9002, 801, 802; *Davis v. Pacific Studios Corp.*, 84 Cal.App. 611, 615, 258 P. 440. The statement in the articles that the "enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation" is not a general grant of power. It merely means that the incidental powers reasonably necessary to effectuate plaintiff's main purposes shall not be limited by the specific

enumeration of them. (See 7 Fletcher, *Cyclopedia Corporations*, 780, § 3648.) It does not give plaintiff any power except such as are specifically given in the articles and those given by statute. The enumerated powers are limited in their exercise. They are not unlimited grants of power, but are subordinate to the primary objects and purposes of the corporation which are entirely charitable.

All that plaintiff was empowered to do during the years in question, was to establish, maintain, support, and operate a charitable home or homes for worthy aged and infirm persons, and in so doing, to exercise the powers given it by its articles and by statute, all of which are incidental to and reasonably necessary to the accomplishment of those purposes, and to provide funds for the retired ministers' fund of the Conference.

[7] From the fact that in the exercise of its powers plaintiff may have had income during the tax years in question it does not follow that the subject property was not irrevocably dedicated to exempt purposes. As was said in *Young Mens Christian Ass'n v. County of L. A.*, 35 Cal. 2d 760, 771, 221 P.2d 47, 54: "Furthermore, the mere fact that the exempt institution may have income or earnings from its property is not necessarily decisive in determining the tax status of its property or any portion thereof. Both the constitutional provision and the statute contemplate that the exempt institution may have income and even 'net earnings' without losing the benefit of its exemption, provided such earnings are derived from the normal pursuit of its exempt purposes and provided further that all other conditions, enumerated in § 214 of the Revenue and Taxation Code, are met." While this statement was made with respect to the question of whether the use made of the property was for exempt purposes it is equally applicable to the question whether the powers given in the articles are incidental to and reasonably necessary for the accomplishment of plaintiff's main purposes and usefulness. *Fredricka Home for the Aged v. County of San Diego*, 35 Cal.2d 789, 221 P.2d 68.

Pasadena Hospital Ass'n v. County of L. A., 35 Cal.2d 779, 221 P.2d 62, 66, which held that the property of that plaintiff had not been irrevocably dedicated to exempt purposes, is not controlling. In that case the plaintiff's articles empowered it "to permanently divert all of its property to any lawful nonprofit purpose * * * though the welfare exemption does not extend to *all* lawful nonprofit purposes and, in fact, expressly excludes certain ones such as fraternal, lodge, or social purposes unless 'clearly incidental' in nature, Rev. & Tax. Code, § 214(5), its directors were empowered to convey all or part of its property in trust for *any* lawful purposes which they might deem advisable * * *; in carrying out its broad purposes, plaintiff's powers were likened to those of corporations organized for *social* as well as other purposes * * *; and finally, plaintiff was vested with authority 'to carry on any other lawful business, enterprise or activity whatsoever' which would 'enhance the value of its properties' * * *." No such powers are to be found in the articles of plaintiff in the present case.

[8] Defendants argue that the property of a nonprofit charitable corporation can be said only to have been irrevocably dedicated to exempt purposes when the articles contain a provision which expressly irrevocably dedicates its property to such purposes. The contention is untenable. The statute does not so provide. If such had been the intention of the Legislature, undoubtedly it would have said so. Pasadena Hospital Ass'n v. County of L. A., 35 Cal.2d 779, 221 P.2d 62, does not say so. There, the court stated, 35 Cal.2d 786, 221 P.2d 66, that the "requirement of irrevocable dedication is ordinarily to be determined by ascertaining the powers of the owner with respect to its assets, including its properties and the proceeds thereof." The court did not say that the requirement of irrevocable dedication is to be determined by ascertaining whether the articles contain a provision which expressly irrevocably dedicates the property to exempt purposes. The reasoning of Cedars of Lebanon Hosp. v. County of L. A., 35 Cal.2d 729, 221 P.2d 31, 15 A.L.R.2d 1045, and Young Men's

Christian Ass'n v. County of L. A., 35 Cal.2d 760, 221 P.2d 47, negatives this contention. If defendants' argument was well taken none of the property of Cedars of Lebanon Hospital or of the Y.M.C.A. would have been exempt. So far as appears from the opinions and records in those cases, the articles of incorporation of the plaintiffs did not contain such a provision as defendants suggest. In those cases it was held that certain properties of the plaintiffs were exempt and that certain other properties were nonexempt. Obviously, the decisions in those cases were bottomed on the premise that the plaintiffs' exempt properties were irrevocably dedicated to exempt purposes without a provision in the articles expressly irrevocably dedicating the properties to such purposes, otherwise all of the properties would have been held subject to taxation because of the absence of a provision expressly dedicating them to exempt purposes. In other words, the presence of a provision in the articles expressly irrevocably dedicating the property to exempt purposes was not deemed essential to exemption. Nor does the fact that plaintiff may amend its articles to give it the power to use its property for non-exempt purposes affect the result. The question is whether the property was on the tax-lien dates * * * the first Mondays of March, 1946, 1947, and 1948 * * * irrevocably dedicated to exempt purposes. Rev. & Tax. Code, §§ 254, 254.5. The effective date of determining whether there is an irrevocable dedication is the tax-lien date. Pasadena Hospital Ass'n v. County of L. A., 35 Cal.2d 779, 788, 221 P.2d 62. It is plaintiff's powers, as fixed by its articles as they existed on the tax-lien dates, which is controlling. (*Idem*.)

[9] We conclude that on the tax-lien dates in question plaintiff's articles of incorporation did not empower it to divert any of its property to nonexempt purposes.

[10] Since plaintiff's articles of incorporation did not permit the present use of plaintiff's assets for nonexempt purposes, and since the court found that upon the liquidation, dissolution, or abandonment of plaintiff, its property would have inured to the benefit of a fund, foundation, or cor-

poration organized and operated exclusively for religious, hospital, or charitable purposes within the meaning of section 214, the requirement of irrevocable dedication to exempt purposes has been satisfied.

[11] Since the facts are undisputed and the parties agree that a question of law only is involved, it is appropriate to reverse the judgments with directions. The parties stipulated as to the amounts in controversy.

The judgment in each action is reversed with directions to the superior court to amend its findings of fact and conclusions of law, and to render judgment for plaintiff in accord with the stipulation of the parties as to the amounts in controversy.

SHINN, P. J., concurs.

PARKER WOOD, J., being disqualified did not participate.



PACIFIC HOME v. COUNTY OF LOS ANGELES et al. (two cases). *

Civ. 19277.

District Court of Appeal, Second District,
Division 3, California.

April 20, 1953.

Rehearing Denied May 11, 1953.

Hearing Granted June 18, 1953.

Action brought by corporation maintaining home for aged and infirm persons to recover taxes paid under protest. The Superior Court, Los Angeles County, rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that since the plaintiff's articles of incorporation did not permit the present use of plaintiff's assets for non-exempt purposes, and since the trial court had found that upon liquidation, dissolution, or abandonment, of plaintiff, its property would inure to benefit of fund, foundation, or corporation organized and operated exclusively for religious, hospital, or charitable purposes, there had been an irrevocable dedication of

the organization's property to exempt purposes.

Reversed with directions.

1. Taxation $\hookrightarrow$ 241(2)

With regard to whether irrevocable dedication had been made, within welfare exemption statute, articles of incorporation of organization maintaining home for aged and infirm persons could not reasonably be construed so as to permit it to operate a non-charitable home or so as to permit diversion of all or any part of organization's property to non-exempt purposes. Const. art. 13, § 1c; Revenue and Taxation Code, § 214.

2. New Trial $\hookrightarrow$ 163(1)

An order ruling on a motion for new trial is ineffective unless filed with clerk or entered in minutes; and effective date of order denying motion for new trial is date of minute entry.

3. New Trial $\hookrightarrow$ 164

Notwithstanding fact that trial judge had, at conclusion of hearing on motion for new trial, stated that he "would" deny the motion, court nevertheless had jurisdiction thereafter to deny the motion and to vacate findings, conclusions, and prior judgment, and to enter a new and different judgment. Code Civ.Proc. § 662.

4. Appeal and Error $\hookrightarrow$ 1176(1)

Where facts were undisputed and only a question of law was involved, and parties had stipulated as to amount in controversy, reversal with directions would be appropriate.

Newby, Holder & Newby and Charles R. Newby, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Louis A. Babior, Deputy City Atty., Harold W. Kennedy, County Counsel, and Arvo Van Alstyne, Deputy County Counsel, Los Angeles, for respondents.

VALLÉE, Justice.

This is a companion case to *Pacific Home v. County of Los Angeles*, Cal.App., 256 P.2d 36. The action is to recover taxes paid for the tax year 1949-1950. Plaintiff filed its claim for exemption, which was

* Subsequent opinion 264 P.2d 544.

denied, and paid the taxes under protest. Defendants had judgment.

After the first Monday of March 1948, and prior to the first Monday of March, 1949, plaintiff's articles of incorporation were amended. The amendments consisted in eliminating the clause providing for contribution to the retired ministers' fund and changing the dissolution clause to read as follows: "In the event this corporation shall abandon the conducting of any Home under its control or management and shall be dissolved voluntarily or involuntarily, all of the corporation assets of said corporation wherever situated remaining after payment of all of its obligations in the manner provided by law, shall be subject to the disposition and control of the Southern California-Arizona Annual Conference of The Methodist Church, or its successors; and be used for the benefit of worthy aged and infirm persons and for such other charitable work as may be consistent with the history and purposes of the corporation."

The court first found that on the first Monday of March, 1949, plaintiff and the subject properties met the requirements of the welfare exemption and concluded that the properties were irrevocably dedicated to religious, hospital, or charitable purposes, and upon liquidation, dissolution, or abandonment by plaintiff would not have inured to the benefit of any private person except a fund, foundation, or corporation organized and operated for such purposes. Judgment for plaintiff was entered accordingly on February 18, 1952. Defendants made a motion for a new trial. On April 1, 1952, at the conclusion of the hearing of the motion, the court said: "I will deny all motions." (Motions for new trial in the companion cases were heard at the same time.) The clerk made a memorandum to that effect but did not make an entry in the minutes. On April 2, 1952, the trial judge instructed the clerk that the motion would stand submitted. The clerk then made a minute entry dated April 1, 1952, which said the motion was submitted. On April 15, 1952, the court signed and filed a written order vacating the findings of fact, conclusions of law, and judgment, ordering judgment for defend-

ants, directing the preparation of new findings, conclusions, and judgment in accord with those in the companion cases, and denying the motion for new trial. In the new findings the court found that on the first Monday of March, 1949, the property upon liquidation, dissolution, or abandonment of plaintiff would have inured to the benefit of a fund, foundation, or corporation, organized and operated for exempt purposes. It found, however, that on that date plaintiff's property was not irrevocably dedicated to religious, hospital, or charitable purposes. Judgment for defendants was entered on April 17, 1952. Defendants appealed from the judgment entered February 18, 1952. Plaintiff appealed from the judgment entered April 17, 1952.

Defendants appear to concede that the amendment of the dissolution clause imposed a restriction on the purposes for which the property could be diverted upon succession thereto by the Conference in the event of plaintiff's liquidation, dissolution, or the abandonment of it; that it creates a trust on the assets for charitable purposes in the hands of the Conference; and that it has the effect of preventing diversion of the property to nonexempt purposes in such event.

[1] The principle question in this case is whether on the first Monday of March, 1949, plaintiff's articles of incorporation permitted it to divert all or any part of its property to nonexempt purposes. Plaintiff's articles were the same on the first Monday of March, 1949, as we have quoted them in the companion cases, except that the provision for contribution to the retired ministers' fund of the Conference had been eliminated and the dissolution clause had been changed. We concluded in the companion cases that plaintiff's articles did not permit it to divert all or any part of its property to nonexempt purposes. On the authority of *Pacific Home v. County of Los Angeles*, Cal.App., 256 P.2d 36, we hold that on the first Monday of March, 1949, the subject property was irrevocably dedicated to exempt purposes.

[2,3] Plaintiff argues that the oral statement of the trial judge at the conclusion of the hearing of the motion for a

PEOPLE v. LARRANN.

Cr. 936.

District Court of Appeal, Fourth District,
California.

April 28, 1953.

new trial, "I will deny all motions," was effective immediately to deny the motion, and that the court did not have jurisdiction thereafter to vacate the findings, conclusions, and prior judgment, and to enter a new and different judgment. The point is important only because of the appeal of defendants. It is without merit. The court's pronouncement was in the future tense. The formal order which the judge signed, and which was the only order entered in the minutes, was the order of the court denying the motion for a new trial. An order ruling on a motion for a new trial is ineffective unless filed with the clerk or entered in the minutes. *Jablon v. Henneberger*, 33 Cal.2d 773, 775, 205 P.2d 1. The effective date of an order denying a motion for a new trial is the date of the minute entry. *Millsap v. Hooper*, 34 Cal.2d 192, 193, 208 P.2d 982. The minute entry in the present case was made while the court still retained jurisdiction. The court was authorized in denying the motion for a new trial to vacate the prior findings, conclusions, and judgment, and to make new findings and conclusions, and to render a new judgment. Code Civ.Proc. § 662; *Spier v. Lang*, 4 Cal.2d 711, 713-714, 53 P.2d 138. The new judgment entered April 17, 1952, superseded the judgment entered February 18, 1952. Defendants' appeal from the judgment of February 18, 1952, apparently taken as a matter of precaution, is a nullity and will be dismissed.

[4] The parties agree that the facts are undisputed and that a question of law only is involved. They stipulated as to the amount in controversy. A reversal with directions is, therefore, appropriate.

Defendants' appeal from the judgment entered February 18, 1952, is dismissed. The judgment entered April 17, 1952, is reversed with directions to the superior court to amend its findings of fact and conclusions of law, and to render judgment for plaintiff in accord with the stipulation of the parties as to the amount in controversy.

SHINN, P. J., concurs.

PARKER WOOD, J., being disqualified did not participate.

Defendant was convicted of a violation of statute making it a felony to drive or take a vehicle without owner's consent, and from the judgment and an order of the Superior Court of Riverside County, Russell S. Waite, J., denying defendant's motion to set aside the judgment, defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence at preliminary examination was sufficient to justify holding defendant on charge of which he was convicted.

Appeal from judgment dismissed and order denying motion to set aside judgment affirmed.

1. Criminal Law ⇨1044

Defendant could not challenge sufficiency of the evidence at preliminary examination in absence of motion to quash the information.

2. Criminal Law ⇨238

Evidence at preliminary examination was sufficient to justify holding defendant on a charge of violating statute making it a felony to drive or take a vehicle without consent of owner. Vehicle Code, § 503.

3. Criminal Law ⇨998

In proceeding on motion by defendant to set aside conviction, record did not disclose that any fraud had been practiced by district attorney to obtain conviction.

4. Criminal Law ⇨1158(1)

In proceeding on motion to set aside conviction of violation of statute making it a felony to drive or take a vehicle without owner's consent, conflicting evidence presented a question for trial court as to whether defendant was induced to plead guilty by false statements that offense charged was not a felony. Vehicle Code, § 503.

5. Criminal Law ⇨1069(6)

Where appeal from conviction of violation of statute making it a felony to drive or take a vehicle without owner's consent

was filed more than nine months after entry of judgment, purported appeal from judgment was dismissed on ground that it was not taken in time. Vehicle Code, § 503.

Charles Larrann, in pro. per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying the defendant's motion to set aside the judgment. In effect, the proceeding in the trial court was an application for a writ of error coram nobis.

The appellant was originally charged with a violation of section 484 of the Penal Code, and was represented by the public defender. The information was later amended to charge a violation of section 503 of the Vehicle Code, to which he pleaded guilty. His application for probation was denied, and judgment was pronounced on December 28, 1951, sentencing him to prison.

On June 13, 1952, the appellant filed a motion to set aside the judgment based on the grounds that the evidence at the preliminary hearing was not sufficient to show a violation of section 503 of the Vehicle Code, and that he was induced to enter a plea of guilty by the false representation of his attorney that the offense denounced in that section is not a felony and could not be punished as such. It was alleged that section 503 "is limited to cases where a vehicle is driven or taken in the absence of the owner", and that the evidence here disclosed that the owner was present and gave the appellant permission to take this automobile. It was also alleged that through the fraud of his attorney the appellant was induced to plead guilty to a violation of section 503, when the actual offense was merely a violation of section 499b of the Penal Code, a misdemeanor. Affidavits in opposition to the motion were filed by the attorney who had represented the appellant, and by the deputy district attorney who had handled the matter. A counter-affidavit

was also filed by the appellant. The court appointed another attorney to represent the appellant at the hearing. The motion to set aside the judgment was denied, and the appellant filed a notice of appeal from that order and also from the original judgment.

[1, 2] It is first contended that the motion to vacate the judgment should have been granted since the evidence taken at the preliminary examination showed that the appellant could not have been guilty of a violation of section 503 of the Vehicle Code, as this evidence disclosed that the vehicle was not taken in the absence of the owner, and also disclosed that the offense, if any, constituted a violation of section 499b of the Penal Code. The requirement that the taking be in the absence of the owner of the vehicle, which was formerly in section 503, was eliminated from that section in 1947, Stats. 1947, p. 1926. Moreover, the appellant is precluded from challenging the sufficiency of the evidence at the preliminary examination by his failure to move to quash the information. *People v. James*, 99 Cal. App.2d 476, 222 P.2d 117; *In re Rogers*, 91 Cal.App.2d 394, 205 P.2d 667. The evidence taken at the preliminary examination shows that on November 21, 1951, the appellant, with a woman and small child, entered a used-car lot in Indio at two or three o'clock in the afternoon and inquired about a certain automobile which was there for sale; that the salesman gave the appellant permission to drive the car "around the block"; that the appellant left with the car and did not return; that later on that day, the appellant and the car were picked up near Blythe, about 100 miles from Indio; and that later on the same day the appellant told the chief of police of Indio that he had taken this car and was using it as a means of transporting his wife and himself to the Blythe area for the purpose of securing work, and that he did not have any funds with which to pay for the car or for a down payment on the car. The evidence at the preliminary was entirely sufficient to justify holding the appellant on a charge of violating section 503 of the Vehicle Code.

[3] It is next contended that fraud was used "to support and obtain a conviction." It is argued that on May 10, 1952, the ap-

pellant learned that the file of the district attorney's office contained a statement which purported to be signed by the appellant; that the appellant wrote to the district attorney asking him if any such statement existed and saying that if such a statement was in the file, bearing the signature of the appellant, this was a forged signature; that the appellant received a reply from the district attorney saying "We do not have any forged statements in our file in your case"; and that at the hearing of the motion to vacate the judgment on October 3, 1952, the deputy district attorney told the court that "We have a signed statement from the defendant." This had nothing to do with obtaining a conviction, and the only reference thereto made at the hearing on the motion was that the district attorney said they had a signed statement from the defendant in which he said he was going east from Blythe; that he went to the used-car place and said he wanted to buy a car, and had \$3 in his pocket; that he then left; and that they apprehended him just outside of Blythe. Except for the statement that he was going east from Blythe these same matters appeared in the affidavit of appellant's former attorney. Conflicting statements made by the appellant as to his destination and purpose were also set forth in the affidavits. No fraud on the part of the district attorney appears, and the matter thus complained of furnishes no ground for vacating the judgment or for a reversal of the order here appealed from.

[4] Appellant's final contention is that he was induced to plead guilty by false statements made by his then attorney, and that this attorney informed him that he was fixing up a deal with the district attorney's office for a lesser offense, a misdemeanor; told him that the violation of section 503 charged in the amended information was not a felony, and he "could only receive local punishment"; and also told him that if he refused to plead guilty to the charge the chances were his wife would be arrested as an accomplice. The affidavits filed by appellant's former attorney and by the deputy district attorney who handled the matter positively deny all of the allegations made by the appellant in this regard; set

forth in detail another version of what was actually said and done, including various conflicting stories told by the appellant; and disclose a situation entirely different from that claimed by the appellant. Nothing more than a conflict in the evidence appears, and any such conflict has been resolved by the trial court against the appellant.

[5] The attempted appeal from the original judgment was filed more than nine months after the judgment was entered. The purported appeal from the judgment is dismissed, and the order denying the motion to set aside the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



117 Cal.App.2d 434

HILL et al. v. RALPH et al.

Civ. 4619.

District Court of Appeal, Fourth District,
California.

April 27, 1953.

Hearing Denied June 18, 1953.

Action for wrongful death of truck passenger sustained in collision with automobile as truck was completing U-turn on highway. The Superior Court, Kern County, entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that the testimony of the truck driver, who was called as plaintiffs' witness, was not irreconcilable with presumption that the passenger was exercising ordinary care and obeying the law at time of the fatal accident, and refusal to give requested instruction on such presumption was prejudicial error, in view of fact that jury returned for additional instructions on question of contributory negligence.

Reversed.

I. Death ☞58(1)

Where plaintiff's own evidence in wrongful death action is reconcilable with presumption that deceased was exercising ordinary care and obeying law at time of fatal accident, the presumption remains evi-

dence in the case until dispelled or overcome by evidence offered in contradiction thereof.

2. Death ⇨103(3)

Whether evidence in wrongful death action was sufficient to overcome presumption that deceased was exercising ordinary care and obeying law at time of fatal accident usually is question for trier of fact.

3. Automobiles ⇨246(60)

In action against motorist for wrongful death of truck passenger who was killed when automobile struck truck in motorist's lane as truck was completing U-turn, testimony of truck driver, who was called as plaintiffs' witness, that passenger evidently was looking straight ahead because he told truck driver "look out, they are going to hit us" was not wholly irreconcilable with presumption that passenger was exercising ordinary care and obeying law at time of fatal accident, and refusal of instruction on such presumption was error.

4. Appeal and Error ⇨1069(3)

Where presumption that deceased truck passenger was exercising ordinary care and obeying law at time of fatal accident was applicable in wrongful death case arising out of automobile collision, and jury returned for further instructions on subject of contributory negligence, refusal to give instruction relating to such presumption was prejudicial error.

Mack, Bianco & King, Bakersfield, for appellants.

Johnston, Baker & Palmer, Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiffs and appellants, as heirs at law of Johnny Roy Hill, deceased, brought this action against defendants and respondents for damages alleged to be due them by reason of the death of deceased as a result of claimed negligence on the part of defendants arising out of an automobile accident. A trial by jury resulted in a judgment for defendants.

The sole question raised is the claimed prejudicial error of the court in refusing

to give, at plaintiffs' request, an instruction to the effect that the law presumes that the deceased, in his conduct at the time and immediately preceding the accident, was exercising ordinary care and obeying the law. It was offered in the language of B.A.J.I. No.135, Alt., Supplement. In support of the claimed error they cite such cases as *Smellie v. Southern Pacific Company*, 212 Cal. 540, 299 P. 529; *Carlton v. Pacific Coast Gasoline Co.*, 110 Cal.App.2d 177, 242 P.2d 391; *Westberg v. Wilde*, 14 Cal. 2d 360, 367, 94 P.2d 590; and *Kelley v. City and County of San Francisco*, 58 Cal.App. 2d 872, 137 P.2d 719.

It is defendants' position that since plaintiffs produced a witness who testified as to the facts of the accident and the actions of the deceased, it was not prejudicial error for the court to refuse the proffered instruction.

The deceased was riding with one Sinner in a pick-up truck. Sinner was driving. The men had been on an errand hauling accumulated junk from Bakersfield, driving easterly to the dump. They decided to drive farther eastward on a highway following generally the course of the Kern River. On the way they changed their minds and decided to return to Bakersfield. Sinner pulled the truck off to his right side of the road, came to a stop, and then turned to his left, making a "U" turn in low gear on the highway, across double white lines in the center thereof. As the rear wheels of his truck were about to pass over the white lines an Oldsmobile sedan driven by defendant Richard Ralph, proceeding in a westerly direction, ran into and side-swiped the truck after he had applied his brakes and "fishtailed" the sedan. The right side of the sedan collided with the right side of the pick-up truck. The sedan skidded its tires for a distance of about 150 feet.

Ralph testified that when he first saw the truck it was about 200 to 250 feet from him and moving very slowly making the "U" turn; that he immediately applied his brakes and sounded his horn but the pick-up truck continued turning in his pathway. The evidence indicates he might have been traveling somewhere between 50 and 70

miles per hour. Hill was killed. Many witnesses were called by plaintiff showing the nature of the terrain and some obstruction of the view by intervention of a brush-covered sloped bank to the south of the highway. The testimony is, however, that there was a distance of about 365 feet east of the point of impact wherein the view was not obstructed.

Plaintiffs called Sinner, the driver of the truck, as their witness. ³He testified briefly in reference to the conduct of the deceased Hill just prior to and at the time of the accident. His testimony is that he saw no vehicle approaching him within 300 to 400 feet before he started to turn; that Hill was seated beside him and they were carrying on a conversation; that "evidently" Hill was looking straight ahead "because he told me * * * look out, they are going to hit us"; that he heard the squeal of tires and Hill was knocked to the floor of the truck unconscious. Sinner then testified he did plead guilty to a violation of section 544 of the Vehicle Code in making an illegal turn. No other evidence was produced as to the conduct of deceased.

The evidence, if any, which could support a finding of contributory negligence on the part of the deceased, is only slight. The court refused proffered instructions to the jury pertaining to claimed joint venture between deceased and Sinner on the ground there was not sufficient evidence to support them. No error is claimed in this respect. Whether the deceased was looking ahead and watching for traffic at the time Sinner started to turn the truck in the highway was not established by any direct evidence. Sinner's statement that the deceased was looking straight ahead at the time he was making the turn, was based upon a conclusion of the witness. There is some evidence that when Hill arrived at the hospital he was unconscious and that he did have some odor of intoxicating liquor on his breath. It does not appear to us that this evidence was such as would *compel* the conclusion that the deceased was guilty of contributory negligence. The evidence thus produced by plaintiff would not be wholly irreconcilable with the so-called presumption of due care.

In *Westberg v. Willde*, supra, 14 Cal.2d at page 367, 94 P.2d at page 594, the court said:

"* * * where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the *Mar Shee* case, and other cases decided by this court following the *Mar Shee* case, an instruction that the deceased is presumed to have exercised ordinary care of his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction."

The question then is whether the testimony in the instant case meets the requirements of the rule in the *Mar Shee* case, infra, and other cases decided by the Supreme Court following that case. In the *Mar Shee* case, *Mar Shee v. Maryland Assurance Corporation*, 190 Cal. 1, 210 P. 269, 273, witnesses testified on behalf of plaintiff regarding the facts and circumstances immediately preceding the shooting which indicated murder. Their testimony was uncontradicted. Plaintiffs there relied on the presumption "that a person is innocent of crime". The court held that from the facts thus proved by him, being wholly irreconcilable with the presumption of innocence, the presumption was dispelled thereby, and no evidence would then remain to support the finding that the insured was not murdered. It then held, quoting from syllabus [3] that "A fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence, and when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

Referring to the *Smellie* case, then, we find the conclusion that the presumption continued in plaintiff's favor as against the testimony of a defendant called by plaintiff

as his witness under section 2055 of the Code of Civil Procedure. See *Shirk v. Southern Pacific Co.*, 103 Cal.App.2d 97, 100, 229 P.2d 100.

[1,2] It therefore appears that when plaintiff proceeds to prove by his own witnesses all of the facts pertaining to the conduct of deceased leading up to and at the time of the accident, he is not entitled to an instruction on due care, and may not rely upon the presumption here involved, if the uncontradicted facts established by him are wholly irreconcilable with such presumption, where such testimony is not the product of mistake or inadvertence. In other words, plaintiff must first establish a sphere or field within which the presumption must operate before he is entitled to such an instruction, and where plaintiff's own evidence is reconcilable with the presumption, it remains evidence in the case until dispelled or overcome by evidence offered in contradiction thereof. This question is usually one for the trial court or jury to determine. *Smellie v. Southern Pacific Company*, supra; *Hoppe v. Bradshaw*, 42 Cal.App.2d 334, 108 P.2d 947.

In *Duehren v. Stewart*, 39 Cal.App.2d 201, 102 P.2d 784, which was an action for damages for the death of a pedestrian who was struck by an automobile while crossing in a marked cross-walk, where no witnesses testifying on behalf of plaintiff saw deceased until he was 10 or 15 feet out into the cross-walk, this court held that the presumption that he had exercised ordinary care before that time arose in the absence of evidence on the subject.

Among the cases relied upon by defendants is *Speck v. Sarver*, 20 Cal.2d 585, 128 P.2d 16, where it was held that it was error to give an instruction pertaining to plaintiff's freedom from contributory negligence where plaintiff was living and his testimony disclosed his acts and conduct because, under those circumstances, there was no room for the operation of any presumption. To the same effect is *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884.

In *Mundy v. Marshall*, 8 Cal.2d 294, 65 P.2d 65, the plaintiff's own evidence controverted and dispelled any presumption of

due care. So also in *Tice v. Kaiser Co., Inc.*, 102 Cal.App.2d 44, 226 P.2d 624.

The question before us then is whether the testimony produced by the plaintiff was wholly irreconcilable with the presumption of due care on the part of the deceased immediately prior to and at the time of the casualty in which he lost his life. If it were, there would be no field in which the presumption could operate and the court would be justified in refusing such instruction. On the other hand, if it was not, the instruction should have been given.

[3] We see nothing wholly irreconcilable between the presumption and the testimony of Sinner as to the conduct of deceased up to and at the time of the accident. There is no evidence that deceased saw the approach of defendant's car or failed to warn Sinner when he stopped the truck to make the turn or that he, as a guest, was called upon to watch the highway for any possible approach of vehicles. For all that is known, he may have had his attention upon other matters. The testimony that he was looking straight ahead after the commencement of the turn in the highway was predicated upon the conclusion of the witness that he must have been because he called to the driver to look out for an approaching car. There is nothing about this testimony wholly irreconcilable with the presumption. In fact, it supports it. We conclude that the court erred in refusing to give the proffered instruction.

The only remaining question is whether or not such error was prejudicial. It does appear to us from the evidence that the jury might have believed that the negligence of Sinner, the driver of the truck, was the sole proximate cause of Hill's death, or that the defendants were not negligent, or that the defendants were negligent and deceased was guilty of contributory negligence releasing defendants from liability. This latter conclusion is somewhat fortified by the import of a dialogue between the court and the foreman of the jury when he returned for further instructions on that subject. It is as follows:

(Juror) "I would like to have the instruction re-read on the part regarding

the guest's responsibility * * *. By The Court: I will read to you the two instructions that were given on that and see if this answers your question. By The Court: (Reading) * * * You are instructed that the driver's negligence, if any there was, may not be imputed to the passenger * * * and that, therefore, you shall find that there was no contributory negligence on the part of Johnny Roy Hill unless you should find that there was personal negligence on his part—that is, some negligent conduct of his own—which contributed as a proximate cause of his injuries and death.

"It may happen that one who is riding in, but not operating, an automobile, although having no joint authority with the driver in the management of the vehicle, will so conduct himself—either by voluntarily assuming some part in the operation, or by some interference, or by failure in some duty resting upon himself—as to independently, negligently and proximately either cause, or participate in causing an accident. Whether such an instance occurred must be judged, not by imputing to him the conduct of the driver or of any other person, but by considering his own conduct and its effect in the light of all the surrounding circumstances.

"By The Court: Does that answer your question?" (Juror) "Yes, sir".

[4] This might lead one to believe that the jury had already determined that defendants were guilty of negligence, otherwise it would not be necessary to consider the question of contributory negligence on the part of deceased, and after having the instruction on that subject read to it, it concluded that deceased was guilty of contributory negligence and accordingly found in favor of defendants. Under such circumstances the aid of the presumption and an instruction on that subject would become important, and the failure to give the instruction would, no doubt, be prejudicial. See, *Kelley v. City and County of San Francisco*, supra, where it is said that where contributory negligence is an issue in the case, and where it is impossible to

determine upon what issue a verdict for defendants rested, and where the refusal to give the instruction cut off the only defense possible, because of the death of the plaintiff and the absence of witnesses, it was prejudicial error to refuse to give an instruction on the presumption that the decedent took ordinary care of his own concerns.

Judgment reversed.

BARNARD, P. J., and, MUSSELL, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.



117 Cal.App.2d 432

BUTTS v. CUMMINGS et al.

Civ. 8111.

District Court of Appeal, Third District,
California.

April 27, 1953.

Action between owners of lands originally separated by river to quiet title to strip of land between original channel and present channel. The Superior Court, Sonoma County, Geary, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peek, J., held that since the change in the course of the river was not by imperceptible degrees but was by a sudden change resulting from the effect of flood waters, the doctrine of avulsion, rather than the doctrine of accretion, was applicable.

Affirmed.

1. Navigable Waters ⇐45

In action between owners of lands originally separated by river to quiet title to strip of land between original channel and present channel, evidence supported determination of trial court that change in course of river was not by imperceptible degrees but was by certain sudden change resulting from effect of flood waters.

2. Navigable Waters ⇐45

Where change in course of river was not by imperceptible degrees but was by

sudden change resulting from effect of flood waters, doctrine of avulsion, rather than doctrine of accretion, was applicable to determine boundary line of properties which originally had been separated by river.

3. Navigable Waters ⇐45

In action between owners of lands originally separated by river to quiet title to strip of land between original channel and present channel, plaintiff could not successfully complain that boundary lines laid down by court as defining defendants' property lacked definiteness and certainty.

J. A. Ratchford, Healdsburg, for appellant.

Murphy, Brownscombe & Gleason, Santa Rosa, F. M. Passalacqua, Healdsburg, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from an adverse judgment in an action to quiet title to certain property situated on the Russian River in Sonoma County. It is his contention (1) that under the evidence he was entitled to judgment as a matter of law and (2) that the boundary lines defining defendants' property lacked definiteness and certainty. From an examination of the record before us it appears that plaintiff's contentions are not well founded and that the judgment of the trial court must be sustained.

The lands of the parties herein were originally held in common ownership under what was then known as the Sotoyome Grant. Since that time various conveyances have been made with the result that at the present time plaintiff's lands lie to the west and defendants' lands lie to the east of the Russian River.

The present action arose as the result of the eastward movement of the Russian River, which at the time of trial was about 1500 feet easterly of its original position in 1856, when the lands were held in common ownership. The area embraced by the action is a strip, mostly a gravel bar, lying between the original and present day

channels of the river. At the conclusion of the hearing the trial court found that the change in the course of the river was not by imperceptible degrees but rather was the result of a sudden change by reason of the effect of flood waters upon the eastern bank of the river. Judgment was thereupon entered accordingly in favor of defendants, and plaintiff appeals.

Plaintiff's argument in support of his first contention is, as stated in his opening brief, that "The record before the court leaves no doubt that over the years, from natural causes, *and in the area involved*, the Russian River has persistently, consistently, and imperceptibly shifted eastward, and that the channel of the river is now several hundred feet east of where it was located in 1857."

[1] In so arguing, plaintiff has completely disregarded the evidence to the contrary. It would seem unnecessary for this court to extensively summarize the evidence in support of the judgment. Suffice it to say that not alone do the terms of the conveyances of plaintiff's predecessors in interest and those of defendants reveal sudden changes in the course of the river, but also does the testimony of numerous elderly persons who testified from their own knowledge concerning such sudden changes. In view of the ample evidence in this regard it would seem unnecessary to add that plaintiff is, at the outset, confronted with the primary rule on review, see *In re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689, and hence his first contention is wholly without merit.

[2] Since the evidence amply supports the conclusion of the trial court that the change in the course of the river was not by imperceptible degrees but rather that it was by a sudden change of said course resulting from the effect of flood waters, the trial judge properly applied the doctrine of avulsion rather than that of accretion. *Wholey v. Caldwell*, 108 Cal. 95, 41 P. 31, 30 L.R.A. 820; *McKissick Cattle Co. v. Alsaga*, 41 Cal.App. 380, 182 P. 793. In the case last cited this court stated, 41 Cal.App. at page 387, 388, 182 P. at page 796, that

"* * * when, solely by an act of Providence, the channel of riparian waters has been so changed as that such waters cease to flow over and across the lands of a riparian owner—that is to say, when such waters cease through the operation of some natural force to pursue their accustomed course and in consequence cease to flow in a portion of that natural channel, which portion of such channel passes or crosses over certain lands—then in that case the owner of such lands loses the role of a riparian owner."

See also McKinney on Irrigation, Water Rights, 2d Ed., Vol. 1, pages 931, 932.

[3] Plaintiff's second contention attacks the boundary lines laid down by the court as being indefinite and uncertain. However, it is apparent from the record that the description so attacked relates solely to the property of defendants and hence is of no concern to the plaintiff.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



117 Cal.App.2d 334

CHAHON v. SCHNEIDER.

No. 15416.

District Court of Appeal, First District,
Division 1, California.

April 17, 1953.

Hearing Denied June 11, 1953.

Action for quasi-specific performance of oral contract to transfer certain property by will in consideration of services rendered during decedent's lifetime. The Superior Court, City and County of San Francisco, rendered judgment against plaintiff, after sustaining demurrer to plaintiff's amended complaint without leave further to amend, and plaintiff appealed. The District Court of Appeal, First Appellate District, Division

One, Fred B. Wood, J., held that complaint was insufficient to show such unconscionable injury to plaintiff or unjust enrichment of decedent as would estop executors from interposing bar of statute of frauds.

Affirmed.

1. Limitation of Actions ⇨46(5)

Statute of limitations does not begin to run against action at law for services rendered by promisee to promisor in reliance upon promisor's agreement to give promisee property by will until termination of the services.

2. Frauds, Statute of ⇨144

Complaint alleging that plaintiff continued to care for decedent in reliance upon decedent's oral promise to will plaintiff a bank account containing about \$46,000, and thereafter decedent required more nursing care, but that decedent willed plaintiff only \$1,000 was insufficient to show such unconscionable injury to plaintiff or unjust enrichment to decedent as would estop executors from interposing bar of statute of frauds to plaintiff's suit for quasi-specific performance of decedent's oral promise. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

3. Estoppel ⇨106

Doctrine of equitable estoppel is available in actions at law as well as in suits in equity.

4. Frauds, Statute of ⇨144

In determining whether or not cause of action is barred by statute of frauds, plaintiff's claim to equitable estoppel will be considered, whether action be at law upon contract or an equitable action for specific performance.

5. Wills ⇨68

Damages in action at law for breach of oral agreement to leave plaintiff a bank account are measured by amount of money in particular account at time of promisor's death.

6. Executors and Administrators ⇨224

In action at law against a decedent's estate for damages or for quantum meruit, plaintiff is a creditor and must file his claim against estate or be forever barred.

7. Executors and Administrators ⚡443(7)

A complaint in an action at law for damages or for quantum meruit against estate of deceased person, which does not allege that plaintiff's claim was filed against estate, fails to state cause of action.

8. Executors and Administrators ⚡443(7)

Even if complaint alleging breach of oral promise to will plaintiff a bank account had stated facts sufficient to constitute a cause of action at law for damages, complaint was insufficient for failure to allege that plaintiff had presented claim for damages or for quantum meruit against decedent's estate.

Charles E. Greenfield, Jr., Sonoma, Wal-lace, Garrison, Norton & Ray, San Francisco, for appellant.

J. C. Flannery and Edward J. Lynch, San Francisco, for respondent.

FRED B. WOOL, Justice.

In this action for quasi-specific performance of an oral contract to transfer certain property by will, in consideration of services rendered during the lifetime of the promisor, judgment was rendered against the plaintiff upon the sustaining of a demurrer to the amended complaint without leave further to amend.

The demurrer presented the asserted bar of that clause of the statute of frauds which declares invalid "An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will", unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or by his agent. Civ.Code, § 1624, subd. 6, and Code of Civ.Proc., § 1973, subd. 6.

[1] The statute clearly applies. In such a case the person who renders services to another in reliance upon the latter's promise to give him property by will is not without remedy. He has an action against the deceased promisor's estate for the reasonable value of the services rendered. The statute of limitations does not commence to

run against such an action until termination of the services, which usually occurs upon the death of the person sought to be charged. *Leoni v. Delany*, 83 Cal.App.2d 303, 307, 188 P.2d 765, 189 P.2d 517, and cases cited. But plaintiff herein did not choose to bring such an action.

She brought, instead, this action for quasi-specific performance of the oral contract, to impress a trust in her favor upon the property in the hands of the legatee of the decedent and the administratrix of his estate. The theory is that "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civ.Code, § 2224. Plaintiff claims to be "the person who would otherwise have had it." But the oral agreement, by which she might have had this property, is "invalid" under the statute of frauds.

Yet, there are circumstances in which the law allows quasi-specific enforcement of such a contract despite the statute; i. e., when the principle of estoppel comes into play. "The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract [citations], or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute. [Citations.] In many cases both elements are present. Thus not only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations. [Citations.]" *Monarco v. Lo Greco*, 35 Cal.2d 621, 623-624, 220 P.2d 737,

739. There it appeared that Natale Castiglia and his wife Carmela, when Christie, her son by a former marriage, became 18 and decided to leave home, wanted Christie to stay home and participate in the family venture. "They made an oral proposal to Christie that if he stayed home and worked they would keep their property in joint tenancy so that it would pass to the survivor who would leave it to Christie by will except for small devises to John and Rosie. In performance of this agreement Christie remained home and worked diligently in the family venture. He gave up any opportunity for further education or any chance to accumulate property of his own. He received only his room and board and spending money. When he married and suggested the possibility of securing some present interest to support his wife, Natale told him that his wife should move in with the family and that Christie need not worry, for he would receive all the property when Natale and Carmela died. Natale and Carmela placed all of their property in joint tenancy and in 1941 both executed wills leaving all their property to Christie with the exception of small devises to Rosie and John and \$500 to plaintiff. Although these wills did not refer to the agreement, their terms were agreed upon by Christie, Natale and Carmela. The venture was successful, so that at the time of Natale's death his and Carmela's interest was worth approximately \$100,000. Shortly before his death Natale became dissatisfied with the agreement and determined to leave his half of the joint property to his grandson, the plaintiff. Without informing Christie or Carmela he arranged the necessary conveyances to terminate the joint tenancies and executed a will leaving all of his property to plaintiff." 35 Cal.2d at pages 622 and 623, 220 P.2d at page 739. In such a case, it is clear, Christie would suffer unconscionable injury and Natale and his estate would be unjustly enriched if Natale's devisee were allowed to invoke the statute of frauds. The trial court refused to permit him to do so and the Supreme Court approved that refusal.

The cases in which the principle of estoppel did not apply, said the reviewing

court, "Have been cases where the court found either that no unconscionable injury would result from refusing to enforce the oral contract [citations], or that the remedy of *quantum meruit* for services rendered was adequate. [Citations.]" At page 625 of 35 Cal.2d, at page 740 of 220 P.2d. "It is settled that neither the remedy of an action at law for damages for breach of contract nor the quasi-contractual remedy for the value of services rendered is adequate for the breach of a contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a close family relationship. [Citations.]" 35 Cal.2d at page 626, 220 P.2d at page 741.

[2] *Did plaintiff herein allege facts which bring into play the principle of estoppel as expounded in the Monarco case?* She did not, as a brief summary of those facts will demonstrate.

Plaintiff alleged: (1) in 1943, she made an agreement with Marcelin Berge, then 60 years of age, to take him into her home and furnish him with board, room, and laundry, for \$40 per month. In addition to caring for her nine room home, taking care of Berge's personal needs and acting as housekeeper in his personal room, plaintiff worked in a laundry and returned from work each noon to prepare Berge's lunch. Berge continued payment of \$40 per month and remained in plaintiff's home until July, 1947, when her husband died. Shortly after moving into her home, Berge became demanding, attempted to dictate the menu for guests of plaintiff and her husband, and resented intrusions in plaintiff's home which he came to consider his own.

(2) In 1946 Berge fractured his leg, was hospitalized for about six months, and submitted to extended bone grafts and surgery. He returned to plaintiff's home and went through an additional six months' period of convalescence. During this period plaintiff was required to furnish him with extensive nursing care in addition to room, board, and laundry. Because of the increased burden plaintiff and her husband desired to terminate the relationship, but did not do so, and agreed to continue the

relationship, because Berge orally promised plaintiff that if she would continue to care for him until his death he would compensate her in his will, in that he would leave her a certain bank account, which then contained approximately \$46,000, and would leave the remainder of his estate, consisting of two other bank accounts, to the defendant. Plaintiff agreed to permit Berge to remain and to care for him and render said services for him upon the terms proposed by him. In making this agreement the parties did not contemplate that the services appellant was to perform were to be compensated by the \$40 monthly payments or other pecuniary compensation; that the services were so personal and unusual in character that the parties did not intend they should be compensated on a basis of any specific amount in monthly payments. Pursuant to the agreement, and in reliance upon Berge's promise, plaintiff performed the following services until Berge died: washing, ironing, cooking of special foods, mending, sewing, cleaning and other household tasks; continued nursing care, including massaging his back and legs and helping him to walk about the house; doing all his personal errands outside the house; and taking him along on week-end trips.

(3) Upon the death of her husband in 1947, it was no longer necessary for plaintiff to maintain such a large home and she desired to give up working in the laundry, sell her home and enjoy a more complete social life than was possible while continually remaining at home caring for decedent. For these reasons, in the fall of 1948, she advised decedent he would have to find other quarters. Decedent repeated his promise to will her the bank account, urged her not to sell, and requested her to continue caring for him. In reliance upon these promises appellant was induced to continue caring for decedent until his death, in spite of the fact that his demands increased, in that he refused to give appellant messages left by her friends, discouraged her friends from calling at the house, and attempted to dominate her social and business affairs.

(4) Berge was again hospitalized April 13, 1950, and while at the hospital made a will bequeathing \$1,000 to plaintiff and giving all the residue of his assets to the defendant. He died January 19, 1951, without changing that will or making a new one.

It does not appear to us that plaintiff made such a change of position or that the services she rendered were so peculiar that she could not be compensated in terms of money. Recognition of the invalidity of the contract and consequent denial of enforcement of its provisions, would neither unconscionably injure the plaintiff nor unjustly enrich the decedent, his estate, or his legatee, were plaintiff to pursue her legal remedy of recovering from the estate the reasonable value of her services, less such amount as may already have been paid her.

The facts of our case are quite like those in *Jirschik v. Farmers & Merchants Nat. Bank*, 107 Cal.App.2d 405, 237 P.2d 49, in which a demurrer to a similar complaint was sustained. There the plaintiff rendered services as a housekeeper and nurse for a person who orally promised to will her \$15,000. Said the reviewing court:

"In this case the most that can be drawn from plaintiff's complaint is that while she was employed and paid by decedent she could have secured work at a higher rate of pay, with certain social security and unemployment benefits; and that, relying upon decedent's promise to leave her \$15,000 in his will—which promise he did not keep—she stayed with him, did not earn additional money in defense work and did not secure the social benefits mentioned.

"This does not show unconscionable injury sufficient to estop defendants from interposing the bar of the statute of frauds. Nor does it show unjust enrichment of decedent.

"The complaint does not allege that plaintiff was paid less than the reasonable value of her services. And if the wages paid plaintiff had been less than they were reasonably worth, an action in quantum meruit for the difference

would prevent any unjust enrichment of decedent, or of his estate. *Monarco v. Lo Greco*, supra; *Ruinello v. Murray*, supra [36 Cal.2d 687, 227 P.2d 251].” 107 Cal.App.2d at pages 406-407, 237 P.2d at page 50. A petition for a hearing by the Supreme Court was denied.

In *Tompkins v. Hoge*, 114 Cal.App.2d 257, 250 P.2d 174, one of the grounds of decision was that equity denies relief when the services are compensable in damages or in quantum meruit. “Plaintiff here alleged she gave up a salary of \$2,500 per year and that she could have retired as a school teacher upon a pension of about \$50 per month when she had attained the age of 70 years, or in 1947, and that defendant was aware of that fact. The detriment suffered by plaintiff in resigning her position, with respect both to loss of salary and pension rights, would have been proper elements of damage in an action to recover for the value of plaintiff’s services. The fact that plaintiff gave up association with her friends and relatives in New York was comparable to the neglect of marital, social and household duties and absence from her home and husband, alleged by the plaintiff in the *Murdock* case [Murdock v. Swanson, 85 Cal.App.2d 380, 193 P.2d 81]. There was no finding that by reason of the facts found plaintiff suffered detriment in coming into the home of defendant that could not be compensated for in money. We think such a finding would have had no basis in the evidence. Anyone who goes into the home of another, there to reside permanently, gives up associations and ways of life for others that may turn out to be less desirable. Inability to be restored to the former status is not a good ground for equitable relief unless to deny it would operate as a fraud upon the party seeking relief. This is not such a case and was not considered by the trial court to be one. Such detriment as plaintiff suffered was compensable in damages and her claim therefor was one to be prosecuted at law and not in equity. See *Zaring v. Brown*, supra, 41 Cal.App.2d 227, 106 P.2d 224.” 114 Cal.App.2d at page 265, 250 P.2d at page 179.

In *Murdock v. Swanson*, 85 Cal.App.2d 380, 193 P.2d 81, a demurrer to the complaint was sustained. The first cause of action alleged that “in September, 1941, the plaintiff and the decedent, who was then 74 years of age, entered into an oral agreement whereby it was agreed that the plaintiff would care for the decedent, render personal services to her and furnish her with certain goods during the remainder of her lifetime; that she would assist her in caring for her property to the extent that might be necessary to preserve the property and prevent its sale; and that, if necessary, she would care for the decedent in her own home or in plaintiff’s home to the end that she should not be sent to an institution. It is then alleged that in consideration of all these things the decedent agreed to make and leave at her death a will leaving her ranch and all her other real and personal property to the plaintiff; and that, in making this agreement, both parties understood and agreed that the things to be done by the plaintiff would not be susceptible of pecuniary compensation and that it would be impossible to compensate plaintiff except in the manner agreed upon.

“It is then alleged that in September, 1941, the plaintiff commenced to fulfill her part of this agreement; that she made trips from her home to the home of decedent, a distance of many miles, on the average of twice a day; that she performed various personal services for the decedent and worked on her ranch; that she furnished laborers from time to time to construct fences and do other work on the ranch; that she furnished decedent with food, clothing, drugs and medicine and other articles, including a milk cow and other animals for her ranch; that she acted as sole companion to the decedent; and that these various services continued until the decedent died. It is further alleged that until 1945 the plaintiff owned and operated a beauty shop; that in 1945 it became necessary to spend so much time with the decedent that she found it impossible to continue to operate her business; and that in order to comply with her agreement and devote her time to the decedent she then

sold her business at a great loss with respect to the good will and future profit; that during the last three years the plaintiff was married and living with her husband several miles from decedent's home; and that her carrying out of this agreement caused her to neglect many of her marital, social and household duties and to remain away from her home and husband for many hours at a time.

"It is then alleged that the plaintiff has received no compensation for these services, performed in reliance on the agreement; that because of her reliance upon the agreement she kept no record of the things she did for the decedent and by reason thereof it would be difficult for her to render an exact statement of all her services or of all of the things furnished to the decedent; that the decedent left no will; that the services and things so furnished by her are not susceptible of pecuniary compensation or measurement; that she has so changed her status, mode of living and financial position in reliance on the agreement that it would be impossible to compensate her unless the agreement is specifically enforced; and that the failure of the decedent to make such a will will be a fraud on the plaintiff unless the court impresses a trust on the property of the estate for her benefit." 85 Cal.App.2d at pages 382 and 383, 193 P.2d at page 82. In affirming the judgment, the appellate court said in part: "There is no merit in the further contention that the services rendered by the appellant were not susceptible of pecuniary compensation and that, as alleged, this situation was recognized and agreed upon by the parties to the oral agreement. The allegation to that effect is merely a conclusion and the facts alleged clearly show that they were all personal services and articles furnished, and that they are not of so extraordinary or exceptional character 'as in contemplation of law, cannot be compensated for in money.' *Morrison v. Land*, 169 Cal. 580, 147 P. 259". 85 Cal.App.2d at page 385, 193 P.2d at page 84. In respect to the sale of the beauty parlor the reviewing court, while observing there was no allegation that such sale was requested by or known to the de-

ceased promisor, also significantly observed that if any loss occurred in respect to that sale it "was an element which could have been included in showing the value of the services she rendered, and a remedy at law existed. No such change of position here appears as to make it impossible for plaintiff to obtain compensation for anything she did other than through equitable relief, or upon the constructive trust theory as it has always been applied." 85 Cal.App. 2d at page 385, 193 P.2d at page 84.

In *De Mattos v. McGovern*, 25 Cal.App. 2d 429, 77 P.2d 522, likewise, a demurrer to the complaint was sustained. It was alleged that the deceased promisor had been engaged in the ownership and control of a mercantile business and that plaintiff was actively employed by the deceased in the conduct of that business; also, that "for the purpose of inducing plaintiff to continue in his said employment, the deceased promised him that he would bequeath to him by will an amount equal to one-third of all his property, and that he had actually executed a will to that purpose. It is alleged that the compensation paid to the plaintiff for his services was grossly inadequate, and that he remained in the employ of the deceased because of and in reliance upon said promise and representation above noted." 25 Cal.App.2d at page 431, 77 P.2d at page 523. The remedy at law was deemed adequate.

The significance of the *Jirschik* and *Tompkins* decisions is that they were rendered subsequent to the rendition of the decision in the *Monarco* case, and in each the Supreme Court denied a hearing. The *Murdock* and *De Mattos* cases are of special significance because they were cited with approval in the *Monarco* case as holding "that the remedy of *quantum meruit* for services rendered was adequate." At page 625 of 35 Cal.2d, at page 740 of 220 P.2d.

Ruinello v. Murray, 36 Cal.2d 687, 227 P.2d 251, lends added support to the view that plaintiff has not alleged facts which estop the defendant from relying upon the statute of frauds. In the *Ruinello* case a demurrer was sustained to a complaint

which alleged an oral agreement "whereby in consideration of plaintiff's giving up a 'permanent life-time position' with another employer as engineer and superintendent of the 834 South Broadway Building and taking a similar position with defendant, the owner of the Ninth and Broadway Building in Los Angeles, for the term of five years, defendant would pay plaintiff a monthly salary of \$350 plus a yearly bonus of 20% of the gross income in excess of \$114,000; that plaintiff had been continuously employed as engineer and superintendent of the 834 South Broadway Building since its erection in 1926 until October 1945, when he resigned to enter the employ of defendant; that plaintiff was personally acquainted with defendant for 20 years and had been previously employed by defendant's deceased husband and by defendant, who were lessees of 834 South Broadway Building from 1933 to 1943; that plaintiff was employed by defendant from December 1, 1945 to February 21, 1948, when defendant summarily discharged him to avoid payment of the bonus; that during the period plaintiff worked for defendant he was able to increase the annual gross income of the building to approximately \$263,000. Plaintiff seeks recovery of \$11,050, the sum he would have been entitled to receive as salary during the remainder of the employment agreement. He also prays for an accounting of the gross profits and for judgment for 20% of the yearly gross profits in excess of \$114,000." 36 Cal.2d at pages 688-689, 227 P.2d at page 252. The Supreme Court held that these facts failed to show that plaintiff would suffer unconscionable injury or that defendant would be unjustly enriched if the oral contract were not enforced. It was not enough to allege that he gave up existing employment to work for the defendant, "He must set forth his rights under the contract given up and show that they were so valuable that unconscionable injury would result from refusing to enforce the oral contract with defendant." 36 Cal. 2d at page 689, 227 P.2d at page 253. He also failed to allege facts showing that the employment which he gave up was not terminable at the will of either party. The

leaving of such employment for employment likewise terminable at will because of the statute of frauds "does not result in unconscionable injury." 36 Cal.2d at page 690, 227 P.2d at page 253. The failure to allege that the reasonable value of plaintiff's services was greater than the \$350 a month he was paid while working for the defendant indicates that no unjust enrichment would result. If the salary received was less than the reasonable value of the services, "an action in *quantum meruit* for that value would prevent any unjust enrichment of defendant." 36 Cal. 2d at page 690, 227 P.2d at page 253.

In addition to the Monarco case, plaintiff relies upon *Walker v. Calloway*, 99 Cal.App.2d 675, 222 P.2d 455; *Fowler v. Hansen*, 48 Cal.App.2d 518, 120 P.2d 161; and *Notten v. Mensing*, 3 Cal.2d 469, 45 P.2d 198. In each of these, as in the Monarco case, the facts were such that failure to enforce the contract would result in the accomplishment of a fraud. In the Notten case, a husband and wife executed reciprocal wills pursuant to an oral agreement that upon the death of either all of their property should go to the survivor, who upon death would in turn leave it to certain relatives including plaintiffs. The fraud consisted in the acceptance of benefits by the wife under the provisions of the husband's will plus the subsequent revocation of her will in violation of the oral agreement. As stated by the court: "It is our opinion that when two parties execute reciprocal wills pursuant to an oral agreement, and one of the parties dies before either will is revoked, and the other party accepts the benefit of the decedent's will, and then revokes, a constructive fraud sufficient to raise the estoppel has been practiced on the first decedent and on the beneficiaries of the oral agreement." 3 Cal.2d at page 474, 45 P.2d at page 201. In the Walker case, plaintiff, in reliance upon the decedent's promise to leave her all his property at death, abandoned her occupation, residence and social ties in Michigan, came to California where the decedent resided, and gave him her companionship and affection until his death. Moreover, the defendant in that case fraudulently

procured decedent to change the will he had previously made pursuant to the oral agreement with plaintiff, and substitute a new will leaving the estate to defendant. In the Fowler case the plaintiff and his wife moved from Texas to California and furnished a home, affection, and care for the decedent's mother in reliance upon decedent's promise to leave one-half of her property to the plaintiff and his wife.

[3-5] An additional reason why equity should not intervene is furnished by the decisions in *Morrison v. Land*, 169 Cal. 580, 147 P.259, and *Zellner v. Wassman*, 184 Cal. 80, 82, 193 P. 84. In the *Morrison* case the plaintiff alleged that the deceased promisor had agreed to bequeath to plaintiff \$50,000; in the *Zellner* case, \$5,000. In each case the Supreme Court deemed the legal remedy completely adequate, expressed in the *Zellner* case in these words: "Since plaintiff relies upon an alleged contract to bequeath a specified sum of money, the case falls within the decision of this court in *Morrison v. Land*, 169 Cal. 580, 147 P. 259, where it was said: 'An ordinary action at law for breach of the contract would bring him the very thing to which he is entitled under the allegations of his complaint—afford him full and adequate relief. In such an action, the measure of damages would have been the value of the property agreed to be bequeathed, for that was the amount in which he was damaged by the breach. See 40 Cyc. 1073. Attorneys for respondents pertinently ask, "Is a decree in equity ordering payment of a sum of money from the estate to plaintiff any more perfect and complete justice to him than a common law judgment in his favor and against the estate for a like sum?" A clearer case of adequacy of remedy at law could not be made than that presented here. The situation is such as to absolutely preclude resort to equity.'" At page 84 of 184 Cal., at page 86 of 193 P. It happened that the oral agreement in the *Morrison* case was made before and that in the *Zellner* case after the amendment of the statute of frauds which declares invalid an oral agreement to leave property by will. The argument was advanced in the *Zellner* case that in view of

the statute of frauds, there could be no remedy at law for damages for breach of the agreement, hence that the legal remedy could not possibly be adequate. The answer to that is that "Where the administration of law and equity has been merged in one court, this doctrine of equitable estoppel is not confined to suits in equity, but is equally available in an action at law. 5 *Browne on Statute of Frauds*, p. 575; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. Therefore a plaintiff's claims to an equitable estoppel will be considered in determining whether or not his cause of action is barred by the statute of frauds whether the action be at law upon the contract or an equitable action seeking specific performance." At page 85 of 184 Cal., at page 86 of 193 P. In our case the decedent's promise, as alleged, was to bequeath the plaintiff a certain bank account. Damages for the breach of that agreement would be measured by the amount of money in that particular bank account at the time of the promisor's death. That would be a definite sum of money, just as definite as the \$50,000 in the *Morrison* case and the \$5,000 in the *Zellner* case.

[6-8] In an action at law for damages or for quantum meruit, the plaintiff is a creditor and must file his claim against the estate of the deceased promisor or be forever barred. A complaint which does not allege such a filing fails to state a cause of action. *Morrison v. Land*, 169 Cal. 580, 585, 147 P. 259; *De Mattos v. McGovern*, supra, 25 Cal.App.2d 429, 433, 77 P.2d 522. In the instant case, even if the complaint had stated facts sufficient to constitute a cause of action at law for damages (which it does not) it would still be insufficient because it does not allege that plaintiff presented a claim for damages or for quantum meruit against the estate of the deceased.

The judgement appealed from is affirmed.

BRAY, J., concurs.

PETERS, Presiding Justice.

I concur.

I do so with some reluctance. It is my belief that, under the facts alleged, the

question of whether or not there was an estoppel should be decided as a question of fact and not one of law upon a demurrer. If the question were an open one, I would vote for a reversal. But the question is not an open one. The cases of *Jirschik v. Farmers & Merchants Nat. Bank*, 107 Cal. App.2d 405, 237 P.2d 49; *Murdock v. Swanson*, 85 Cal.App.2d 380, 193 P.2d 81; *De Mattos v. McGovern*, 25 Cal.App.2d 429, 77 P.2d 522; *Ruinello v. Murray*, 36 Cal.2d 687, 227 P.2d 251, and others, all cited in the majority opinion, on facts stronger than those here alleged, held that, as a matter of law, no estoppel existed. As a judge of an intermediate court I feel bound by those decisions. In my opinion, the whole problem needs reconsideration by the Supreme Court.



117 Cal.App.2d 268

PEOPLE v. WAYNE.*

Cr. 2853.

District Court of Appeal, First District,
Division 1, California.

April 13, 1953.

As Corrected on Denial of Rehearing

April 28, 1953.

Hearing Granted May 11, 1953.

Defendant was convicted in the Superior Court, Alameda County, of soliciting another to offer and join in offer of bribe to police officials, of engaging in pool selling and book-making, and of keeping and occupying a room with paraphernalia for recording bets on horse races, and he appealed. The District Court of Appeal, Bray, J., held that it had been error not to instruct the jury that the person defendant was charged with soliciting to join in a bribe was an accomplice and that his testimony must be corroborated to sustain conviction.

Reversed on one count and affirmed on others.

1. Conspiracy ⚡47

Evidence sustained finding that defendant and prosecution witness had conspired together to join in offer of bribe. Pen.Code, §§ 337a, 653f.

2. Conspiracy ⚡41

A conspirator adopts acts of his fellow conspirator.

3. Criminal Law ⚡507(1), 510

Prosecution witness who had conspired with defendant to bribe was an "accomplice", and his testimony, unless corroborated, would not support conviction of defendant for soliciting the prosecution witness to offer and join in offer of bribe to police official. Pen.Code, §§ 337a, 653f.

4. Criminal Law ⚡511(2, 3)

Evidence necessary to corroborate an accomplice is sufficient, though slight when standing by itself, if it creates more than a suspicion of guilt, and it may consist of inferences from circumstances surrounding criminal transaction and need not establish precise facts testified to by witnesses whose testimony it supports; but it must connect defendant with commission of crime in such way as to reasonably satisfy trier of facts that witness whose testimony is supported thereby is telling truth.

5. Gaming ⚡98(3, 5)

Convictions for pool selling and book-making and for keeping and occupying a room with paraphernalia for recording bets on horse races were sustained by evidence. Pen.Code, § 337a, subs. 1, 2.

6. Criminal Law ⚡1141(2)

It is duty of appealing defendant to show error, and it is not proper for appellant to attempt to shift his affirmative duty in that respect to court or respondent.

7. Criminal Law ⚡1128(2)

Defendant's contention that his fellow conspirators were receiving unduly favorable treatment related to matters entirely outside record and had no place on appeal.

8. Criminal Law ⚡730(1), 1171(1)

When district attorney stated that members of grand jury had believed that evidence showed that defendant committed crimes for which he was charged, court should have immediately admonished jury that indictment was mere accusation and that jury was not authorized in the slightest degree to presume or to infer guilt of defendant therefrom; but under circumstances of prosecution for bribery and gaming

* Subsequent opinion 264 P.2d 547.

offenses, delay in admonishing jury to that effect could not have been prejudicial. Pen. Code, §§ 337a, 653f.

9. Criminal Law §1119(3, 4)

On appeal from convictions for, *inter alia*, engaging in pool selling and bookmaking and occupying a room with paraphernalia for recording bets on horse races, record would not sustain defendant's contention that court and district attorney had been guilty of misconduct in unfairly criticizing defense counsel or otherwise. Const. art. 1, § 13; Pen.Code, § 1323.

10. Criminal Law §1118

In absence of authority or reference to transcript where alleged misconduct may be found, general charge of prejudicial misconduct should be disregarded. Pen.Code, § 653f.

Harrison W. Call, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthurst, Deputy Atty. Gen., J. F. Coakley, Dist. Atty. of Alameda County, Richard H. Chamberlain, Asst. Dist. Atty., Ray Meliana, Deputy Dist. Atty., Oakland, for respondent.

BRAY, Justice.

Defendant appeals from a judgment on jury verdicts, convicting him on three counts, and from an order denying a new trial.

Questions Presented.

1. As to count one, was May an accomplice of defendant, so as to require corroboration of his testimony?
2. Sufficiency of evidence as to all counts.
3. Alleged errors in admission and rejection of evidence.
4. Alleged misconduct of court and district attorney.
5. Alleged error in instructions.

Record.

Defendant Wayne and one Redden were jointly indicted on three counts: One—violation of section 653f, Penal Code, by solic-

iting Joseph May to offer and join in the offer of a bribe to Alameda police officials to influence them corruptly in the investigation and arrest of said May for violating section 337a, Penal Code (bookmaking). Two—violation of subdivision 1 of section 337a, Penal Code, in that they engaged in pool selling and bookmaking. Three—violation of subdivision 2, section 337a, Penal Code, in keeping and occupying a room with paraphernalia for recording bets on horse races. Redden pleaded guilty to all three counts and applied for probation. From time to time the determination of his application was continued beyond Wayne's trial. Prior to the arrest of defendant and Redden, May was arrested on a separate charge for bookmaking. He pleaded guilty and was placed on probation which included a county jail farm sentence. Defendant Wayne was found guilty on all three counts. His motion for new trial was denied.

Evidence.

Although the reporter's transcript consists of 1,355 pages, the case is based primarily upon the testimony of May and Redden as opposed to that of defendant. Generally, the two testified that May, who was then on probation for bookmaking, suggested to Redden that he contact someone who could arrange police protection in the city of Alameda so that May could operate bookmaking there. Redden contacted defendant and explained the situation. Later defendant informed Redden that he had contacted a certain police lieutenant who said the protection could be arranged. Redden then invited defendant to meet May at Redden's home. At that meeting May explained how much book he was taking in. After some discussion May and defendant agreed that defendant was to receive 20 per cent of the net take of the book for the payoff, as a starter to see how it would go. This money was to be split three ways, the police getting one part, Redden and defendant each one part. It was to be paid by May to Redden who was to give it to defendant. Defendant stated that he would have to tell the police that he was to be May's partner as they did not let everybody come into Alameda. He also explained the conditions of operating required by the lieutenant. De-

fendant left saying that he would contact the police to see if the location May had proposed would be satisfactory and then would let Redden know. Defendant later phoned Redden that the location was all right. May started operating in late September, 1950. November 28, Redden phoned May to come to his home as the matter was important. Defendant was there and stated that May "was supposed to be knocked off between the hours of two and three" that afternoon; that a teletype came into the police station from the sheriff's or district attorney's office to have May picked up; that one officer laughed and said "Look what we have here." The lieutenant grabbed the message and said, "I will take care of it myself." He then tried all afternoon to locate defendant to tell him of this, had called May's office a couple of times, and left word with defendant's wife for May to "stop taking music lessons." The office where May was operating his book was ostensibly a school of music. Defendant said "we will have to close down." They decided to move out that night. May, being on probation, was afraid to go down to the book as he thought the police might be watching the place. Defendant said he would go down to police headquarters and find out if there were any lookouts and would phone back. In 20 or 30 minutes he phoned that there were no watchers and for them to go down and move out the equipment. This May and Redden did in Redden's car. A little later a new location was chosen. Defendant stated that the lieutenant was very angry when he learned that the operator of the place was a man who was on probation and that he had told the lieutenant that he personally had lost \$4,500 in the operation. Defendant said also that the police were unhappy with the amount they had received under the 20 per cent deal and wanted \$100 a week or 20 per cent of the take if it ran over that amount. May opened up the new place on those terms. Redden bought an interest in the book there. Under the first arrangement, May only paid \$17 for the first week. Defendant then suggested that Redden check May's books. While operating at the first location May paid Redden "Something like \$500, it could have been \$550, and

it could have been \$475." While operating at the new location May paid Redden about \$300. Defendant gave a case of whisky to the lieutenant, a slot machine to one of the police, and a couple of cases of whisky to other policemen. After deducting the cost of these, defendant and Redden split the balance evenly. On January 12, 1951, May was arrested for bookmaking. The lieutenant took Redden down to police headquarters. On the way he told Redden that May claimed to have been paying Redden and defendant money to give to him. He asked Redden what he was going to tell at headquarters. Redden said he would say that May was paying off a loan to defendant. The lieutenant said, "Well, I guess that story is as good as any." The lieutenant took Redden in to the Chief of Police. May was brought in. Redden then asked May if he did not borrow \$1,000 from defendant and May replied that he did. On leaving the chief's office the lieutenant asked Redden to get in touch with defendant as soon as possible and let the lieutenant know. Redden learned from defendant's wife that defendant was on his way to Sacramento and that he could be reached at the Senator Hotel there after 8 o'clock. Redden phoned the lieutenant that he was going to call defendant and would get his phone number for the lieutenant since the latter wanted to talk to him. Redden did give the lieutenant defendant's number. Redden phoned the hotel and left word for defendant to call him. Defendant called later and Redden told him of May's arrest, and then, or when he saw defendant two days later, Redden told him about telling the police the story about a loan from defendant to May. Defendant stated that he would get an attorney for defendant and Redden. This he did and the two of them were in the attorney's office together. This attorney represented them both on this indictment.

Defendant's Testimony.

Defendant's business, among other things, was servicing slot machines at an Alameda club, where he met the lieutenant and several other police officers. He had visited at the lieutenant's home and the latter at his. He admitted getting a slot machine for one of the police officers. Defendant

denied that he had ever agreed to receive or received any money from May or Redden for police protection or for payments from a book. His version was that Redden had asked him if he would lend a friend of his \$1,000 repayable \$100 a week for 12 weeks. On being told that he might, Redden told him to bring the money over to Redden's house when he brought a television set that defendant was selling him. When he got to the house a man was there whom Redden introduced as "Joe." Redden said, "you fellows make your own arrangements." Defendant said that he understood he was to be paid back at the rate of \$100 per week plus \$200 interest. May said that he would do his best to pay it back at that rate. If it was "a little light" one week he would make it up the next week or over the period of a month, it would average \$100 per week. Redden suggested that May could leave the money each week and he would give it to defendant. Redden had told defendant that May had a restaurant and was a responsible person. Defendant gave May the money in cash. He had kept it at home in a locked metal cigar box. Defendant took no receipt or note from May for the money. After May left defendant asked Redden what type of restaurant May had and was told it was a small 20-stool restaurant, although Redden said he had never been in it. Defendant then said that it was odd that a man with only a small restaurant could make the payments he had promised. Redden then told him that May "runs a little bookie place in his restaurant." Defendant stated that he had received a total of \$850 on the loan. He kept no record of payments "other than a few times I have a calendar over my bench, and a few times I have jotted down the balance that was owing me, but I never kept a methodical record of it or any business-like record of it." He was unable to find the calendar. In a prior statement given a deputy district attorney defendant stated that the only record he kept was in his head and also that Redden had told him prior to his making the loan that May was "probably doing a little bookmaking on the side." Defendant did not know that May had been arrested before. In Novem-

ber there was an article in the paper about May being given probation. He phoned Redden that he was uneasy about the situation and that May should stick to the restaurant business as he surely would be caught. A day or so later at Redden's house he told May that he read in the papers that an extensive drive was being made on bookmakers in Alameda and that he was foolish to be engaged in such business in a town the size of Alameda. (Although defendant disagrees with May and Redden as to the date, this is the conversation in which they claim he told them about the teletype and advised immediate closing.) In his statement to the district attorney he claimed that the reason he told Redden and May to close down was because of the Kefauver investigation. Before the grand jury defendant, on advice of his counsel, claimed his privilege not to testify. Defendant admitted calling Redden from Sacramento on the night of May's arrest. This, according to the hotel records, was at 8:41 p. m. At 1:39 a. m. following, he received a call from "Willie Smith" from Oakland, who had previously asked defendant to get him a job. Smith called to say that "he was on his way, that he was going to Los Angeles." The records show that this call came from a public phone booth. When the police raided the premises where May was conducting his book there was an abundance of equipment and paraphernalia to show that bookmaking was going on there.

Accomplice.

As to the second and third counts, the court fully instructed concerning accomplices and the necessity for corroboration of them. As to count one the court instructed that as a matter of law Redden was an accomplice of defendant, but that under section 653f of the Penal Code "the person solicited cannot be prosecuted for soliciting the offer of a bribe, and therefore is not an accomplice." This instruction, considered with the instructions on corroboration, told the jury, in effect, that May was not an accomplice and his story did not need to be corroborated, hence the jury could convict on May's testimony alone. *People v. Coffey*, 161 Cal. 433, 119

is an accomplice of the receiver. * * * [Citations follow.] Where there has been a conspiracy or prearranged plan between the thief and the receiver, the conspirators have been held to be accomplices even where, as is necessary under our statutory definition of accomplices, § 1111, supra, the test is whether they are liable to prosecution for the identical offense or offenses. * * * In our opinion, reason supports the exception recognized in the cited cases and texts. An accomplice has been defined as one 'who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime.' People v. Shaw, 17 Cal.2d 778, 798, 799, 112 P.2d 241; People v. Wilson, 25 Cal.2d [341], 153 P.2d 720. Where, as here, the prosecution evidence discloses the existence of a conspiracy or agreement whereby the principal prosecution witnesses were to steal and defendant was to purchase the stolen property, it is both logical and reasonable to hold that they are accomplices in the offense or offenses resulting from execution of such plan. If we were to allow the conspiracy element to be disregarded and the accomplice relationship thereby eliminated, the prosecution could circumvent the rule, requiring corroboration of accomplice witnesses. We conclude, therefore, that Amos and Larkin, the principal prosecution witnesses, by virtue of their admissions, must be held to be accomplices whose testimony, standing uncorroborated, will not support defendant's conviction."

[1] While it is true that May, by asking Redden to find someone who could obtain police protection for him, started the chain of circumstances culminating in the crime charged, the evidence justifies the conclusion that the three, May, Redden and defendant, conspired together to join in the offer of the bribe. For that reason it is not necessary to discuss the technical differences between a solicitor and a solicitee. In the first meeting between defendant and May the former told May he could insure him for protection for \$200 per week. Defendant further stated that the police who were to get a part of that money would be told that defendant was a partner in the

enterprise. While at first blush it may seem unusual to state that one can solicit himself, it must be remembered that here May was no innocent member of the triangle. It was not the usual situation where persuasion has to be used to get the solicitee to accept the solicitation, as was the case in People v. Haley, 102 Cal.App.2d 159, 227 P.2d 48, and People v. Baskins, 72 Cal.App. 2d 728, 165 P.2d 510, where it was held that one cannot solicit himself to commit a crime. Here May actively aided and abetted defendant. As said in People v. Shaw, supra, 17 Cal.2d 799, 112 P.2d 241, he "knowingly, voluntarily and with *common intent with the principal offender*" (17 Cal. 2d at page 799, 112 P.2d at page 253, emphasis added) united in the commission of the crime.

[2,3] A conspirator adopts the acts of his fellow conspirator. The prosecution established a conspiracy of May, Redden and defendant to bribe. This was the major conspiracy. Prior thereto defendant and Redden conspired to bribe and one of the acts done in furtherance thereof was the solicitation of May. May joined this conspiracy to bribe, in fact was an active participant in it. Hence he could be held liable for his own solicitation. "If we were to allow the conspiracy element to be disregarded and the accomplice relationship thereby eliminated, the prosecution could circumvent the rule, requiring corroboration of accomplice witnesses." People v. Lima, supra, 25 Cal.2d 573, 578, 154 P.2d 698, 701. See also People v. Wallin, 32 Cal.2d 803, 197 P.2d 734, where the court held the person committing the murder was the accomplice of the defendant charged with the crime of being an accessory to the murder, and People v. Young, 132 Cal.App. 770, 23 P.2d 524, where it was held that a female who assisted in the commission by the defendant of the offense of pimping, could be prosecuted for that charge although the statute defining the crime refers only to a male person. Also in People v. Bartol, 24 Cal.App. 659, 142 P. 510, it was held that a woman who aids a rapist may be charged with rape. Surely, if it can be held, as it was in the Shaw case, that a person who alters the books of a

city is an accomplice of the person who aided, abetted, advised, encouraged, compelled and caused him to do such altering, and as in the Lima case, that the thief is an accomplice of the receiver of stolen goods, it is reasonable to hold that under the conspiracy shown in this case, May was an accomplice of defendant. Being such accomplice, defendant was entitled to an instruction that May's testimony must be corroborated. The failure to so instruct was error and prejudicial error, even though, as we will point out later, there was corroboration as to the crimes charged in the second and third counts. Under the evidence, proof of bookmaking and keeping a room for bookmaking purposes did not necessarily prove the soliciting to bribe charge. The jury as to that charge may have relied on the testimony of the accomplices alone.

Sufficiency of Evidence.

[4-6] Defendant's contention in this respect as to counts two and three is that there is no corroboration of the testimony of May and Redden, who admittedly under their testimony were accomplices of defendant. The equipment and paraphernalia found by the police when they raided May's place amply demonstrates that he was engaged in bookmaking there and that the place was occupied for that purpose. The testimony of May and Redden amply substantiates the finding that defendant aided and abetted in the operation there. In determining the sufficiency of the other evidence necessary to corroborate an accomplice, "there are certain established legal principles that serve as guides. It must 'tend to connect the defendant with the offense,' but 'So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it "be slight and, when standing by itself" entitled to but little consideration.' [Citations.] The necessary corroboration may consist of inferences from the circumstances surrounding the criminal transaction. [Citation.] It need not establish the precise facts testified to by the witness whose testimony it supports. (Ibid.) It is not necessary that the corroborative evidence prove the defendant is guilty of the offense.

[Citation.] Such evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the trier of fact that the witness whose testimony it supports is telling the truth. [Citations.] * * * *'Whether the corroborating evidence by itself is as compatible with innocence as it is with guilt, is a question for the trier of fact, not for the reviewing court.'* (Emphasis added.) [Citations.]" People v. Kendall, 111 Cal.App.2d 204, 210, 244 P.2d 418, 422.

Applying these principles, it cannot be said as a matter of law that the corroborative evidence in this case is insufficient. "The relationship of the men and all of their acts and conduct * * * are corroborating circumstances." People v. Henderson, 34 Cal.2d 340, 343, 209 P.2d 785, 786. The following matters constituted sufficient corroboration. Perhaps no one of them, taken alone, would be sufficient, but taking them together they make a strong circumstantial case of defendant's interest in May's bookmaking business. Defendant had more than a speaking acquaintance with at least five important members of the police department. The telephone calls between Redden and defendant on the day of May's arrest. Mrs. Wayne testified to three phone calls from Redden for defendant that afternoon, two before and one after defendant left for Sacramento. Then Redden's call to Sacramento and defendant's answering call that night. The call to defendant at 1:39 the following morning from the mysterious Willie Smith and defendant's rather tenuous explanation of it. The call came from an East Oakland pay station. The police lieutenant, who Redden testified had asked how to get in touch with defendant that night, got off duty shortly before that call and at a distance not great from the pay station. Defendant's story of the alleged loan to May. On Redden's assurance alone that May was all right, he made a loan of \$1,000 to a man whose business he did not know until after he made the loan, according to his statement at one time. He took no receipt or note, and thereafter kept no records of payments other than on an elusive

calendar. As far as aiding and abetting in the operation and maintenance of the book is concerned, the defendant's own admission at one time that prior to making the so-called loan Redden informed him May was operating a book, and defendant's then making a loan, obviously intended to be used in that racket, defendant to receive 20 per cent interest on a twelve weeks' loan, which interest obviously could only come from one source,—go a long way towards corroborating the testimony of May and Redden. A captain in the sheriff's office of Alameda County testified that on November 27, 1950, he informed by phone an inspector of the Alameda Police Department that he had information that May was apparently operating in the city of Alameda, giving him May's address (May's so-called School of Music). In addition the captain mailed to the inspector a memo of the matter. This was the day when, under May's testimony, defendant warned May that he would have to close down as the police had informed defendant that a report had come in concerning May's operation. Defendant's testimony that he advised Redden and May to close down because of the Ke-fauver investigation, also corroborates the fact that defendant was aiding and abetting the operation. At his second trial defendant for the first time produced evidence of an alibi as to his whereabouts on November 28, a date of considerable importance at the former trial as well as at this one. Defendant's testimony in a number of respects was contradictory of other statements made by him. Defendant's testimony at the trial and his conflicting statements tended strongly to corroborate the testimony of the accomplices. "The defendant's statements and admissions, made in connection with his testimony, may afford corroboratory proof sufficient to sustain a verdict. False or conflicting statements as to material facts may constitute corroborative evidence." *People v. Dodd*, 113 Cal. App.2d 682, 686, 248 P.2d 965, 967. See *People v. Jordan*, 115 Cal.App.2d 452, 252 P.2d 328, for an excellent résumé of the rules relating to corroboration.

Alleged Error.

[7] Defendant in his opening brief makes the broad blanket charge that the

court erred on rulings on the admissibility of evidence in eight general matters. He gives no grounds for such charge, nor does he discuss the matter further than to state that the court erred in those matters. Typical of the kind of charge made is the statement that the court erred in admitting any evidence of the bookmaking activities of Redden and May. In his closing brief he states: "* * * the crux of appellant's contention is that there is no legally admissible evidence in the entire record to support appellant's conviction. In this connection we stressed the lack of corroboration of the testimony of the two chief witnesses for the prosecution, and covered this question extensively. We made these contentions after repeatedly reading the entire transcript and thoroughly reviewing the law on the subject. No individual or specific citations can be made as to those contentions, as a reading of the entire record is necessary in order to determine the validity of such contentions." Without specifying why, or citation of authority, defendant contends the extrajudicial statements of May, Redden and defendant are inadmissible. Defendant has violated the rule set forth in *People v. Goodall*, 104 Cal. App.2d 242, 249, 231 P.2d 119, 123: "It is the duty of the defendants to show error, and that means defendants are under an affirmative duty in that respect. It is not proper to attempt to shift that burden upon the court or respondent." It might be pointed out that defendant himself offered Redden's extrajudicial statements. These statements were admissible under the authority of *People v. Suter*, 43 Cal.App.2d 444, 111 P.2d 23. The evidence concerning the relationship of defendant's mother-in-law with Saucke (both of whom were witnesses for defendant) was admissible for the purpose of showing the interest and bias of Saucke. See *People v. Gould*, 111 Cal.App.2d 1, 243 P.2d 809. It was limited to that purpose by the court. As to defendant's connection with slot machines, defendant brought it out in his own testimony and made no objection when asked concerning it by the prosecution. It was through his work with slot machines that he met the police officers. There was no undue restriction of defendant's examina-

tion of Mrs. Kiester as to the date of the birthday party. Although objections to a couple of questions concerning it were sustained, the matter was thoroughly gone into.

We have read the entire transcript and are unable to find any warrant for such blanket contentions. We fail to find any prejudicial error.

Alleged Misconduct of Court and District Attorney.

[8,9] Defendant attacks almost everything said by the district attorney in his argument, although as to very few of his remarks did defendant object at the time. A great deal of the matter to which he objects was in an answer to defendant's rather vitriolic attacks on the district attorney. We fail to find any prejudicial misconduct in these remarks. Defendant attacks the district attorney also, because, he says, that subsequent to defendant's conviction May and Redden were given short county jail sentences, and that two other persons whom the evidence indicates might have participated in May's bookmaking activities were never prosecuted. These are matters entirely outside the record, and of course have no place on this appeal. Moreover, considerable of the voluminous transcript is due to the constant iteration and reiteration by defendant of his claim that May and Redden were receiving unduly favorable treatment by both court and counsel in having their sentencing continued from time to time until after the jury should decide defendant's fate. Likewise the alleged preferential treatment of the other two persons in not being charged at all was referred to on several occasions. The jury undoubtedly considered these matters in weighing testimony. Probably goaded by defendant's constant contention that in effect the district attorney was conspiring with May and Redden to make up a case against defendant, the district attorney stated that the members of the Grand Jury believed that the evidence showed that defendant had committed the crimes charged. Defendant objected and assigned the statement as misconduct. The court should have then ad-

monished the jury. In its final instructions, the court did give a direct and positive instruction to the effect that the indictment was a mere accusation and that it was not evidence nor were the jury "authorized in the slightest degree to presume or to infer the guilt of the defendant therefrom." However, under the circumstances of this case we do not see how the delay in admonishing the jury could have been prejudicial. There is no similarity in the situation here to that in *People v. Edgar*, 34 Cal.App. 459, 167 P. 891, where the district attorney referred to the beliefs of the members of the Grand Jury during the course of what the court in *People v. Dykes*, 107 Cal.App. 107, 290 P. 102, 106, stated was "an address of an inflammatory character" and where "the testimony of the prosecutrix in that case was inherently improbable". 107 Cal.App. at page 117, 290 P. at page 106.

Defendant's own version of the alleged loan and his alleged disinterested advice to May to get out of the business, are so fantastic that the jury could have had no doubt that he was connected with May's bookmaking operations.

Defendant contends that there was unfair criticism of defense counsel throughout the trial by the court and the district attorney. Our examination of the transcript discloses no instances in which anything was done by the court in the nature of a rebuke of counsel which was not merited by counsel's persistent refusal to accept the court's rulings as final. Nor can we find any action of the district attorney that was prejudicial. There was an occasional statement concerning defense counsel induced by the heat of the arguments between them, but nothing of serious import in view of the constant implication by defense counsel that the district attorney's motives in this prosecution were ulterior.

Without objection, in response to a question on cross-examination, defendant stated that he had refused to testify before the Grand Jury on the ground of self-incrimination. Defendant's counsel in his argument referred to the fact that defendant had voluntarily gone before the Grand Jury

but refused to testify on his counsel's advice. Thereafter the district attorney commented on his failure to testify. No objection was made to such comment. Counsel has cited no authority holding that such conduct is improper. See Cal.Const., art. I, § 13; Penal Code, § 1323; *People v. Jones*, 112 Cal.App.2d 430, 433, 246 P.2d 683. Likewise we find no prejudicial restriction of defendant's cross-examination. While occasionally the court attempted some limitation, the matters limited were gone into again and again.

Instructions.

Defendant makes the blanket charge that the court erred in the giving and refusing of instructions. Except for the refusal to instruct on accomplices as to the first count, and the giving of an "instruction on the Saucke-Kiester" testimony, and an instruction on corroboration of the charge under section 653f, Penal Code, defendant makes no reference to any particular instruction given or refused. We have already determined that the accomplice instruction as to the first count should have been given. We are not sure we understand what instruction defendant is referring to as the one in the Saucke-Kiester testimony. Defendant does not point out what he claims to be erroneous about it. Nor can we find anything erroneous in the instruction or instructions to which we assume he refers. As we have reversed the conviction of the crime charged in section 653f, Penal Code, it is unnecessary to discuss the instruction complained of. The instructions as to corroboration of the other charges were proper.

[10] Defendant's opening brief is replete with general statements of denial of a fair trial, without specific or transcript reference, and without citation of authorities. " * * * in the absence of authorities or references to the transcript where such alleged misconduct may be found, the general charge of prejudicial misconduct should be disregarded." *People v. Van De Wouwer*, 91 Cal.App.2d 633, 641, 205 P.2d 693, 698. Among others he claims that the public and jury were "inflamed by newspaper and radio accounts of the charges in this case." There is nothing in the evi-

dence to support this statement. See *People v. Stroble*, 36 Cal.2d 615, 620, 226 P.2d 330.

The judgment of conviction on the first count and the order denying a new trial thereon are reversed and a new trial ordered thereon. As to the second and third counts, the judgment and order denying a new trial are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



117 Cal.App.2d 379

Petition of JOST.

JOST v. UNITED STATES.

Civ. 4400.

District Court of Appeal, Fourth District,
California.

April 20, 1953.

Rehearing Denied May 15, 1953.

Hearing Denied June 18, 1953.

Petition for naturalization. The Superior Court, Fresno County, Arthur C. Shepard, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, Griffin, J., held that the evidence established that petitioner's refusal to bear arms, to wear uniform, or to perform non-combatant service in United States armed forces was based, in part at least, upon his personal fear for his own safety, rather than upon his bona fide religious training and belief.

Affirmed.

1. Aliens ⇐68(6)

A wide discretion is vested in court to determine whether alien seeking naturalization has demonstrated his fitness to become a citizen, but it is beyond court's power to exercise this discretion arbitrarily.

2. Aliens ⇐68(5)

Where, on fair consideration of evidence adduced, doubt remains in mind of court as to any matter of fact essential to naturalization of alien, United States is entitled to benefit of doubt and application for naturalization should be denied. Nationality Act of 1940, § 335(b) (1, 2), as

amended by Internal Security Act of 1950, § 29, U.S.Code Congressional Service 1950, p. 1012; Immigration and Nationality Act, § 337, 8 U.S.C.A. § 1448.

3. Aliens ⇨68(5)

In proceeding on petition for naturalization, evidence established that alien's refusal to bear arms, to wear uniform, or to perform noncombatant service in United States armed forces was based, in part at least, upon his personal fear for his own safety, rather than upon his bona fide religious training and belief. Nationality Act of 1940, § 335(b) (1, 2), as amended by Internal Security Act of 1950, § 29, U.S.Code Congressional Service 1950, p. 1012; Immigration and Nationality Act, § 337, 8 U.S.C.A. § 1448.

4. Appeal and Error ⇨989, 996

Duty of District Court of Appeal begins and ends with inquiry whether trial court had before it evidence upon which unprejudiced mind might reasonably have reached the same conclusion which was reached, and such rule is applicable where parties stipulate to probative facts and different inferences may reasonably be drawn from agreed facts.

5. Appeal and Error ⇨931(3)

Where evidence is conflicting, it will be presumed that trial court found every necessary fact that evidence would justify to support its order.

6. Appeal and Error ⇨994(3), 1011(1)

So far as trial court has passed upon weight of evidence or credibility of witnesses, its implied findings are conclusive, even when based upon conflicting affidavits, where conflict is not sharp but only such as to create uncertainty in judge's mind.

7. Appeal and Error ⇨996

Where finding of fact of trial court is based upon reasonable inference, it is not within power of appellate court to set it aside.

Division, Robert K. Grean, Asst. U. S. Atty., Los Angeles, for respondent.

Richard W. Petherbridge, Los Angeles, amicus curiae for appellant, for American Civil Liberties Union, Southern California Branch, and others.

Randles & Randles, Anthony V. Randles, Los Angeles, amici curiae for appellant for Board of Social Study and Action of the Southern California-Arizona Conference of the Methodist Church.

William A. White, San Francisco, Malcolm Champlin, Oakland, B. W. Gearhart, Fresno, Alfred P. Chamie, Hollywood, and Howard R. Harris, Los Angeles, amici curiae for respondent for American Legion, Department of California.

GRIFFIN, Justice.

On May 25, 1950, appellant, a native of Canada, petitioned for naturalization. The law then in effect, Nationality Act of 1940, 54 Stats. 1137, 1157, 8 U.S.C.A. § 735, as amended by Internal Security Act of 1950, 64 Stats. 987, 1017, U.S.Code (1946 Ed.) Sup. IV, Sec. 735, U.S.Code Congressional Service 1950, p. 1012, provided for two oaths, one of which must be taken for admittance to citizenship. The first, (b) (1), so far as here involved, contains the clause that petitioner will "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States or perform noncombatant service in the Armed Forces of the United States when required by law * * *." The other (b) (2) omits the provision in reference to bearing arms or performing noncombatant service in the Armed Forces. The section then provides that all such applicants for naturalization shall be required to take the oath described in subsection (b) (1) "unless by clear and convincing evidence he can show to the satisfaction of the naturalization court that he is opposed to the bearing of arms or the performance of noncombatant service in the Armed Forces of the United States by reason of religious training and belief".

The legislative history pertaining to the amendment of this section is set forth in the

Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, for appellant.

Walter Binns, U. S. Atty., Clyde C. Downing, Asst. U. S. Atty., Chief Civil

remarks of Senator Pat McCarron, 96 Congressional Record 14183, September 5, 1950, in which he said that by adopting the amendment "we will be adhering to the time-honored practice and procedure of recognizing the bona fide religious convictions of a petitioner for naturalization while at the same time making no exception for those aliens who desire the benefits of United States citizenship but who would shirk its responsibilities."

Appellant's position is that he is a conscientious objector to war and to service in the Armed Forces, both as to combatant and noncombatant service; that he is willing and desires to take the oath prescribed in Section 735(b) (2) of 8 U.S.C.A.; that he is unable, because of conscientious scruples, to take the oath set forth in subsection (b) (1), which requires a promise to bear arms or to perform noncombatant service in the Armed Forces of the United States; that he believes his position is in accordance with the teachings of his church on nonresistance; that he produced sufficient evidence to establish this fact and that the trial court abused its discretion in holding that petitioner had not met this burden, citing such cases as *United States v. Everngam*, D.C., 102 F.Supp. 128, *Atherton v. United States*, 9 Cir., 176 F.2d 835, and *United States ex rel. Phillips v. Downer*, 2 Cir., 135 F.2d 521.

It is not clear from the findings of the trial judge whether he also found that petitioner was "not attached to the principles of the Constitution". He recites in his memorandum opinion and order that "This court has very serious doubts as to whether or not the petitioner is, in fact, attached to the principles of the Constitution of these United States", citing *United States v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889. He then finds that "This court certainly is not satisfied that petitioner's religious faith prevents him from service in the Armed Forces as a noncombatant; * * * that the petitioner has not proved by clear and convincing evidence to the satisfaction of this court that he is opposed to the performance of noncombatant service in the Armed Forces of the United States, by reason of religious training and belief".

256 P.2d—5½

The appeal is from the order dated January 4, 1952, denying appellant's petition for naturalization. Certain amici curiae briefs were allowed to be filed on appellant's behalf and on behalf of the Government.

It is appellant's first claim that the court erred in holding that he was not attached to the principles of the Constitution because the court's finding was predicated upon the ruling in the *Schwimmer* case, *supra*; *United States v. MacIntosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302, and *United States v. Bland*, 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319, which cases were overruled in the late cases of *Girouard v. United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 90 L.Ed. 1084, and *Cohnstaedt v. Immigration and Naturalization Service*, 339 U.S. 901, 70 S.Ct. 516, 94 L.Ed. 1331.

If the reason for so finding was that petitioner refused to bear arms and such refusal was based upon his bona fide religious training and belief, then there is merit to appellant's argument. In the *Girouard* case it was said that in the absence of unequivocal language to the contrary, the court could not assume that Congress intended to make a promise to bear arms a prerequisite to naturalization, and where the oath of allegiance prescribed by Congress for aliens seeking naturalization was that they would support and defend the Constitution and laws of the United States against all enemies, denial of citizenship to one who from religious scruples declared that he would not take up arms in defense of the United States was error.

A closer question presents itself as to whether appellant met the burden cast upon him of showing "by clear and convincing evidence * * * to the satisfaction of the naturalizing court" that he is opposed to the bearing of arms or the performance of noncombatant service in the Armed Forces of the United States *by reason of religious training and belief* and not for some other reason.

By amendment of June 27, 1952, c. 477, Title III, chap. 2, sec. 337, 66 Stats. 258, Sec. 1448, U.S.C.A. Title 8, adopted subsequent to the entry of the order in the instant proceeding, Congress defined the term

"religious training and belief" as meaning "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code." See *Berman v. United States*, 9 Cir., 156 F.2d 377.

In *Re Bogunovic*, 18 Cal.2d 160, at page 164, 114 P.2d 581, at page 584, our Supreme Court held, that "The opportunity to become a citizen of the United States is a privilege as distinguished from a right, and the burden is upon the alien to establish the facts necessary to support his application. * * * that in passing upon the application the court performs a judicial function. It exercises a legal as distinguished from a personal discretion." (Citing cases.)

In 3 C.J.S., Aliens, § 122, p. 833, it is said:

"The opportunity of an alien to become a citizen of the United States by naturalization is a mere matter of grace, favor, or privilege extended to him by congress; he does not have a natural, inherent, existing, or vested right to be admitted to citizenship. The only right which an alien has to become a citizen is that which is conferred on him by statute, and to acquire this right he must strictly comply with all of the statutory conditions and requirements. Prior to the filing of a petition in compliance with existing law and a final hearing thereon, an alien has no vested right to citizenship or any right which is not subject to the power of congress to modify; but the privilege of naturalization ripens into a right when he complies with the conditions prescribed by congress *and establishes the requisite facts.* (Italics ours.)

"* * * In view of the constitutional requirement that the rules of naturalization shall be uniform, naturalization laws should be construed and enforced with uniformity. They should be rigidly enforced and strictly construed in favor of the government and against applicant for citizenship." (Citing cases.)

The phrase "clear and convincing" evidence has been defined as "clear, explicit, and unequivocal", "so clear as to leave no substantial doubt", and "sufficiently strong to command the unhesitating assent of every reasonable mind". *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 P. 543, 544. The phrase "to the satisfaction of the court" has been interpreted as meaning "the quieting of the mind of the judge * * * the freedom to act according to one's judgment". *State of South Dakota v. Chapman*, 1 S.D. 414, 47 N.W. 411, 412, 10 L.R.A. 432; *Lawrence v. Goodwill*, 44 Cal.App. 440, 452, 186 P. 781.

[1, 2] While it is true a wide discretion is vested in the court, it is beyond the power of the court to exercise this discretion arbitrarily, but when, on a fair consideration of the evidence adduced, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of the doubt and the application should be denied. 3 C.J.S., Aliens, § 140, p. 851, and cases cited.

We will therefore consider the evidence presented in the light of these rules to determine if the appellant has met the burden cast upon him.

Appellant's testimony, summarized, is that he was born in Canada in 1918; that he came to the United States in 1927, has lived here ever since with his wife and children; that he is the West Coast Administrator of the Mennonite Central Committee, director of that faith's mental hospital, and has been a member of the Mennonite Brethren since 1932; that during World War Two he was classified under section 5(g) Selective Training and Service Act of 1940, 54 Stats. 885, 889, 50 U.S.C.A. Appendix, § 305(g), as a conscientious objector to service in the armed forces of the United States, but served in the Civilian Public Service Camp System working in forestry camps and in mental hospitals; that he is willing to render medical service during any war as a civilian, including service on the battlefield itself and to do other civilian work beneficial to the suffering members of society, but that he will not render such services under the direc-

tion of the Armed Forces; that he would not work in a "war plant", buy defense bonds, or do anything directly connected with the war effort; that if called by the Selective Service System he would serve the United States in a way compatible with his Christian principles of nonresistance; that he would not shoot or kill another human being even in defense of his life or the lives of his family; that he is not willing to serve in the Armed Forces in either a combatant or noncombatant capacity; that he was brought up in a home where war or participation in war in any form was considered wrong; and that he is willing as a civilian to accompany the Armed Forces and render first aid or medical treatment anywhere necessary. However, he stated he would not be willing to join the Armed Forces in any capacity or wear a uniform. He recites that the Mennonite Church was founded during the Reformation times in Switzerland (1525) and Holland (1533), and that it is the Mennonite belief that, as followers of Jesus Christ, they must renounce the use of force and violence in the settling of problems, and that this principle is derived from the scripture. Reference is made to many passages from the Bible in support of this claimed belief. Received in evidence in support thereof was the "Hand Book of the Mennonite Central Committee, 1950", reciting in part:

"We can have no part in carnal warfare or conflict between nations, nor in strife between classes, groups or individuals. We believe that this means that we cannot bear arms personally nor directly aid those who do so, and that, as a consequence, we cannot accept service under the military arm of the government, whether it is combatant or noncombatant, which ultimately causes us to be responsible for the destruction of life, health, and property of our fellow men. This applies to all wars whether they be designated defensive or offensive."

Also received in evidence was the publication "The Principle of Nonresistance as Held by the Mennonite Church", by John Horsch, and "Year Book of the 44th Gen-

eral Conference of the Mennonite Church of North America".

Appellant relies principally upon *Cohnstaedt v. Immigration and Naturalization Service*, 167 Kan. 451, 207 P.2d 425, wherein the trial court refused an application for citizenship predicated upon somewhat similar facts. The Supreme Court of Kansas sustained the trial court. On a writ of certiorari the United States Supreme Court, in a memorandum opinion, *supra*, reversed the order, based upon the decision in *Girouard v. United States*, 328 U.S. 61, 66 S. Ct. 826, 827, 90 L.Ed. 1084. It appears from the facts and contentions presented in that case that petitioner contended that he submitted sufficient evidence to the trial court to show that he was "'attached to the principles of the Constitution of the United States'" and that the court, in 1948, prior to the 1950 amendment here under consideration, found otherwise. The question here presented arises from the finding that appellant failed to establish by clear and convincing proof that he is opposed to the bearing of arms or the engaging in non-combatant service in the Armed Forces by reason of his bona fide religious training and belief. The two cases may be thus distinguished.

The report of the investigation of appellant, conducted by the Naturalization Examiner, was received in evidence after appellant read it and consented to its admission. It recites that investigation was made to determine whether the religious sect of the Mennonite Brethren Church to which appellant belongs, trains or teaches its members to refrain from performing military service. He sets forth interviews he had with ministers of that church who definitely state that there is nothing in the Mennonite creed or teaching to prevent one from wearing the uniform of the Armed Forces, and that the Mennonites, as an organization, do not teach their members that they should refrain from performing non-combatant service in the Armed Forces; that the instructions to the eligible members were that they should register for noncombatant duty. One minister testified that as a minister of that church, he was

naturalized in 1948; that he was willing to perform noncombatant service in the Armed Forces of this country if called upon to do so. Another stated that never in his training had he been told or instructed that he should not perform service in the Armed Forces. It was further shown that many members of the Mennonite Church and some members of the same church which appellant attends have been naturalized within the past two years, and all testified that they were willing to serve in the Armed Forces in noncombatant capacities if called upon to do so; that they had been Mennonites all their lives and knew of nothing in the religion which prevented them from serving in the Armed Forces in a noncombatant capacity; that "our religion teaches 'Thou should not kill' which we think means we should not bear arms, but it does not teach us that we should not wear the uniform"; that their forefathers wore the uniform in Russia and picked up the wounded on the front".

The examiner then found, as a result of his interviews, that the Mennonite organization, as a whole, does not teach its members to refrain from service in the Armed Forces in a noncombatant capacity.

Appellant presented a statement of a pastor of a Mennonite Brethren Church in Kansas, who knew appellant there for about ten years. He stated it was his conviction that appellant had conscientiously and considerably developed his present convictions regarding war throughout that period; that his home training program was consistent with the church program in holding that war is sin and that all war relationships must be avoided by Christians; that appellant is a conscientious objector to all war, and as a result of his religious training. The affidavit makes no reference to the nonwearing of the uniform. Appellant related that there were others in the churches that felt as he did and that he individually could not wear the uniform. This statement was corroborated by a minister who testified for appellant. However, he said he knew of nothing in the church teaching indicating that its members should abstain from the wearing of the uniform or performance of noncombatant service. Statements by

appellant's mother and brothers relate that appellant's early training was that war or any participation in it was wrong and that appellant was taught he should serve in alternate service outside of the Armed Services.

The examiner's findings analyze the evidence produced. They recite that it may be that resolutions have been passed at general conferences of the Mennonite Brotherhood organizations and that it might be the opinion of certain leaders of the church that its members should refrain from bearing arms or performing noncombatant service, but he maintains that if the organization as a whole does not teach, instruct or train its membership to refuse to perform noncombatant service, then the individual members cannot claim that they received religious training from the organization to that effect. They then conclude that since ministers in the immediate area of petitioner's residence have stated and testified that they believe, from the training received in the Mennonite organization, that they can consistently perform noncombatant service and wear a uniform and still live by the creed of the Mennonites "Thou shall not kill", petitioner's refusal to bear arms or to perform noncombatant service in the Armed Forces of the United States is based upon a personal fear for his own safety and he is merely attempting to stretch the training of his organization that "thou shall not kill" to include refusal to wear the uniform. They then conclude that petitioner has failed to establish necessary facts permitting him to take the alternative oath. The trial court, in effect, made a similar finding. The Commissioner of Immigration and Naturalization, however, made certain findings and recommended that the petition should be granted.

[3] Had the trial court found that appellant had met the burden cast upon him and accordingly that he was entitled to take the alternative oath prescribed, it might be properly held that such finding of fact would be supported by the evidence presented. On the contrary, it cannot be said that appellant produced unconflicting evidence and established, as a matter of law and fact, that appellant's refusal to bear arms,

refusal to wear the uniform, or to perform noncombatant service in the Armed Forces of the United States, was based upon his *bona fide religious training and belief* and was not, as found by the Naturalization Examiner and the court, based, in part at least, upon his personal fear for his own safety.

[4-6] No citation of authority should be necessary to demonstrate our position in respect to such a finding. This court's duty, on appeal, begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion which was reached. This rule is applicable also where the parties stipulate to the probative facts and different inferences may reasonably be drawn from the agreed facts. *Dunphy v. Dunphy*, 161 Cal. 380, 119 P. 512, 38 L.R.A.,N.S., 818; *Crisman v. Lanterman*, 149 Cal. 647, 87 P. 89. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as the court has passed upon the weight of the evidence or credibility of witnesses, its implied findings are conclusive even when based upon conflicting affidavits, and where the conflict is not sharp but only such as to create an uncertainty in the mind of the judge. *Hyde v. Boyle*, 105 Cal. 102, 38 P. 643; *Kern Valley Bank v. Koehn*, 10 Cal.App. 679, 103 P. 173.

In *La Jolla Casa de Manana v. Hopkins*, 98 Cal.App.2d 339, 219 P.2d 871, 876, this court said:

"A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. * * * Where conflicting inferences may be drawn from testimony, this court is bound by the findings of the trial court as conclusively as in other cases of conflict."

[7] If the finding of fact is based upon a reasonable inference it is not within the power of an appellate court to set it aside any more than it is within its power to set aside any other finding supported by any legal evidence. An appellate court cannot review a finding because in its judgment the inference adduced by the trial court is improbable or more unlikely to be true than the opposite one. Such a finding is as completely a finding based upon good and sufficient evidence as any other finding of fact. *Wallace v. Sisson*, 114 Cal. 42, 45 P. 1000; *Kimball v. Semple*, 25 Cal. 440.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



PRESCOTT v. RALPHS GROCERY
CO. et al. *
Civ. 19377.

District Court of Appeal, Second District,
Division 1, California.

April 30, 1953.

Rehearing Denied May 19, 1953.

Hearing Granted June 25, 1953.

Action by customer against grocery company for injuries received in fall on sidewalk which was adjacent to company's market and which allegedly was wet and had debris on it. The Superior Court of Los Angeles County entered judgment on verdict for company, and customer appealed. The District Court of Appeal, Drapeau, J., held that, where trial court instructed jury on assumption of risk, jury should also have been instructed that customer did not assume risk of latent dangers created by negligence of another in absence of notice, and failure to so instruct constituted prejudicial error.

Judgment reversed.

White, P. J., dissented.

See also, 252 P.2d 61.

I. Negligence ⚡32(1), 52, 105

A property owner is not an insurer of invitee's safety but must use reasonable care to keep his premises in reasonably safe condition and give warning of latent

* Subsequent opinion 265 P.2d 904.

or concealed perils and is not liable for injury to invitee resulting from danger which was obvious or should have been observed in exercise of reasonable care, but invitee does not assume risk of latent dangers which are created by negligence of another and of which he has no notice.

2. Negligence ⇨136(22, 26)

In action by customer against grocery company for injuries received in fall on sidewalk, which was adjacent to company's market and which allegedly was wet and had debris on it, questions of negligence, contributory negligence, and assumption of risk were for jury.

3. Negligence ⇨105

Doctrine of assumption of risk is based on theory that there has been a voluntary acceptance of risk, and such acceptance, whether express or implied, requires knowledge and appreciation of risk.

4. Negligence ⇨105

Where facts are such that plaintiff must have had knowledge of hazard, situation is equivalent to actual knowledge, and there may be an assumption of risk, but, where it merely appears that person could or should have discovered danger by exercise of ordinary care, defense is not assumption of risk but contributory negligence.

5. Trial ⇨203(1)

A litigant, who makes such request, is entitled to proper instructions presenting his theory of case, based on pleadings and proofs.

6. Appeal and Error ⇨1067

Negligence ⇨138(1)

In action by customer against grocery company for injuries received in fall on sidewalk, which was adjacent to company's market and which allegedly was wet and had debris on it, where trial court instructed jury on assumption of risk, jury should also have been instructed that customer did not assume risk of latent dangers created by negligence of another in absence of notice, and failure to so instruct constituted prejudicial error.

Kenny & Morris and Eleanor V. Jackson, Los Angeles, for appellant.

Moss, Lyon & Dunn, Richard B. Coyle and Henry F. Walker, Los Angeles, for respondent.

DRAPEAU, Justice.

By the instant action, plaintiff seeks to recover damages for injuries sustained by her when she fell on a sidewalk adjacent to defendant company's market.

It appears from the record that around 9 o'clock on the morning of April 14, 1951, plaintiff drove her automobile to Ralphs market at Pico Boulevard and Normandie Avenue in Los Angeles. She was accompanied by her husband and their two dogs. She parked the car in the lot back of the market and walked along the sidewalk on the Normandie side of the store to the entrance on Pico. As she walked she did not notice any water on the sidewalk. She purchased some ice-cream and in ten or fifteen minutes retraced her steps toward her parked car. At that time she observed "A lot of water. The sidewalk seemed to be quite flooded with water."

As she proceeded, she stepped "very carefully into the water. After taking three or four steps, she "felt something slip" under her foot. Immediately she slipped, her right foot went out from under her and she fell breaking her right wrist. She looked as she took each step and noticed that the water was not very clean. However, she saw no debris of any kind in the water, although she felt something under her foot before falling. When she reached home her dress was soiled and she brushed off some flakes of foreign matter.

Mr. William McKinney, a porter, had been employed by defendant company for 14½ years to clean the store and take care of the sidewalks. He testified that vegetables were loaded and unloaded through a receiving door opening off the sidewalk on the Normandie side of the store and the empty crates were then transferred to the rear of the store by trucks. Occasionally he saw vegetable matter on the

sidewalk. About 9 o'clock on the morning in question, he swept the sidewalk and the parking lot. As he returned to the store, he found some refuse on the sidewalk toward the rear of the building. He scooped it up and put it in the garbage container. He then dashed a bucket or two of hot water on the sidewalk and using his broom, "swept it from the side of the building to the curb completely. * * * I saw that the sidewalk was completely clear of water. * * * About 15 or 20 minutes later someone made a report that a lady fell on the sidewalk." He left the store and looked at the sidewalk where the accident occurred. "It was damp and drying partially; drying." Except for the dampness there was no foreign matter on the walk in that area.

The manager of the store testified that he examined the sidewalk on the Normandie side of the market immediately after he was told of the accident. He stated that it "was clean but damp in places where it showed evidence of having been washed off, and there was no debris on the sidewalk, on the side of the building, near where she said she was injured."

It was a clear, sunny morning.

With this evidence before it, the jury brought in its verdict in favor of defendant Ralphs Grocery Company. From the judgment which followed, plaintiff appeals.

It is here urged that the trial court committed prejudicial error in refusing to give to the jury certain instructions requested by appellant.

Specifically, it is asserted that the court having instructed the jury on assumption of risk and contributory negligence, appellant became entitled to a clear and explicit instruction that no one is required to assume the risk of a latent or obscure danger.

Among others, the court gave the following instruction: "If a danger is so apparent that a person can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning, and if a person fails to heed such warning and is injured as a result there-

of, he or she is guilty of contributory negligence."

Also, the jury was instructed that appellant "was required to use ordinary care to avoid injury to herself, and this requires the exercise of ordinary care both to avoid dangers known to her and to discover dangers or conditions of danger to which she might become exposed."

Having so instructed the jury, appellant claims that it was then mandatory upon the trial court to instruct further in the language of her proposed instructions 1 and 2, to-wit:

(1) "You are instructed as to the doctrine of assumption of risk that the law is, that while a person assumes the perils which are naturally incident to the position he has taken, he does not assume dangers which come only from the negligent act of another."

(2) "Plaintiff was not negligent as a matter of law merely because she continued to walk on the sidewalk after knowledge that some danger existed. She can only be charged with negligence if you find as a fact that before she proceeded further she was aware of the amount of danger actually present."

[1] The rule of law applicable to this type of case is stated in *Jones v. Bridges*, 38 Cal.App.2d 341, 345, 101 P.2d 91, 93, quoting from *Blodgett v. B. H. Dyas Co.*, 4 Cal.2d 511, 512, 50 P.2d 801: "The owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care."

However, "An invitee does not assume the risk of latent dangers which are created by the negligence of another and of which he has no notice. *Oettinger v. Stewart*, 24 Cal.2d 133, 139, 148 P.2d 19, 156 A.L.R. 1221; *Hedding v. Pearson*, 76 Cal. App.2d 481, 173 P.2d 382." *Popejoy v. Hannon*, 37 Cal.2d 159, 171, 231 P.2d 484, 491.

Appellant's case was tried on the theory that the negligence of respondent in permitting debris to remain in the water on the sidewalk was the proximate cause of her fall. As hereinbefore stated, there was evidence that the water was not clean, that although appellant looked, she saw no debris, but she did feel something slip under her foot. There was also evidence that the walk had been cleaned that morning, and that it was still damp after appellant fell but no debris was then found on the walk.

[2] Thus, the issues of negligence, contributory negligence and assumption of risk became questions for the jury to decide under proper instructions.

[3,4] "The doctrine of assumption of risk is based on the theory that there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, requires knowledge and appreciation of the risk. See Rest., Torts, § 893; Prosser on Torts (1941), pp. 377-386; 10 So. Cal.L.Rev., 67, 74. Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of risk; but where it merely appears that a person could or should have discovered the danger by the exercise of ordinary care, the defense is not assumption of risk but contributory negligence. See Prosser on Torts (1941), pp. 379-380, 400." *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 384, 240 P.2d 580, 585.

Apropos is the following language in *Hedding v. Pearson*, 76 Cal.App.2d 481, 486, 173 P.2d 382, 385: "If any instructions were to be given in this case on the subject of assumed risk, they should have further included a proviso that, while a person assumes the perils which are naturally incident to the position he has taken, he does not assume dangers which can come only from the negligent acts of another. *Muskin v. Gerun*, 1941, 46 Cal.App.2d 404, 410, 116 P.2d 105; 19 Cal.Jur. 589, sec. 30."

[5] Moreover, a "litigant requesting it is entitled to proper instructions presenting his theory of the case, based on the plead-

ings and proofs." 24 Cal.Jur. 826, sec. 92 and the authorities there cited. See, also, *McGowan v. City of Los Angeles*, 100 Cal.App.2d 386, 395, 223 P.2d 862, 21 A.L.R.2d 1206; *Clement v. State Reclamation Board*, 35 Cal.2d 628, 643, 220 P.2d 897.

[6] In the circumstances, the jury should have been instructed that appellant did not assume the risk of latent dangers created by the negligence of another in the absence of notice. *Popejoy v. Hannon*, supra, 37 Cal.2d 159, 171, 231 P.2d 484.

Had the jury received the instructions proposed by appellant it might have reached a different conclusion. Hence, failure to give them was prejudicial.

Because of the conclusions reached herein, it is not deemed expedient to consider the remaining points raised by appellant on this appeal.

For the reasons stated, the judgment is reversed.

DÖRAN, J., concurs.

WHITE, Presiding Justice.

I dissent. In urging error upon the part of the trial court in failing to give the instruction designated number (1) in the majority opinion, appellant evidently contends that the trial court failed to admonish the jury that a person is not negligent in failing to anticipate injury which can come to him only from the negligent act of another. This contention is unavailing because the court did instruct the jury as follows:

"A person who, himself, is exercising ordinary care, has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another * * *."

Instruction number (2), as set forth in the majority opinion, was, in my opinion, properly refused because it is an incorrect statement of the law. It would have

advised the jury that appellant could be charged with negligence only if it be found, "that before she proceeded further she was *aware* of the amount of danger *actually* present." (Emphasis added.)

This instruction would wrongfully limit the consideration of the jury to such evidence only as tends to show what *actual* knowledge of the sidewalk danger appellant had at the time of the accident. Negligence may be predicated upon proof that appellant failed to exercise that degree of vigilance and use of her faculties, which and ordinary, prudent person would have done under similar circumstances, even though it also appears that appellant had no actual knowledge of the danger. One is bound to exercise ordinary care to anticipate danger. *Soda v. Marriott*, 118 Cal. App. 635, 640, 5 P.2d 675.

An examination of the record herein reflects that the court fully, fairly and correctly instructed the jury on all the issues presented by the pleadings or raised by the evidence.

I would affirm the judgment.



117 Cal.App.2d 455

**CITY & COUNTY OF SAN FRANCISCO v.
INDUSTRIAL ACCIDENT COM-
MISSION et al.**
Civ. 15563.

District Court of Appeal, First District,
Division 2, California.
April 28, 1953.

Proceedings were brought by employer to review an award granting death benefit to widow of deceased employee. The District Court of Appeal, Goodell, J., held that evidence was insufficient to establish that employee's death arose out of employment within meaning of the Workmen's Compensation Act.

Award annulled and proceeding remanded.

I. Workmen's Compensation ⇨1359

There is no presumption that because injury occurs in course of employment it

arises out of employment within meaning of the Workmen's Compensation Act.

2. Workmen's Compensation ⇨1357

To make out prima facie case in compensation proceeding to recover award for death of employee, it is necessary to prove more than fact that employee died while performing a task which was required by his employment, and which he had performed on various occasions throughout years apparently without incident.

3. Workmen's Compensation ⇨1411

Hearsay testimony of incompetent witness is insufficient to support award in workmen's compensation proceeding.

4. Workmen's Compensation ⇨1409

In order to justify compensation award, it is not sufficient that referee or members of Industrial Accident Commission be satisfied as laymen of correctness of their view, but it is necessary that they reach their conclusion on basis of legally competent evidence.

5. Workmen's Compensation ⇨1397

In compensation proceeding, referee did not abuse his discretion in rejecting report of physician, who was not attending physician, where report was only a rationalized opinion based on findings of others, and was based on data not in evidence. Labor Code, §§ 5703, 5709.

6. Workmen's Compensation ⇨1397

In compensation proceeding, referee could have admitted physician's report, though physician was not attending physician, and though report was only a rationalized opinion based on findings of others, and though it was based on data not in evidence. Labor Code, §§ 5703, 5709.

7. Workmen's Compensation ⇨1173

Where there was nothing to show in compensation proceeding that employer had made any effort to have witness present at compensation proceedings, or that his testimony would have been of value, referee did not abuse his discretion in denying application of employer for continuance until witness had returned from his vacation so that employer could produce witness. Labor Code, § 5700.

8. Workmen's Compensation ⇨1536

Evidence that 64 year old employee of park commission had been in good health and had never complained of shortness of breath, chest pains, or tightness in his chest, and that after storm he and another sawed a fallen tree about ten inches in diameter with a two-man cross-cut saw, and that employee then collapsed and became unconscious, and that he was dead on arrival at hospital, was insufficient to establish that death from heart condition "arose out of employment" within meaning of compensation act.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising Out of Employment".

Dion R. Holm, City Atty., City and County of San Francisco, Jerome Cohen, Deputy City Atty., San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, for respondents.

GOODELL, Justice.

A writ was issued herein to review an award granting a death benefit to Catherine Murdock, the widow of James Murdock, a gardener employed by the City.

Petitioner contends that the evidence and the inferences to be drawn therefrom do not establish that the employee's death arose out of his employment. The Referee's exclusion of a medical report offered by petitioner and the refusal to grant a continuance to secure the testimony of a witness are further issues raised by the City.

James Murdock, aged 64, was employed by the Park Commission at the time of his death on January 14, 1952. His widow testified that he had been in good health and had never complained of shortness of breath, chest pains, or tightness in his chest. She did not know of any visit of her husband to a doctor. He had planned to get another position when he had to retire from City service at 65.

Dennis Harrington, a foreman of maintenance in Golden Gate Park, testified that on the night of January 13-14, 1952 there

had been a heavy storm which had blown down several trees and branches in his section of the park. Decedent went to work on the morning of the 14th with other members of his crew. They began clearing a driveway across which a large tree had fallen. The two crews at work supplied ample help. At about 10:30, two hours or so after starting the day's work one of the crew called to Harrington, who turned and saw that Murdock had collapsed. He was unconscious, his ears were turning blue "and he just gave a couple of sighs, and he was trying to get his breath, and we covered him up and kept him awake until the ambulance came." He was dead on arrival at the Park Emergency Hospital. Just before this Murdock and one Delmonte had been sawing a log approximately ten inches in diameter with a two-man cross-cut saw. The foreman testified that the sawing of logs was heavy work and that the particular log was green. He also testified that Murdock had worked with him for a long time and he had never known him to complain of ill health.

He testified further that normally it was the duty of a gardener to cut up trees, and that they had always done that. It was, however, their heaviest work; "you have to strain" he said, but there was no rush and there was plenty of help.

The testimony just summarized was the widow's entire case before the Commission.

The City offered in evidence a report of Dr. Francis L. Chamberlain which noted the enlargement of the decedent's heart, a profound degree of arteriosclerosis, and evidence of old fibrosis, all which were disclosed by the autopsy. He concluded that the cause of death was acute occlusive thrombosis of the right coronary artery, which was the result of long standing calcific arteriosclerosis of the coronary vessels and that this type of complication "would occur at any moment of the day, whether this man had been active physically, or whether he had been sitting or lying quietly." This report was based on copies of the Coroner's Autopsy Report, the transcript thereof and the verdict of the Coroner's Inquest, also on a written statement of Delmonte, decedent's working partner,

none of which documents went into evidence. Applicant's objection was sustained, and Dr. Chamberlain's report was not admitted in evidence.

[1, 2] It is contended by petitioner that the cause of death was not a subject within the knowledge of laymen, and that only expert evidence would be conclusive thereon. *Hartford Accident & Indemnity Co. v. Industrial Acc. Comm.*, 140 Cal.App. 482, 35 P.2d 366; *William Simpson Construction Co. v. Industrial Acc. Comm.*, 74 Cal. App. 239, 240 P. 58. When Dr. Chamberlain's report was excluded there was no medical evidence of any kind before the Commission. It is well settled that "there is no presumption * * * that because an injury occurs in the course of the employment it arises out of or because of that employment." *George L. Eastman Co. v. Industrial Acc. Comm.*, 186 Cal. 587, 593, 200 P. 17, 19; *Newton v. Industrial Acc. Comm.*, 204 Cal. 185, 188-189, 267 P. 542, 60 A.L.R. 1279. To make out a prima facie case it is necessary to prove more than the fact that decedent died while performing a task required by his employment which he had performed on various occasions throughout the years apparently without incident. The present record is wholly devoid of evidence of the cause of death. It is true that the employee died immediately after performing a task that was the most arduous of any required by his employment. However, it is not a matter of common knowledge, that operating a cross-cut saw with a partner on the other end is labor of such a strenuous type as to bring on a fatal heart attack.

Since the autopsy report was not introduced, there was no evidence that the employee already had a heart ailment, from which the Commission might have inferred that such condition was aggravated by the strenuous task assigned to him. In fact there was no evidence that he died of a heart attack. As petitioner argues, from all that appears the cause of death may have been some form of poisoning or an attack of acute indigestion.

Respondents cite *Pacific Employers Ins. Co. v. Industrial Acc. Comm.*, 19 Cal.2d 622, 629, 122 P.2d 570, 574, 141 A.L.R. 798,

which holds that circumstantial evidence is sufficient to support an award, and that "it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required." In that case, however, both sides introduced the testimony of medical experts on the issue whether or not the employee contracted the disabling disease as a proximate result of his employment. It is said there that "The opinions of qualified medical witnesses with reference to the origin and cause of the injury are valid evidence which will support an award."

[3] As was pointed out in *Pacific Employers Ins. Co. v. Industrial Acc. Comm.*, 47 Cal.App.2d 494, 499, 118 P.2d 334, 338, hearsay testimony of an incompetent witness is insufficient to support an award. There it is said that "It has no probative force and is not calculated to ascertain the substantial rights of the parties." In that case the applicant testified that other people, including her own doctor, informed her that the ulcer on her leg resulted from the original injury. She also testified how the injury occurred. The award was annulled for lack of competent evidence to support it. It was held that it was within the province of the Commission to disregard the testimony of the employer's experts that the then present ulcer was in no way related to the original injury, but when it did so, the record was entirely "devoid of evidence upon an ultimate fact on a scientific subject." Where the subject matter is within the exclusive knowledge of experts trained in a scientific subject, expert evidence is essential. See *William Simpson Construction Co. v. Industrial Acc. Comm.*, supra; *Newton v. Industrial Acc. Comm.*, supra; *State Compensation Ins. Fund v. Industrial Acc. Comm.*, 195 Cal. 174, 231 P. 996.

Respondents rely on *United Dredging Co. v. Industrial Acc. Comm.*, 92 Cal.App. 110, 267 P. 763; *Moquin v. Industrial Acc. Comm.*, 33 Cal.App.2d 511, 92 P.2d 413; *Singer v. Industrial Acc. Comm.*, 105 Cal. App. 374, 287 P. 567; and *Brant v. Retirement Board*, 57 Cal.App.2d 721, 724, 135 P.2d 396. In the *United Dredging* case, it

was said that an award could be based on circumstantial evidence, and that from the facts proved the Commission could infer that the employee accidentally fell overboard and was drowned. Indeed the opinion recited that "It was in evidence that death was caused from drowning." [92 Cal.App. 110, 267 P. 764.] In the present case there is nothing in evidence bearing on the cause of death. In the Moquin case medical testimony was offered by the applicant to prove the existence of the hernia condition and its recent origin. In the Singer case there was the testimony of a physician as to the existence of a hernia. In the Brant case there was considerable medical testimony respecting the cause of death. A prima facie case of industrial injury was therefore made out in all those cases, whereas here we have only evidence of death following exertion in the course of the employment, but no competent evidence showing that the exertion caused the death.

In *Travelers Ins. Co. v. Industrial Acc. Comm.*, 33 Cal.2d 685, 687, 203 P.2d 747, 748, it was said that "An award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained." In *Fireman's Fund Indemnity Co. v. Industrial Acc. Comm.*, 93 Cal.App.2d 244, 246, 208 P.2d 1033, 1034, this court held that "expert evidence of a medical possibility taken with other evidence of a non-expert character may be sufficient to support an inference of medical probability." But the evidence offered by the widow herein does not meet that test. An award cannot be based on mere speculation that the injury was industrially caused. See *California, etc., Exchange v. Industrial Acc. Comm.*, 76 Cal.App.2d 836, 840-843, 174 P.2d 680; *William Simpson Const. Co. v. Industrial Acc. Comm.*, 74 Cal.App. 239, 246, 240 P. 58, *supra*.

[4] As was said in *Hartford A. & I. Co. v. Industrial Acc. Comm.*, 140 Cal.App. 482, 486, 35 P.2d 366, 368, *supra*, "It is not sufficient that the referee or commission be satisfied as laymen of the correctness of their view, but the law requires that they shall reach their conclusion on the basis of legally competent evidence."

[5, 6] Petitioner also contends that there was error in excluding the Chamberlain report. The Referee sustained the applicant's objection to it because Dr. Chamberlain was not the attending physician and his report was only a rationalized opinion based on the findings of others. Labor Code, § 5703 provides that the Commission may receive as proof of any fact in dispute "Reports of attending or examining physicians" but Dr. Chamberlain's letter was not such a report. True, the Referee might have received it in evidence since Labor Code, § 5709 provides that the Commission is not bound by common law or statutory rules of evidence or procedure. However, no abuse of discretion is shown in the rejection of it, since it was based on data not in evidence. See *Thoreau v. Industrial Acc. Comm.*, 120 Cal.App. 67, 72-73, 7 P.2d 767; *Winthrop v. Industrial Acc. Comm.*, 213 Cal. 351, 355, 2 P.2d 142; *Nielsen v. Industrial Acc. Comm.*, 125 Cal.App. 210, 212, 13 P.2d 517.

[7] Nor was there any abuse of discretion by the Referee in denying the City's application for a continuance to enable it to produce as a witness Delmonte, who was working with decedent when he collapsed. The transcript shows the following:

"Referee: Q. Well, why isn't he here today?"

"Mr. Cohen: A. He is on his vacation, and we could not produce him.

"Referee: Well, that has nothing to do with the preparation of this case, and I see no reason to give another hearing, and that was ascertainable before the hearing. There is no reason to hold up this case, as far as I can see it.

"Mr. Cohen: There was one continuance at the request of the applicant.

"Referee: Well, we do not balance the situation."

There is nothing to show that petitioner had made any effort to have the witness present, nor that his testimony would be of value. No showing was made as to why he had not been subpoenaed. Labor Code, § 5700 provides that adjournments from time to time are in the discretion of the Referee. The Commission's Rules of Prac-

tice and Procedure, Rules 10773-74, Title 8, California Administrative Code, provide that continuances are not favored, and that a further hearing will not be granted except for good cause stated in detail in writing or on oral motion addressed to the Referee. Petitioner has shown no abuse of discretion in this ruling.

[8] The award must be annulled, however, because there is no competent evidence in the present record from which it may be inferred that the employee's death arose out of his employment.

The award is annulled and the proceeding remanded for such disposition as the Commission may deem proper.

NOURSE, P. J., and DOOLING, J., concur.



117 Cal.App.2d 568

**CROWDER v. ATCHISON, T. & S. F.
RY. CO.
Civ. 19171.**

District Court of Appeal, Second District,
Division 2, California.

April 30, 1953.

Hearing Denied June 18, 1953.

Action under Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq., for injuries to switchman which occurred when switchman stepped off moving train at "Y-form" to check spring switch. The Superior Court, Los Angeles County, Otto J. Emme, J., rendered judgment on verdict for defendant, and switchman appealed. The District Court of Appeal, Fox, J., held that trial court's instructions were not erroneous for injecting assumption of risk doctrine into case.

Affirmed.

1. Master and Servant ⇨265(2, 3)

To recover under Federal Employers' Liability Act, plaintiff must establish that defendant was negligent, and that such negligence was proximate cause of employee's injury. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

2. Master and Servant ⇨228(1)

Negligence ⇨101

Under Federal Employers' Liability Act, plaintiff's contributory negligence is not a defense, but may be considered in reduction of damages. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

3. Master and Servant ⇨228(1)

Under Federal Employers' Liability Act, if plaintiff's negligence is the sole proximate cause of his injuries he may not recover. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

4. Master and Servant ⇨295(1), 296(8)

In action under Federal Employers' Liability Act for injuries to switchman which occurred when switchman stepped off moving train at "Y-form" to check spring switch, tripped on wiry grass, and fell, instruction that if switchman had choice of using reasonably safe area in which to alight, but voluntarily chose unsafe area which ordinarily prudent man would avoid, he is ordinarily deemed negligent, in absence of emergency or other circumstances justifying choice, was not erroneous for charging that switchman was negligent as matter of law or for injecting assumption of risk doctrine into case. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

5. Master and Servant ⇨295(1), 296(4)

In action under Federal Employers' Liability Act for injuries to switchman which occurred when switchman stepped off moving train at "Y-form" to check spring switch, instruction that person exercising ordinary care may assume, and rely upon assumption, that others will perform their legal duties, and that one is not negligent for failure to anticipate injury which can come from another's violation of law, but that such rights do not exist when it is reasonably apparent that another is not going to perform his duty, did not erroneously inject doctrine of assumption of risk into case, but was proper instruction on issue of negligence. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

6. Master and Servant ⇨295(2)

In action under Federal Employers' Liability Act for injuries to switchman

which occurred when switchman stepped off moving train at "Y-form" to check spring switch, instruction that under act employer is not liable for unavoidable "risks" or "dangers", that industrial enterprise entails unavoidable "hazards", and that to recover switchman must prove that defendant was guilty of negligence which proximately caused switchman's injury, and that if jury found that "dangers" to which switchman was subjected could not have been avoided by defendant in exercise of reasonable care switchman was not entitled to recover, did not erroneously inject doctrine of assumption of risk into case. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

7. Trial ⇌295(1)

In determining propriety of instructions District Court of Appeal must consider instructions in their entirety.

8. Master and Servant ⇌270(15)

In action under Federal Employers' Liability Act for injuries to switchman which occurred when switchman stepped off moving train at "Y-form" to check spring switch, trial court properly rejected employee's offer of evidence to establish engineers' custom of traveling between 10 to 15 miles per hour on Y, where there was no indication that employee had personal knowledge of practices of enough engineers to establish existence of prevailing custom. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

9. Appeal and Error ⇌1056(1)

In action under Federal Employers' Liability Act for injuries to switchman which occurred when switchman stepped off moving train at "Y-form" to check spring switch, even if trial court improperly excluded employee's offer of evidence to establish engineers' custom of traveling between 10 to 15 miles per hour on Y, it was not prejudicial, where evidence showed that switchman did not rely on purported custom and usage, but stepped from train at time when he knew it to be exceeding what he sought to represent as customary speed. Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

Hildebrand, Bills & McLeod, Oakland, Richard E. Crow, Los Angeles, D. W. Brobst, Oakland, for appellant.

Robert W. Walker, J. H. Cummins, Los Angeles, for respondent.

FOX, Justice.

Plaintiff appeals from a judgment for defendant in an action to recover damages for personal injuries under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Defendant is a common carrier within the provisions of that statute. The complaint was in two counts: (1) that plaintiff was injured by reason of defendant's failure to provide him with a safe place to work, (2) that plaintiff was injured by reason of the negligence of defendant's employees in operating an engine at an excessive rate of speed at a time and place when it was necessary for him to dismount from the train while in the course of his employment. Plaintiff urges on appeal that (1) certain instructions given by the trial court were prejudicially erroneous; (2) the trial court committed prejudicial error in refusing his offer of evidence to establish custom and practice relating to the rate of speed at the place of injury.

Plaintiff was in defendant's employ as a switchman or yardman at San Diego since 1946. He was injured on the afternoon of October 8, 1950, at which time he was one of a crew engaged in turning around a Diesel-drawn streamline train (No. 77) to prepare it for its regularly-scheduled return trip to Los Angeles. This turn-about process is accomplished by the use of a Y-form. No. 77 arrives in San Diego proceeding away from Los Angeles. To reverse its direction, a switch engine hauls the train along one arm of the Y and down its lower stem until the engine of the streamliner is clear of a switch situated at what may be described as the apex of the Y, or the point of junction of the two arms and the stem of the Y. When this switch is cleared, it is automatically thrown. The switch engine is then uncoupled, the air brakes tested, and the streamliner, powered by its Diesel, leaves the Y via the arm leading into the mainline tracks headed toward

Los Angeles. The brake test and detachment of the engine take about two minutes.

The injury complained of occurred while such a movement was in process. On the afternoon of the accident, it was plaintiff's duty to ride in the cab of the Diesel engine and at some point step off or alight from the engine to check the spring switch previously described and assure that it had functioned properly to enable the train to proceed on its run to Los Angeles. Plaintiff had the further duty, after completing his switch inspection, to proceed to Pacific Boulevard, a heavily-traveled main highway traversing both arms of the Y, and there control traffic to prevent obstruction of the tracks that would interfere with or delay passage of the train. Located between the two arms of the Y are electrically controlled traffic signals. Adjacent to the spring switch is a paved private road (Consolidated Road), which normally carried heavy traffic at about the time the accident happened. There was a distance of some 100 feet between the Pacific Highway and Consolidated Road, of which between 60 and 65 feet consisted of tough, wiry grass and weeds grown to a height of between 6 and 10 inches, and the remainder was bare dirt. About 30 feet south of Consolidated Road, the surface was black topped on both sides of the railroad. The spring switch was about 175 feet from the highway where a switchman customarily flagged traffic during the two-minute interval while the air-brake test was made prior to the train's departure.

The evidence showed that the rules of defendant railroad limit the speed of trains operating on the Y to 15 miles per hour. Plaintiff testified that at the time of the accident he alighted from the Diesel cab while the train was traveling between 18 and 20 miles per hour, stepping into the grassy area. As his feet struck the ground, plaintiff was tripped by the grass and fell, injuring his left knee and back. He regained his feet quickly and performed his duties of switch inspection and traffic control. Plaintiff stated that he anticipated the speed of the train would be diminished before he got off, but he alighted at that

place despite no slackening of the train's speed. On other occasions he had stepped off onto the bare dirt. Plaintiff admitted he knew of a company rule requiring an employee not to get off an engine or car moving at an excessive rate of speed and testified that he thought 15 to 18 miles an hour would be an excessive rate at which to dismount under any of the conditions along the track. He testified that he was never required by the company to get off a train that was traveling too fast, that it was a matter for his own judgment as to where and when he would get off the train, and that he could alight when the train stopped if he so chose.

With reference to the speed of the train, plaintiff testified he did not realize that the train was going as fast as it was until a few seconds before he stepped off, when he became aware that it was going between 18 and 20 miles per hour. The train stopped in its usual place, about 120 to 150 feet from where plaintiff alighted, or just a few feet beyond the switch. Albert Smith, a yardman called by plaintiff, testified that the train was going about 18 to 20 miles an hour when plaintiff stepped off, and that such was the speed the engineer in control customarily traveled at that place. He stated switchmen usually do not get off a train going more than 10 miles an hour. The engineer of the switch engine testified that the train was going at a maximum of 12 miles per hour during the movement prior to the clearing of the switch. There was other testimony that a switchman was permitted to step off the train anywhere along the arm of the Y here involved whenever, in his discretion, he considered it safe to do so.

About three weeks after the accident, plaintiff was forced to stop working because of progressive pain attributable to his injury. He has been idle since then.

Plaintiff does not challenge the sufficiency of the evidence to sustain the judgment. He complains, however, about certain instructions which the court gave.

[1-4] To recover under the act it is incumbent upon plaintiff to establish that the

railway company was negligent and that such negligence was a proximate cause of his injury. *Spencer v. Atchison, T. & S. F. Ry. Co.*, 92 Cal.App.2d 490, 494, 207 P.2d 126; *Eckenrode v. Pennsylvania R. Co.*, 335 U.S. 329, 69 S.Ct. 91, 93 L.Ed. 41; *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 32, 64 S.Ct. 409, 88 L.Ed. 520. Contributory negligence of plaintiff is not a defense to his action, but can be considered only in the reduction of the damages. Federal Employers' Liability Act, § 53. If, however, plaintiff was guilty of negligence and his negligence was the sole proximate cause of his injuries then he cannot recover. *Chicago, St. P., M. & O. R. Co. v. Arnold*, 8 Cir., 160 F.2d 1002, 1006. The court correctly instructed the jury on these questions and plaintiff does not claim otherwise. The jury was also instructed in accordance with plaintiff's request, that plaintiff did not assume the risks of his employment. Plaintiff, however, contends that three other instructions "injected into the case the issue of the assumption of risk which has been abolished." The first of these instructions reads: "You are instructed that, if the plaintiff had a choice of using a reasonably safe area in which to alight from the train but voluntarily chose to use an area which was so unsafe that the risk of using it was obvious and such that a man of ordinary prudence would avoid, he is *ordinarily* deemed negligent in the absence of a showing of emergency, sudden peril or other circumstances justifying such choice. The fact that a less dangerous alternative is inconvenient furnishes no excuse for knowingly incurring peril." (*Italics added.*)

Plaintiff argues that the jury in effect was told by this instruction that if he voluntarily chose to use an area which was so unsafe that the danger of using it was obvious, he would be negligent as a matter of law. Plaintiff overlooks the word "*ordinarily*" preceding the words "*deemed negligent.*" It is thus apparent that the question of whether the plaintiff's conduct under the described circumstances was negligent was left to the jury's determination as a question of fact.

[5] The second instruction plaintiff challenges reads: "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger, although it is created by another's misconduct, nor is he ever excused from exercising ordinary care."

Plaintiff contends this instruction is in direct conflict with the holding in *Ericksen v. Southern Pacific Co.*, 39 Cal.2d 374, 246 P.2d 642. He points to the statement in the instruction that "One is not justified in ignoring obvious danger, although it is created by another's misconduct" as being at variance with the principle stated in the *Ericksen* case that "The plaintiff's knowledge of the unsafe nature of the premises does not relieve the defendant of liability." There is no conflict or inconsistency here. In the *Ericksen* case the performance of the employee's duties required him to be at an unsafe place. Since it was necessary for him to be there in order to do his work he does not, under the Federal Employers' Act, assume the risk or hazard of being injured as a result of such unsafe premises even though he is aware of their condition. By the express terms of the act he is relieved of responsibility for the assumption of such a risk and the liability for an injury proximately resulting from such hazard is placed on the employer. The problem in the *Ericksen* case was truly one of assumption of risk and the quotation from the opinion is an obviously correct statement of that principle. The quoted instruction, however, does not deal with assumption of risk. It lays down a yardstick by which to determine whether or not a person is guilty of negligence under certain

circumstances. Negligence on the part of plaintiff was an issue in this case for he was free to determine, and did determine, when and where to step off the train. His conduct in such circumstances was a proper subject under the pleadings and evidence for the jury's appraisal. It was therefore necessary to fully instruct the jury on negligence. The instruction is a correct statement of the law and was properly given.

Plaintiff also complains that these instructions assume there was an obvious danger. The instructions do not so state. Implicit in each is the question, for the jury's initial determination, of whether or not the danger was obvious as a matter of fact.

[6] Plaintiff claims the following instruction deals with the assumption of risk and is therefore erroneous. It reads: "You are instructed that under the Federal Employers' Liability Act the employer is not liable for those risks or dangers which it could not avoid in the observance of its duty of due care. Industrial enterprise entails for all those engaged in it certain hazards of life and limb which no amount of care on the part of the employer can avoid."

"In applying the above principle to this case, in order to recover plaintiff is required to prove by a preponderance of the evidence that the defendant through its agents, servants or employees was guilty of negligence, which, in whole or in part, proximately caused the accident and any injuries or damages resulting therefrom, and if you find from a preponderance of the evidence that the dangers, if any, to which the plaintiff was subjected, and which caused his injuries, if any, could not have been avoided by the defendant in the exercise of reasonable care, then the plaintiff is not entitled to recover against the defendant."

When correctly analyzed this instruction simply told the jury that unless the defendant was negligent and such negligence, in whole or in part, proximately caused plaintiff's injuries, he could not recover. That is a correct statement of the law.

Spencer v. Atchison, T. & S. F. Ry. Co., supra. True the instruction uses the terms "risks" and "hazards" but there appears no intimation that plaintiff is required to assume any risk or hazard which flows from defendant's failure to use reasonable care. It is thus plain that the instruction relates only to negligence and proximate cause and does not even by indirection introduce the question of assumption of risk.

[7] Plaintiff relies on Perrett v. Southern Pacific Company, 73 Cal.App.2d 30, 165 P.2d 751. That case is clearly distinguishable. There the jury was in effect told plaintiff could not recover if the train was operated in the usual and ordinary way; that "unless there was an unusual jerk out of the ordinary the jury must find for the defendant". 73 Cal.App.2d at page 38, 165 P.2d at page 756. This assumed that a "normal" jerk could not be the result of negligence. The court therefore properly concluded that "[t]hese instructions withdrew from the jury the inference that the operation of this type of engine and train might itself be negligence." 73 Cal.App.2d at page 35, 165 P.2d at page 754. As pointed out by the court, the issues before the jury were whether the defendant was negligent and whether such negligence proximately caused the injury. "The mere fact that the risk was an ordinary or usual one is a false factor. * * * What is ordinary may also be negligent. That issue was erroneously taken from the jury by the instruction." 73 Cal.App.2d at page 38, 165 P.2d at page 756. The instructions in the instant case plainly avoid the error of suggesting that plaintiff was required to assume any hazard or risk induced by defendant's failure to use reasonable care in its operations. Considering the instructions in their entirety, as we are bound to do, it is clear that the jury was fully and fairly advised on all applicable principles of the law.

[8,9] Plaintiff's second contention is that it was prejudicial error to reject his offer of evidence to establish a custom and practice of engineers charged with moving trains on the Y to slacken their speed to between 10 and 15 miles per hour while

traveling on the Y. This argument cannot be sustained for several reasons. An examination of the record discloses that there was lack of a sufficient foundation for the introduction of such evidence. Plaintiff testified that he had worked with some of the 15 engineers engaged in switching operations, but could not say he worked with all of them. There was no indication that he had personal knowledge of the practices of enough engineers to actually establish the existence of a prevailing custom or usage in the area where he was injured.

But assuming that the proffered evidence should have been admitted, plaintiff could not have been prejudiced by its exclusion. From his own testimony, it is clear that plaintiff did not rely on the purported custom and usage but stepped from the train at a time when, based on his own judgment and observation, he knew it to be exceeding what he sought to represent as the customary speed. Furthermore, plaintiff introduced in evidence a company rule limiting the rate of speed on the Y to 15 miles an hour, which is, in effect, what plaintiff sought to establish by evidence of custom. Of similar probative value was the introduction in evidence of plaintiff's own accident report, which stated that "switch engineer J. W. Moore was taking train into a higher speed than usual." This evidence placed before the jury the issue of defendant's purported deviation from an established standard of reasonable care as the proximate cause of plaintiff's injury. The case cited by plaintiff, *Fowler v. Key System Transit Lines*, 37 Cal.2d 65, 230 P.2d 339, is not here applicable. In that case, the striking from the record of evidence of a custom firmly established by defendant was held prejudicial error, where it was shown that such custom was, at the time of injury, relied on by plaintiff and defendant's departure from such custom without notice or warning to plaintiff was important on the issue of its negligence.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

117 Cal.App.2d 147

UHLER v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.

Civ. 4639.

District Court of Appeal, Fourth District,
California.

May 1, 1953.

Hearing Denied May 28, 1953.

Petition by county auditor for writ of review seeking to set aside judgment rendered against him in contempt proceedings in Superior Court of Fresno County. The District Court of Appeal, Mussell, J., 255 P.2d 29, vacated and reversed the order and judgment of contempt. On petition for rehearing, the District Court of Appeal held that although a court has inherent power to punish for contempt, such drastic remedy should be used only when necessary in order to maintain law and order, and should rarely, if ever, be used for purpose of settling differences of opinion between conscientious officials with respect to close questions of civil law.

Petition denied.

Contempt ⇐2

Although a court has inherent power to punish for contempt, such drastic remedy should be used only when necessary in order to maintain law and order, and it should rarely, if ever, be used for purpose of settling differences of opinion between conscientious officials with respect to close questions of civil law.

Robert M. Wash, County Counsel of Fresno County, and John E. Loomis, Fresno, for petitioner.

E. Clarke Savory, Dist. Atty., Fresno, Richard L. Shepard, Asst. Dist. Atty., Fresno, for respondent.

PER CURIAM.

The respondent has asked for a rehearing, contending that two important questions of law were left undecided: (1) Whether or not the court's order of January 26 was a "valid order," and (2) whether the auditor has any right or duty to consider or pass upon the legality of such a grand jury expense. It is argued that the petitioner had no such right; that all discretion with respect to a claim arising under section 928 of the Penal Code, as

amended, is vested in the court; and that the evidence shows an intentional violation of the court order and amply sustains the finding of contempt.

The controlling question presented to this court was not as to whether the order of January 26 was a valid order, and not as to whether it should eventually be decided that the auditor's duty, in such a case, is merely ministerial. It was unnecessary to decide either of those questions. Because one sentence, considered apart from the rest of the opinion, might be construed as having the effect of deciding the second of these questions, the opinion is modified by striking therefrom the sentence in the fifth from the last paragraph (containing the quotation from section 928 of the Penal Code) beginning with the words "In view of * * *" and ending with the words "* * * was illegal."

The question before us was as to whether the evidence in the record was sufficient to support and justify the finding that the petitioner wilfully and contemptuously refused to obey the court's order. The record clearly discloses that close legal questions with respect to the duties of the auditor were involved which had not been decided, so far as anyone knew or still knows; that there was an apparent inconsistency, if not a possible conflict, between various statutes relating to these duties; that the auditor was advised by the county counsel to await his search of the law, and told that the Attorney General had been asked for an opinion; that on the third day the auditor was cited for contempt; that at the hearing, the first opportunity for both sides to be heard, the auditor expressed his willingness to do whatever the court should order; and that he immediately complied when the court told him that it was his duty to draw the warrant.

It was and is our view that under these circumstances the petitioner should have been allowed a reasonable time in which to act; that the close legal questions involved should have been presented and handled in some manner more appropriate to a just decision than that afforded by a resort

to a quasi-criminal proceeding; and that there was no substantial evidence justifying a finding of contempt.

While a court has inherent power to punish for contempt, this is a drastic remedy which should be used only when necessary in order to maintain law and order. It should rarely, if ever, be used for the purpose of settling differences of opinion between conscientious officials with respect to close questions of civil law. Whether or not the power to do so technically existed here, in our opinion it was an abuse of discretion to punish the petitioner for contempt under these circumstances.

The petition for a rehearing is denied.

Hearing denied; CARTER, J., dissenting.



118 Cal.App.2d Supp. 878

BURNETT v. REYES et al.

Civ. A. 7.

Appellate Department, Superior Court,
Kern County, California.

April 23, 1953.

Owner of automobile brought action against owners of cow and against those who burned fence enclosing pasture so as to permit cow to escape, to recover for damage to automobile as result of running into cow. The Municipal Court of the Bakersfield Judicial District entered judgment adverse to owner of automobile, and he appealed. The Appellate Department of the Superior Court, Lambert, P. J., held that evidence sustained verdict.

Judgment affirmed.

1. Appeal and Error ⇨931(3)

Where trial court rendered judgment for defendants, and written findings of fact were waived, Appellate Department of Superior Court was required to assume that all issues were resolved by the trial court in favor of defendants. Code Civ.Proc. § 632.

2. Courts ⇨190(1)

Consideration of appeal from Municipal Court of Bakersfield Judicial District

by Appellate Department of the Superior Court was governed by exactly same rules that control appeals from Superior Court to Supreme Court and District Court of Appeal.

3. Appeal and Error ⇨994(1), 1011(1)

An appellate court has no power to weigh conflicting evidence to determine credibility of witnesses or decide on which side the evidence preponderates.

4. Appeal and Error ⇨931(1)

Evidence must be viewed by an appellate court in light most favorable to respondent, and respondent is entitled to benefit of all reasonable inferences in his favor.

5. Automobiles ⇨244(1)

In action by owner of automobile against owners of cow and against those who burned fence enclosing pasture so as to permit cow to escape, for damage to automobile as result of running into cow, owner of automobile had burden to prove his case by "preponderance of evidence" which means that greater probability lies in favor of decision. Agricultural Code, § 423.

See publication Words and Phrases, for other judicial constructions and definitions of "Preponderance of Evidence".

6. Automobiles ⇨244(41)

In action by owner of automobile against owners of cow and against those who burned fence enclosing pasture so as to permit cow to escape, for damage to automobile as result of running into cow, burden was on owners of cow and against those, who burned fence, to prove contributory negligence on part of owner of automobile by preponderance of evidence. Agricultural Code, § 423.

7. Automobiles ⇨242(1)

In action by owner of automobile against owners of cow and against those who burned fence enclosing pasture so as to permit cow to escape, for damage to automobile as result of running into cow, owner of automobile was required to prove his case without benefit of any inference of negligence. Agricultural Code, § 423.

8. Appeal and Error ⇨1010(1)

If evidence, contradicted or uncontradicted, supported judgment appealed from, judgment was required to be affirmed.

9. Courts ⇨190(8)

Statute providing that where trial by jury is not a matter of right or where trial by jury has been waived, reviewing court may make findings of fact contrary to, or in addition to, those made by trial court, did not authorize Appellate Department of Superior Court to take evidence to clear up alleged confusion in evidence introduced in Municipal Court. Code Civ.Proc. § 956a.

10. Appeal and Error ⇨994(3)

Statute providing that where trial by jury is not a matter of right or where trial by jury has been waived, reviewing court may make findings of fact contrary to, or in addition to, those made by trial court does not authorize an appellate court to pass on credibility of witness who testified at trial. Code Civ.Proc. § 956a.

11. Appeal and Error ⇨1010(1)

An appellate court need inquire only whether there was evidence of substantial nature to support judgment of trial court.

12. Appeal and Error ⇨996

Where reasonable minds might differ on inferences to be drawn from particular set of facts, an appellate court will not substitute its own conclusions for those reached by trial court.

13. Appeal and Error ⇨989

When verdict is attacked as being unsupported, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

14. Appeal and Error ⇨996

Where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

15. Automobiles ⇨244(1)

In action by owner of automobile against owners of cow and against those

who burned fence enclosing pasture so as to permit cow to escape, for damage to automobile as result of running into cow, evidence sustained verdict adverse to owner of automobile. Agricultural Code, § 423.

J. R. Lamoreaux, Los Angeles, for appellant.

Fred Fischer, Taft, and Vincent P. DiGorgio, Bakersfield, for respondents.

LAMBERT, Presiding Judge.

In this case the appellant brought an action against the above-named defendants, respondents here, seeking to recover damages to his automobile caused by running into a cow which had strayed on U. S. Highway 399 in Kern County. The complaint was cast in two counts: the first count alleged negligence in all of the defendants except Brown and Smith in that they negligently maintained two head of cattle and permitted them to stray on the highway; the second count alleged that Brown and Smith had been negligent in burning a fence enclosing the pasture in which the cattle were kept and allowing them to escape from pasture and wander unattended upon said highway. The defendants denied negligence and also pleaded contributory negligence on the part of plaintiff. While it is not material here the first group of defendants cross complained against the second group of defendants. The decision was against the plaintiff and in favor of all the defendants.

[1] It may be worthwhile to state a few of the fundamental rules which govern this Court in passing on appeals brought here. In the first place in this case findings of fact were waived, C.C.P. § 632, and though the exact basis upon which the case was decided for the defendants does not appear in the record adequate proof under any theory would be sufficient as it must be assumed when findings are waived that all issues are resolved by the trial court in favor of respondent. U Drive, etc., v. System Auto Parks, 28 Cal.App.2d Supp. 782, 71 P.2d 354.

Cal.Rep. 255-256 P.2d-27

[2-8] The consideration of an appeal from the Municipal Court by the Appellate Department of the Superior Court is governed by exactly the same rules that control appeals from the Superior Court to the Supreme Court and the District Court of Appeal. The appellate court has no power to weigh conflicting evidence to determine the credibility of the witnesses or decide upon which side the evidence preponderates. It is also elementary that evidence in such circumstances must be viewed in the light most favorable to the respondent, and the respondent is entitled to the benefit of all reasonable inferences in his favor, *Hamilton v. Pacific Electric Railway Company*, 12 Cal.2d 598, 86 P.2d 829. It is not necessary to recite any of the evidence. We have read the record and of course the burden was upon the plaintiff to prove his case by preponderance of the evidence, and the burden was upon the defendants to prove contributory negligence by preponderance of the evidence—and preponderance of the evidence means that the greater probability lies in favor of the decision. Section 423 of the Agricultural Code provides among other things, "In any civil action brought by the owner, driver or occupant of a motor vehicle, or by their personal representatives or assignees, or by the owner of live stock, for damages caused by collision between any motor vehicle and any domestic animal or animals on a highway, there is no presumption or inference that such collision was due to negligence on behalf of the owner or the person in possession of such live stock. [Enacted 1933; Amended by Stats.1935, ch. 265, S 1, p. 951]." Therefore, the burden was upon the plaintiff to prove his case and he also had to prove it without the benefit of any inference of negligence, and if the evidence, contradicted or uncontradicted, supports the judgment, the judgment must be affirmed.

This court has no way of knowing whether the trial court thought the defendants had used ordinary care to prevent the cattle from straying on the highway or whether the plaintiff himself was guilty of negligence which contributed to the collision and, of course, bars his recovery.

[9-14] This brings us to the point where the appellant claims there is some confusion in the evidence as to the condition of the weather at the time the collision happened. We have been unable to find any confusion in it, and nothing but a conflict; but if there was any confusion in it it was a matter for the trial court to determine, and not this court. Counsel makes a request that under and pursuant to Section 956a, C.C.P., this court take some evidence on this question. Section 956a of C.C.P. by any stretch of interpretation was never intended to cover a case like this. Assuming that additional evidence could be introduced it would only widen the conflict and as before stated, this court cannot resolve conflicts in favor of the appellant. Furthermore the question of contributory negligence does not necessarily depend upon the state of the weather. The leading case on this subject is *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, and in the late case of *Helmer v. Helmer*, 87 Cal. App.2d 682, at page 688, 197 P.2d 558, at page 561, we find this statement, "An appellate court is not authorized under section 956a of the Code of Civil Procedure to pass upon the credibility of a witness who testified at the trial." The request to take evidence in this court is denied. And in *Webster v. Board of Dental Examiners*, 17 Cal.2d 534, at page 539, 110 P.2d 992, at page 995, the Supreme Court said, "It should be observed here that this is an appeal from a judgment of the superior court denying relief to the appellant, and upon familiar principles this court need inquire only whether there was evidence of a substantial nature to support the judgment of the court below." And also, "Similarly, where reasonable minds might differ on the inferences to be drawn from a particular set of facts, the appellate court will not substitute its own conclusions for those reached by the trial court. *Hamilton v. Pacific Electric Ry. Co.*, 12 Cal.2d 598, 603, 86 P.2d 829; *Mah See v. North American Accident Ins. Co.*, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; *Hughes v. Quackenbush*, 1 Cal.App.2d 349, 354, 37 P. 2d 99; *Hales v. Snowden*, 19 Cal.App. 2d 366, 372, 65 P.2d 847." In the *In re*

Estate of Bristol, 23 Cal.2d 221, at page 223, 143 P.2d 689, at page 690, the rule as to substantial evidence is stated by the Supreme Court through Justice Schauer as follows: "The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (*Crawford v. Southern Pacific Co.* (1935), 3 Cal. 2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is '*substantial*'; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical." In the case of *Helmer v. Helmer*, cited above we find this significant statement made when affirming the judgment: "From the testimony produced, as reflected by the cold record, we might hesitate in making the finding indicated by the trial court. However, we are not the

trial judge. Our provinces are separate and distinct. He was the trier of fact and was otherwise impressed. It cannot be said that his finding lacks evidentiary support."

[15] We do not go that far here, but we might with propriety say that if the

Judge had decided the case in favor of the plaintiff on the first cause of action and the defendants had appealed we would likewise affirm the judgment.

It is therefore ordered that judgment be and it is hereby affirmed.

BRADSHAW and MAIN, JJ., concur.



**CITY OF LOS ANGELES v. RANCHO
HOMES, Inc.**

L. A. 22379.

Supreme Court of California, in Bank.

April 28, 1953.

Rehearing Denied May 21, 1953.

Action by city to recover amount allegedly due from dealer in realty for license taxes imposed by ordinance upon any person engaged in any trade, occupation, etc., as an independent contractor and not as an employee, based upon gross receipts, which was defined as total amount received from sales, which was defined as the making of transfer of title to any tangible personal property. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered judgment granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment of dismissal of complaint, and defendant appealed. The Supreme Court, Edmonds, J., held inter alia that the administrative interpretation that such ordinance applied to dealers in realty was not clearly erroneous or unauthorized and would be given effect.

Affirmed.

Prior opinion 251 P.2d 701.

1. Licenses ⇨11(1)

Course of conduct in acquiring, subdividing, improving, selling and otherwise dealing in and disposing of realty was a "trade" or "occupation" within city ordinance levying license tax on gross receipts of those engaged in any trade, occupation, etc.

See publication Words and Phrases, for other judicial constructions and definitions of "Occupation" and "Trade".

2. Statutes ⇨219

Although not necessarily controlling, the contemporaneous administrative construction of enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

3. Licenses ⇨11(1)

Administrative interpretation that license tax ordinance, which imposed tax upon every person engaged in any trade,

occupation, etc., as independent contractor and not as employee of another, based upon gross receipts, which was defined as total amount of sales price of all sales, which was defined as including the making of any transfer of title to tangible personal property, imposed tax on sale of realty by dealer in realty, was not clearly erroneous or unauthorized, and would be given effect.

4. Statutes ⇨212.5

A change in tax statute at time when certain persons or groups are resisting imposition of tax indicates legislative intent to clarify rather than to change existing law.

5. Licenses ⇨9(2)

Where, during pendency of litigation involving question whether dealer in realty was subject to license tax imposed by ordinance which levied tax upon every person engaged in any trade, occupation, etc., as an independent contractor and not as an employee, based upon gross receipts, which was defined as total amount of sales price of all sales, which was defined as including the making of any transfer of title to tangible personal property, city council amended ordinance to include specifically those persons engaged in business of selling realty without changing definitions of "gross receipts" or "sale", such amendment indicated intent to clarify ordinance, rather than to change it.

6. Constitutional Law ⇨287

City ordinance, which imposed license tax upon any person engaged in trade, occupation, etc., as an independent contractor and not as an employee, based upon gross receipts, which was defined as total amount received from sales, which was defined as including the making of transfer of title to tangible personal property, was not too vague or uncertain to satisfy requirements of due process of law, though under its authority, tax was sought to be imposed upon dealer in realty.

Robert S. McClean, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and James A.

Doherty, Dep. City Atty., Los Angeles, for respondent.

EDMONDS, Justice.

The City of Los Angeles sued Rancho Homes, Inc., to recover the amount assertedly due the city for license taxes. The corporation's appeal from a judgment in favor of the city requires the construction of the ordinance which is the basis of the controversy.

Rancho Homes was organized, among other purposes, "to carry on the business of acquiring, subdividing, improving, selling and otherwise dealing in and disposing of real property". Commencing in 1948, the corporation erected 150 houses on land which it owned. Between 1949 and 1951, it sold all of them, realizing gross proceeds in the amount of \$1,539,445.

No license to transact this business was obtained by the corporation, nor did it pay a license tax based upon the amount of the sales. Acting under section 21.190 of the city's licensing ordinance, Los Angeles Municipal Code, art. I, Ch. 2; General Ordinance No. 77,000, the city clerk notified the corporation that an assessment had been levied against it for delinquent license taxes and penalties.

Upon the corporation's refusal to pay the assessment, the city commenced the present action. Each party filed a motion for summary judgment with supporting affidavits; the trial court granted the city's motion and denied that of Rancho Homes. The appeal is from the judgment in favor of the city.

Article I, Chapter 2 of the Municipal Code of Los Angeles, provides that no person may engage in any business, profession, trade or occupation specified in the article without first having obtained a license and paid the required license fee. §§ 21.10 and 21.49. At the time this action was commenced, section 21.190 read in part: "(a) Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article,

shall pay a license fee in the sum of \$12.00 per calendar year or fractional part thereof for the first \$12,000 or less of gross receipts, and in addition thereto, the sum of \$1.00 per year for each additional \$1,000 or fractional part thereof, of gross receipts in excess of \$12,000."

As ground for a reversal of the judgment, Rancho Homes contends that section 21.190 expressly excludes from its operation the sale of realty by its owner. The city takes the position that the manifest intention of the city council, as well as a long-standing administrative interpretation, is to the contrary.

The corporation construes the section as applicable only to persons rendering personal services. This construction is made clear it is argued, by the use of the phrases "trade, calling, occupation, vocation, profession or other means of livelihood" and "as an independent contractor".

Although such terms commonly embrace persons engaged in rendering personal services, they are not limited to that activity. "Trade" has been defined as "equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade". *Babcock v. Laidlaw*, 113 N.J.Eq. 318, 321, 166 A. 632, 633; see also *State v. Worth*, 116 N.C. 1007, 1010, 21 S.E. 204. "The word 'occupation,' * * * is an extremely broad term sufficient to include any business, trade, profession, pursuit, vocation, or calling." *State v. Van Daalen*, 69 S.D. 466, 474, 11 N.W.2d 523, 526; see also *Everett v. Standard Acc. Ins. Co.*, 45 Cal.App. 332, 342, 187 P. 996.

[1] The activities of Rancho Homes were more than simply those of a landowner who sells his realty. As shown by its articles of incorporation, the corporation's purposes included "acquiring, subdividing, improving, selling and otherwise dealing in and disposing of real property". Such a course of conduct reasonably may be denominated a "trade" or "occupation".

See *Milwaukee Land Co. v. State*, 188 Wash. 52, 55, 61 P.2d 996.

For the proposition that "independent contractor" refers only to the rendition of services, several decisions are cited which define the term, using the words "personal services". However, those cases were decided under workmen's compensation laws or dealt with an employer's liability under the theory of *respondet superior*, and the scope of inquiry was whether one performing personal services did so in the capacity of an independent contractor or as an employee. No decision is cited which holds specifically that one may not be an independent contractor without performing personal services. That term may assume a variety of meanings according to the intent with which it is used in particular legislation. Cf. *N. L. R. B. v. Hearst Publications*, 322 U.S. 111, 121-122, 64 S.Ct. 851, 88 L.Ed. 1170.

The legislative history of the ordinance, as stated in the uncontroverted affidavit of the city clerk, demonstrates an intent to make the scope of operation of section 21.190 a very broad one. Pursuant to a resolution of the city council preparatory to study and enactment, the city attorney proposed the addition of section 21.190 for the purpose of "taxing all businesses not otherwise specifically licensed". The mayor rejected the ordinance passed by the council with written objections which placed his disapproval upon the ground that it might be construed as including the earnings of employees.

Subsequently, the mayor approved an ordinance in a revised form. This enact-

ment included a qualification that the business be conducted "as an independent contractor and not as an employee of another". Ordinance No. 90,555; approved May 29, 1946. It further stated: "The term 'independent contractor' is used in this section as defined in Section 3353 of the Labor Code of the State of California, and the term 'employee' is used in this section as defined in Section 3351 of said code." Two months later, the section was amended to delete reference to the Labor Code sections. (Ordinance No. 90,736; adopted July 31, 1946.) The reason for the change, as shown by the report of the city council's committee on revenue and taxation, was that "inclusion of the term 'independent contractor' and the definition of that term operates to severely curtail the scope of the ordinance in a manner contrary to the intention of the Council when the ordinance was first adopted".

Even if the section may be construed as including transactions other than the rendition of personal services, the corporation asserts, it does not include sales of real property. This contention is based upon sections 21.08(i)¹ and 21.08(s)² of the code, purporting to define the terms "gross receipts" and "sales". According to those definitions, it is argued, gross receipts may include only those sales which result from a transfer of tangible personal property.

Section 21.49, the general provision requiring the obtaining of a license and payment of a license fee, assigns to each subsequent section in the same article two functions: first, specifying the businesses to be licensed, and secondly, prescribing

1. Section 21.08(i) defines gross receipts as follows: "The total amount of the sales price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, whether such service, act or employment is done as a part of or in connection with the sale of goods, wares, merchandise or not.
* * *"

2. Section 21.08(s) provides: "the words 'sale' and 'sell' shall be deemed to include and refer to: the making of any transfer of title, in any manner or by any means whatsoever, to tangible personal

property for a price, and to the serving, supplying or furnishing, for a price, of any tangible personal property fabricated or made at the special order of consumers who do or who do not furnish directly or indirectly the specifications therefor. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall likewise be deemed a sale. The foregoing definitions shall not be deemed to exclude any transaction which is or which, in effect, results in a sale within the contemplation of law."

the amount of license fee or tax. Each of the sections is in substantially the same form. It first designates the business required to be licensed and follows with a statement of the amount of the license fee. Section 21.190 is typical of that arrangement. Starting with a description of the businesses required to be licensed ("any trade, calling, occupation, vocation, profession or other means of livelihood * * not specifically licensed by other provisions of this article * * *"), it follows with a specification of the sum to be paid ("shall pay a license fee in the sum of \$12.00 per calendar year or fractional part thereof for the first \$12,000 or less of gross receipts. * * *").

The corporation's position may be sustained only if the term "gross receipts", as used to specify the amount of the license fee, was intended to be a limitation upon the types of businesses for which a license is required to be obtained.

A literal reading of the section does not show that intention. Nor may an intent to exclude proceeds from sales of real property reasonably be drawn from the language of section 21.08(i), which defines "gross receipts". That definition is in the broadest possible terms, including "all sales", the amount charged "for the performance of any act, service, or employment of whatever nature it may be", and numerous other items. It is only when "sales" is given the restricted interpretation placed upon it by Rancho Homes in construing section 21.08(s), that the meaning of "gross receipts" becomes limited.

Whether or not the latter section was intended to refer only to transfers of tangible personal property is questionable. The first portions of the section, according to the briefs of the parties, were based upon Revenue and Taxation Code section 6006, which defines "sale" for the purposes of a retail sales tax. There, the tax is limited to transfers of tangible personal property.

Section 21.08(s), however, adds a provision not found in the Revenue and Taxation Code section. It provides: "The

foregoing definitions shall not be deemed to exclude any transaction which is or which, in effect, results in a sale within the contemplation of law". As explanation for this latter provision, Rancho Homes asserts that the intention of the city council was to include transactions in fact sales but in form some other business arrangement. The city contends that the contrasting use of the words "include" and "exclude" in the section demonstrates an intention that "include" should be given its normal significance as a word of enlargement and not as a word of limitation or restriction. Within the normal contemplation of law, the city's argument continues, the words "sale" or "sell" are broad enough to include transfers of title to both realty and personalty. *Wilson v. Superior Court*, 2 Cal.2d 632, 635, 43 P.2d 286.

[2] As shown by the affidavit of the city clerk, his administrative practice has been to include as one of the classifications under section 21.190 that of "owner-builder", which is defined as one who constructs improvements upon real property with the object of selling it. Since enactment of the section in 1946, a tax has been exacted from several hundreds of persons engaged in those activities. And "Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Coca-Cola Co. v. State Bd. of Equalization*, 25 Cal.2d 918, 921, 156 P.2d 1, 2; *Holloway v. Purcell*, 35 Cal.2d 220, 226, 217 P.2d 665.

[3] Although the corporation's position is tenable, the construction given section 21.190 by the city is a reasonable one and in accordance with the announced policy underlying the section, that of taxing all businesses not otherwise specifically mentioned by the ordinance. Presumably with full knowledge of the administrative action

of the city clerk in exacting taxes according to that interpretation of the ordinance, the city council has amended the section five times with no change indicating an intention to exclude sales of real property. Under these circumstances, there is no reasonable basis for holding that such construction is "clearly erroneous or unauthorized".

[4, 5] Furthermore, as conceded by the briefs of both parties, during the pendency of this litigation the city council amended the license ordinance to include specifically a provision which reads: "Notwithstanding any other provision of this article, every person engaged in the business of selling real property in which said person has any equity or title shall pay for each calendar year, or portion thereof, the sum of \$12.00 for the first \$12,000 or less, of the annual gross receipts, * * *" § 21.193. There is no change in the definitions of "gross receipts" or "sale". A change in a tax statute at a time when certain persons or groups are resisting the imposition of the tax indicates a legislative intent to clarify rather than to change the existing law. *Bermite Powder Co. v. Franchise Tax Board*, 38 Cal.2d 700, 704; 242 P.2d 9; *Coca-Cola Co. v. State Board of Equalization*, supra, 25 Cal.2d at page 923, 156 P.2d 1.

[6] There is no merit in the contention that the section is too vague or uncertain to satisfy the requirements of due process of law. "Catch-all" type statutes frequently have been upheld by the courts. See 37 C.J. 186; 53 C.J.S., Licenses, § 15. Furthermore, this same section of the Los Angeles Municipal Code has been before this court and the district courts of appeal on prior occasions and, although the specific problem of constitutionality was not considered, in each instance the court was called upon to interpret and apply the section. *Martin Ship Service Co. v. City of Los Angeles*, 34 Cal.2d 793, 215 P.2d 24; *Rexall Drug Co. v. Peterson*, 113 Cal.App. 2d 528, 248 P.2d 433; *Franklin v. Peterson*, 87 Cal.App.2d 727, 197 P.2d 788. In the *Martin* and *Franklin* cases, application of

the section to businesses not specifically mentioned in other sections of the ordinance was upheld.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



40 Cal.2d 751

GROVES v. CITY OF LOS ANGELES et al.
L. A. 22110.

Supreme Court of California, in Bank.

April 28, 1953.

Rehearing Denied May 21, 1953.

Action to enjoin collection of occupational license tax imposed by city ordinance on bail bondsmen. From a judgment of the Superior Court, Los Angeles County, John Gee Clark, J., declaring the ordinance invalid and enjoining collection of tax, defendants appealed. The Supreme Court, Carter, J., held that such occupational license tax was a tax on insurance companies in violation of Constitution, article 13, section 14½.

Judgment affirmed.

Schauer, J., dissented.

For prior opinion, see 246 P.2d 976.

1. Bail ⇐60

Occupational license tax imposed by Los Angeles on bail bondsmen, measured by their gross receipts, was for purposes of revenue and not regulation, though ordinance imposing tax made it unlawful to engage in specified business without a license and provided punishment for violation of ordinance.

2. Bail ⇐60

Holding of a bail agent's license, which must have the approval of the insurer, is evidence of agency. Insurance Code, § 1800 et seq.

3. Evidence ⇐69

The presumption is that insurance company authorized to do business in the state obeyed statutory provision that an insurer

cannot conduct a bail bond business except by and through a licensed bail agent and hence was doing its bail bond business through agent who solicited such business as agent of insurance company. Insurance Code, § 1800 et seq.; Code Civ.Proc. § 1963, subds. 1, 33.

4. Bail ☞60

The surety on bail bond is the principal and all licensees connected with the transaction are the surety's agents, even though such bail agents are subject to regulation and must meet special qualifications. Insurance Code, §§ 1800 et seq., 1809.

5. Bail ☞60

The amount charged applicant for a bail bond was the gross premium for such bond, though only one percent of face amount of bond was paid to insurer and bail bond agent retained the balance of amount collected from applicant. Insurance Code, § 1800 et seq.

6. Insurance ☞7

Occupational license tax imposed by city upon bail bondsmen, measured by their gross receipts, exclusive of premiums received on behalf of insurer, is a tax on insurance companies in violation of constitutional provision that State tax on insurance companies based upon gross premiums received upon business done in State shall be in lieu of all other taxes and licenses upon such insurers and their property. Insurance Code, §§ 1800 et seq., 1809; Const. art. 13, § 14½.

7. Statutes ☞219

Where administrative construction of a statute is erroneous, such construction is not binding on the court.

Ray L. Chesebro, City Atty., John L. Flynn, Asst. City Atty., and W. L. Weber, Dep. City Atty., Los Angeles, for appellants.

G. Revelle Harrison, Los Angeles, and Thomas B. Sawyer, San Pedro, for respondent.

Latham & Watkins and Keene Watkins, Los Angeles, and Edmund G. Brown, Atty.

Gen., and Harold B. Hass, Dep. Atty. Gen. as Amici Curiae for respondent.

CARTER, Justice.

Defendants, the City of Los Angeles, and its chief of police and city clerk (who is its tax collector) appeal from a judgment declaring invalid its Ordinance No. 77,000 as amended by Ordinance No. 92,414, and enjoining the collection of the license tax thereunder. The court found that plaintiff is engaged in the business of soliciting, effecting and negotiating undertakings of bail in and out of Los Angeles as agent of National Automobile and Casualty Insurance Company, a corporation, (hereafter called National) authorized to engage and engaged in the insurance business (including bail bonds) in California; he holds a bail agent's license issued under the law of this state. Ins.Code, § 1800 et seq.

[1] Ordinance No. 77,000 as amended by Ordinance No. 92,414 provides that every person in the business of " * * * soliciting, negotiating, effecting, issuing, delivering, or furnishing bail bonds or of the posting of undertakings of bail for the release of persons charged with public offenses shall pay for each calendar year, or fractional part thereof, a license tax in the sum of \$50 for the first \$5,000 or less of gross receipts, and in addition thereto, the sum of \$5 per year for each additional \$1,000 of gross receipts, or fractional part thereof, in excess of \$5,000. The term "gross receipts" as used herein shall not include any insurance premiums received on behalf of any insurance company qualified to do business in the State of California, nor any commissions paid out of such premiums." Also thereunder it is unlawful for any person to engage in the specified business without a license and any person violating the Ordinance is subject to punishment. The license tax is, however, for purposes of revenue, not regulation. See *Fox Bakersfield Theatre Corp. v. City of Bakersfield*, 36 Cal.2d 136, 222 P.2d 879.

It was also found that plaintiff is not engaged in the business of posting bail bonds

from which he receives gross receipts as defined in the Ordinance other than in the transaction of insurance business as defined by the Insurance Code. Hence the Ordinance violates the Constitution which provides that every insurance company (the term "company" includes persons) doing business in the state shall pay to the state a tax consisting of a fixed per cent upon the amount of the "gross premiums" received upon its business done in this state, and "The tax imposed on insurers by this section is in lieu of all other taxes and licenses, State, county, and municipal, upon such insurers and their property" with exceptions not here pertinent. Cal.Const., art. XIII, § 14½.

By its judgment the court declared the ordinance invalid insofar as it purports to impose a tax on plaintiff and that he is not liable for a tax thereunder; defendants are enjoined from collecting any taxes levied on plaintiff by virtue of the ordinance.

According to the evidence plaintiff's business arrangement, generally, was as follows: Groves (not the plaintiff) and Rubin, a partnership doing business as Associated Bond & Insurance Agency (referred to as Associated) is in the surety bail bond business as general agent for National and the partners hold bail agents' licenses. Associated holds general power of attorney from National and power to appoint agents for it over whom it exercises close supervision. It appointed plaintiff as one of such agents for National. Upon receiving an application for a bail bond upon a form furnished by and addressed to National, plaintiff would send it to Associated. It is executed by Associated under its power of attorney from National and delivered to plaintiff—National's agent. The agent reported to Associated every week on business transacted, and the latter reported weekly to National. Agents, such as plaintiff, could charge for a bail bond, any percentage of the face amount not exceeding 10%. They paid 2% of the face amount of the bond (part of which was for a reserve fund to meet losses on bonds) less a certain per cent to Associated and the latter paid 1% of

the amount of the bond, less its commission to National. National is the surety or "insurer" on the bond and the one to whom the state looks in case of forfeiture. As between the agent and Associated the former had to make good a loss from forfeiture, and Associated was in the same position as National in that respect.

This case has been on appeal before *Groves v. City of Los Angeles*, 93 Cal.App. 2d 17, 208 P.2d 254. There plaintiff appealed from a judgment of dismissal after defendants' demurrer was sustained without leave to amend. The judgment was reversed. Based upon the plaintiff's allegations that he was issuing bail bonds as agent of National and that the latter has paid all the in lieu taxes under § 14½ of article XIII of the Constitution, *supra*, the court held the judgment erroneous, reasoning that no insurer could execute a bail bond except through a person holding a bail license, Ins. Code, § 1800, and that plaintiff alleged he was the agent for National and no more. Hence there was no basis for any assumption that plaintiff was engaged in an independent business or that the revenue from his business was derived from such independent activity within the meaning of the last sentence of the ordinance, *supra*, which excludes from its provisions, insurance premiums received on behalf of an insurance company qualified to do business in this state.

Defendants contend that plaintiff is an independent contractor rather than an agent for National and that hence neither he nor National through him is engaged in the insurance business in the state and thus the in lieu tax provisions of the Constitution, *supra*, do not apply, that the ordinance does not purport to tax an insurance business (exempted under last section, *supra*) and that therefore the judgment enjoining the collection of the tax is erroneous.

The law on the subject was settled in *Hughes v. City of Los Angeles*, 168 Cal. 764, 145 P. 94. When the Hughes case was decided the Constitution, Cal.Const., art. XIII, § 14(b), provided substantially the same as now for a state tax on the gross premiums of insurance companies

which was "in lieu of all other taxes or licenses, state, county and municipal upon the property of such companies * *." A Los Angeles revenue ordinance imposed a tax of \$10 per quarter on every person or corporation carrying on the business of local or general insurance agent, solicitor or broker. The Court held the ordinance violated the Constitution, stating: "Under the authority of *Los Angeles Trust Co. v. City of Los Angeles* (L. A. No. 3271), 168 Cal. 762, 145 P. 94, this day decided, no doubt can be entertained but that if this privilege tax were imposed upon the insurance companies themselves it would be invalid. The distinction sought to be drawn in this case is that this particular license fee is not imposed upon the companies but upon the agents of the companies. This is true, but upon the other hand it is equally true that every insurance corporation must act through agents and can act only through agents, and that, therefore, in a direct and immediate sense a tax upon such agents for the right to do business is a tax upon the corporation's right to do business. The agents of corporations are the means whereby the corporations live and in opposition to a tax upon their agents the corporations may well be heard to voice Shylock's expostulation:

'You take my house when you do take the prop

That doth sustain my house; you take my life

When you do take the means whereby I live.'

Hughes v. City of Los Angeles, supra, 168 Cal. 764, 145 P. 94, 95.

In 1937, the Legislature adopted a statute providing that "An insurer shall not execute an undertaking of bail except by and through a person holding a bail license issued as provided in this chapter." Ins.Code, § 1800.

It was held in *Edward Brown & Sons v. McColgan*, 53 Cal.App.2d 504, 128 P.2d 186, that the in lieu tax provision of the Constitution, Cal.Const., art. XIII, § 144½, supra, for insurance companies did not exempt a corporation, which was an agent representing and selling policies for some

18 insurance companies, from the state corporation franchise tax applicable generally to corporations. In view of the holding of this Court in the *Hughes* case, supra, 168 Cal. 764, 145 P. 94, the soundness of the last cited case may be questionable. However, it may be distinguished on the ground that, although the franchise tax is computed on the net income of the corporation, it is on the privilege of using the corporate mechanism to do business and hence has no relation to the nature of the business conducted. Thus the tax is not on the insurance business within the meaning of the Constitution.

Defendants argue, however, that here the plaintiff was an independent contractor rather than an agent of National and he was engaged in an independent business which was not the insurance business or National's business. Hence his business is taxable by the city, and by reason of the last sentence of the ordinance it does not purport to tax other than that business, and the *Hughes* case is distinguishable. In effect, they are asserting that the evidence does not support the trial court's findings that plaintiff was engaged in no business other than that of insurance and that he was National's agent.

[2, 3] At the outset, we have the statutory provision that an insurer cannot conduct a bail bond business except by and through a licensed bail agent. Ins.Code, § 1800, supra. Even the holding of an agent's license, which must have the approval of the insurer, is evidence of agency. *Thompson-Cadillac Co. v. United States Casualty Co.*, 180 Wash. 481, 40 P.2d 170; *Stoner v. First American Fire Ins. Co.*, 218 Iowa 720, 253 N.W. 821; *MacDonald v. Milwaukee Mechanics' Ins. Co.*, 7 Cir., 167 F.2d 276. It will not be assumed that National is violating § 1800 of the Insurance Code, supra. On the contrary, the presumption is that it obeyed the law, Code Civ.Proc., § 1963(1), (33), and therefore is doing its bail bond business through plaintiff as its agent. In addition it appears that National gave broad powers to Associated as its agent, expressly authorizing Associated to appoint bail agents for National and to execute bail bonds. Associated was, in effect, substan-

tially the same as an officer of National. Associated exercised close and direct supervision over the agents appointed by it including plaintiff and limited the maximum per cent the agents could charge for the bonds. The agents filed weekly complete reports of business transacted with Associated and the latter in turn with National.

In support of their claim of independent business, and that plaintiff is not an agent, defendants point to the requirement of the Insurance Code that bail bond agents must meet special qualifications and obtain a license to act as such; that the contracts between National and Associated refer to the "sale" of the bonds by the former to the latter for "resale" to bail agents and similarly those between Associated and the agents refer to "sale" by Associated to the agent for "resale" by him to the public; that plaintiff-agent must indemnify Associated rather than National for losses on bonds, and Associated indemnifies National; and that plaintiff maintains his own offices, pays his expenses, controls his affairs and fixes the amount he charges as fees for arranging for bonds. While those things may be factors to consider, see *Garrison v. State of California*, 64 Cal.App.2d 820, 149 P.2d 711, they are not so compelling as to refute wholly the basic circumstances that National may only conduct a bail bond business through agents and hence it must be doing so here; Associated is empowered by National to appoint and does appoint agents such as plaintiff through whom National conducts its bail bond business; Associated is National's instrumentality or agent to appoint agents, and, as such, exercises close supervision over them; the amount charged for a bond is limited by Associated to a maximum of 10%. The use of the terminology of "sale" with reference to the bonds as between National, Associated, and the agents, is of little assistance to defendants, because calling it a "sale" by the agent of something (a bond) purchased by him, is not realistic in view of the other circumstances. There is really no sale as there is no pretense that the title to a bond passes to Associated, then to the agent and finally to a member of the public. Indeed the testimony shows that a mere record-keeping de-

vice was in the minds of the parties. One of the partners of Associated testified:

"Q. By Mr. Flynn: Now, am I correct in understanding your statement, Mr. Groves, that the premium, so far as the copy is concerned, is one per cent? A. That is the amount that is put in here, and the amount that is—

"The Court: That is paid to the company?

"The Witness: No. It is quite something to explain. That is the way it was devised at the time these forms were prepared. There was a question, so your Honor will really get what the full picture is—there was a question as to whether or not if the company would have to pay on the gross amount that the agent received as a tax, which necessitated then each agent filing a complete list of each and every bond written, the total amount he received. If they were outside of the State of California, he had to deduct them, and so forth. It made quite a thing, and so then it was devised that this receipt which would show one per cent here is the amount the insurance company or surety company would presumably pay the state tax on, and the balance was to presumably go to the agent and to us, and then we pay the company." (Rep.Tr., p. 106.)

[4] Defendants rely upon various provisions of the Insurance Code, asserting that a broker dealing in ordinary insurance is an agent of the insured and not the insurer, and rebates on premiums may not be given or commissions split by them except where he is placing the insurance with sureties which have not appointed them as agents, citing Ins.Code, §§ 750, 755, 755.5, which are not applicable to bail insurance "* * * except that in such case the licensee who executes the undertaking or executes or delivers the bail bond shall, in *all matters in respect* thereto, be deemed the principal and all licensees otherwise connected with the transaction shall be deemed his agents in respect thereto." Ins.Code, § 1809. They reason that therefore the bail agent is an independent contractor like an insurance broker. Accepting their premise it is plain from § 1809, *supra*, like § 1800, *su-*

pra, that in all matters in respect thereto (even if commissions are split or rebates given) the surety on the bail bond is the principal and *all* licensees connected with the transaction are the surety's agent. The fact that bail agents are subject to regulation and must meet certain qualifications does not deprive them of the character of agents for the insurer. True, the insurer may not deprive an agent of his state license, but it can discharge him as its agent, and before he can continue to do business as a bail agent, he must find another insurer for whom he may act as an agent and the insurance commissioner must be notified thereof.

One of the main contentions of defendants is that the money received by plaintiff-agent other than the 1% paid to National is not premium for the bond; that the ordinance purports to reach only such receipts of the agent because it excludes from the tax on his gross receipts any insurance premiums received by him on behalf of an insurance company, and, therefore, it does not violate the constitutional provision as the latter reserves to the state the right to tax gross premiums of insurance companies; that lacking the characteristics of premiums, plaintiff's business in receiving them is independent and not as agent of National.

It is urged that the foregoing question is not involved in this case because it does not concern whether the state may tax those receipts, and that the sole issue is whether plaintiff was National's agent and within the holding of *Hughes v. City of Los Angeles*, supra, 168 Cal. 764, 145 P. 94 and thus subject to the ordinance. We believe, however, that the question is so intimately connected with the problem presented that it must be determined. While it is true that no insurance company is a party to this proceeding and there are actions pending in the superior court for Los Angeles County by the state against insurance companies to recover gross premium taxes which involve such receipts, the state insurance commissioner and several insurance companies, including National, have filed briefs in this case and discuss the question. The judgment rendered by the trial court in this case is broad:

It declares that plaintiff is not subject to the tax provided for under the ordinance and enjoins defendants from collecting any such tax from plaintiff. Moreover, it is clear that the nature of plaintiff's receipts has some bearing upon whether, in conducting the business by which he receives them, he is doing an insurance business for National.

[5,6] Defendants point out (heretofore mentioned) that the receipt given by the plaintiff-agent to the one obtaining the bail bond, mentions only the 1% received by National as the premium, and the rest is for services in arranging for the bond. Also he bears the burden of his expenses in conducting the business and may charge for the bond such percentage as he desires not exceeding 10%. We hold, however, that that does not necessarily establish him as an independent contractor rather than National's agent. We believe also that there is no escape from the conclusion that the full sum received by him from the one desiring the bail bond is the gross premium for the bond. National may act only through agents and plaintiff is its agent. All the business transacted by plaintiff is agency business, the end objective and result of which is to find takers of bail bonds and to furnish bail bonds to applicants therefor, and the amount charged the applicant for a bond is the premium on that bond. It is not significant how National, Associated and plaintiff choose to allocate that amount, such as for various services, premiums, etc. That is nothing more than an intramural arrangement for their convenience. The fact remains that whatever plaintiff receives from the customer or client for a bond, he is authorized to obtain it, and does so as agent of National. The question should not turn on whether the amount charged for the bond is broken down to specific items for their convenience. The situation should be the same as where National paid plaintiff's expenses incurred in writing bonds, because those expenses would be reflected in the gross premium paid—the amount charged the applicant for a bond. Nor is it persuasive that plaintiff-agent does not pay all of the 10% he receives to Associated or National. There is little difference whether

he uses it to defray the expenses of conducting the bail bond business and pay himself a commission or whether all of it is paid to National which in turn pays him a commission and meets the expenses. The essence of the matter is that the amount paid by the insured for the bond is the premium and it has been so recognized by the courts. See *Bankers' Life Co. v. Richardson*, 192 Cal. 113, 218 P. 586; *Western Travelers Accident Ass'n v. Johnson*, 14 Cal.App.2d 306, 58 P.2d 206; *Mutual Benefit L. Ins. Co. v. Richardson*, 192 Cal. 369, 219 P. 1003; *Industrial Indem. Exch. v. State Bd. Equalization*, 26 Cal.2d 772, 161 P. 2d 222; *State Farm Mut. Automobile Ins. Co. v. Carpenter*, 31 Cal.App.2d 178, 87 P. 2d 867. And a mere bookkeeping method cannot thwart the law. *Industrial Indem. Exch. v. State Bd. Equalization*, supra, 26 Cal.2d 772, 161 P.2d 222. Defendants seem to think that *State Farm Mut. Automobile Ins. Co. v. Carpenter*, supra, 31 Cal.App.2d 178, 87 P.2d 867, holding that a membership fee to become a member of an insurance organization is not a part of the premium, and *Mutual Benefit L. Ins. Co. v. Richardson*, supra, 192 Cal. 369, 219 P. 1003, holding that the amount of the premium stated in the policy above the cost thereof and declared as a dividend to the insured, was not premium, are opposed to the views here expressed, but those holdings on the facts are not contrary to the principle here stated, because the sums paid were not what was actually given by the insured for his insurance. In the first case above cited the membership fee did not entitle the payor to insurance. It only authorized him to apply for insurance and pay the premium. In the second, the amount paid back to the insured as a dividend meant the premium was that much less. In both the basic theory is that the amount paid by the insured for the insurance is the premium. Here, as the bail agent is the insurer's agent, what he receives from the applicant for the insurance—that is, what the applicant pays for the bail bond is the premium. What the agent receives, in legal effect the insurer receives. The so-called "fees" received by the bail agent do not result in a reduction of the cost to the insured.

[7] In various aspects the contention is made that administrative construction requires the conclusion that the 9% retained by the agent is not premium. It is pointed out that the state has collected a tax on only the 1% received by National. That is all its books would show, and a neglect to collect the tax because of failure to look beyond those books is hardly a compelling construction that the 1% was the only premium. Moreover, it must be remembered, concerning this question of administrative construction, that where it is erroneous it is not binding on the court. *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028; *Bodinson Mfg. Co. v. California E. Comm.*, 17 Cal.2d 321, 109 P.2d 935.

It is urged that if the bail bond is cancelled the insurer (National) is liable for a return of only 1% stated as premium on the face of the bond, citing Insurance Code, §§ 480-483, and hence the 1% is the only premium. Those sections deal, however, with the requirement that premiums be returned, whatever they be rather than what constitutes premiums, and are thus of no assistance. Moreover, the general agent, and plaintiff testified that the whole amount received from the applicant for the bond was returned upon cancellation, indicating that such amount was the premium.

Point is made of the requirement that every policy must set forth therein the premium, Ins.Code, § 381(f), and the commissioner's rules require separation of "premium" and fees in the bail agent's record. This, it is claimed, shows the fees (9%) were not part of the premium and the state so recognized it. That is not significant because there may be other reasons why the agent should not make a "break-down" of the charge to a bail bond applicant for a bond, but, as seen, the full amount paid is the gross premium which is known by the bail bond applicant.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

SCHAUER, Justice, dissenting to opinion by CARTER, J.

I dissent. Under the majority opinion herein, as under the opinion in *Hughes v. Los Angeles* (1914), 168 Cal. 764, 765, 145 P. 94, there are classes of business—those of local insurance agent and of bail bondsman—in which persons may engage without being subject to local license taxation. The express ground of decision of the *Hughes* case is that “in a direct and immediate sense a tax upon such agents [general and local insurance agents] for the right to do business is a tax upon the corporation’s right to do business” (at page 765 of 168 Cal. at page 95 of 145 P.). But the theory of the *Hughes* case and this case cannot be logically limited to freeing local agents from local license taxes. The provision of the California Constitution (art. XIII, § 14½) which imposes the state “in lieu” tax upon insurance companies does so “in lieu of *all* other taxes and licenses, state, county, and municipal, upon such insurers and their property, except [(1) taxes on their real estate; (2) taxes with respect to a trust department operated by a title insurer; (3) as to foreign insurers doing business in this state, reciprocal taxes in accord with those imposed by the foreign state on California insurers doing business there; (4) the tax on ocean marine insurance].” (*Italics added.*)

If the *Hughes* case is to be given consistent application then a state tax upon an insurance agent’s income derived from his insurance business is as invalid as a local license tax on the right to carry on such business. In *Edward Brown & Sons v. McColgan* (1942), 53 Cal.App.2d 504, 506–508, 128 P.2d 186, the District Court of Appeal was confronted with such a problem. There a corporate insurance agent contended that because of the *Hughes* decision it need not pay its franchise (state income) tax. This contention was rejected. The appellate court attempted to distinguish the *Hughes* case on the ground that the *Hughes* license tax was upon the privilege of transacting insurance business and impinged directly on the insurance company, whereas the franchise tax was upon the corporate agent’s privilege of being a corporation.

The majority opinion in the present case recognizes the difficulty of drawing such a distinction and says (256 P.2d 312), “the soundness of the last cited case may be questionable.” But, the majority opinion goes on to say, “it may be distinguished on the ground that, although the franchise tax is computed on the net income of the corporation, it is on the privilege of using the corporate mechanism to do business and hence has no relation to the nature of the business conducted. Thus the tax is not on the insurance business within the meaning of the Constitution.” The purported distinction made by the majority would have no application to a state income tax on an individual insurance agent.

I would, therefore, conclude that the *Hughes* decision is unsound and should be overruled. It is my further opinion that, even without overruling that case, the validity of Los Angeles Ordinance No. 77,000, as amended by Ordinance No. 92,414, could be upheld. If this latter conclusion were reached then, as will hereinafter appear, Groves would not be subject to the license tax because of the terms of the ordinance itself, rather than because of a strained application of section 14½ of article XIII of the state Constitution. The ordinance provides that “The term ‘gross receipts’ as used herein shall not include any insurance premiums received on behalf of any insurance company qualified to do business in the State of California, nor any commissions paid out of such premiums.” This provision appears to be designed to avoid any litigation such as that in the *Hughes* (1914) and *Edward Brown* (1942) cases, *supra*, by expressly excluding from the “gross receipts” which are the measure of the tax the entire amount collected by a bail bondsman as payment for a bail bond. It thus appears that while Los Angeles could have taxed the amount received by the bail bondsman as payment for his services (rather than as premium to the insurance company) it did not choose to do so.

The judgment of the trial court does not recognize that it is because of the terms of the ordinance itself that certain taxes

cannot be imposed on Groves; rather, it perpetually enjoins defendants from collecting any taxes from Groves under such ordinance. Since Groves may become liable for taxes other than those here discussed, I would reverse the judgment.

Rehearing denied; SCHAUER and SPENCE, JJ., dissenting.



40 Cal.2d 709

PEOPLE v. BUFFUM et al.
Cr. 5293.

Supreme Court of California, in Bank.
April 20, 1953.

Rehearing Denied May 14, 1953.

Defendants were convicted in the Superior Court, Los Angeles County, of conspiracy to induce abortions, and they appealed. The Supreme Court, Gibson, C. J., held that where Superior Court, in prosecution for conspiracy to induce abortions, erred in admitting evidence concerning Mexican Penal Laws relating to abortions, and erred in failing to give instructions on necessity of corroboration of accomplices, cumulative effect of errors required reversal of conviction.

Reversed.

Shenk, J., dissented.

Prior opinion, 238 P.2d 47.

1. Conspiracy ⇨23

A "conspiracy" may be established by showing that there was an agreement between two or more persons to commit a crime and that an act was done within the state to effect object of agreement. Pen. Code, §§ 182, 184.

See publication Words and Phrases, for other judicial constructions and definitions of "Conspiracy".

2. Abortion ⇨1

Statute dealing with criminal abortion does not regulate conduct taking place outside borders of the state. Pen.Code, § 274.

3. Conspiracy ⇨23

Conspiracy statute, standing alone, should not be read as applying to a conspiracy to commit a crime in another jurisdiction. Pen.Code, § 182.

4. Criminal Law ⇨97

Statute providing that persons may be punished under state laws if they commit, in whole or in part, any crime within the state must be construed in light of general principle that ordinarily a state does not impose punishment for acts done outside its territory. Pen.Code, § 27, subd. 1.

5. Criminal Law ⇨97

Statute, providing that whenever a person, with intent to commit a crime, does any act within the state in execution or part execution of such intent, culminating in commission of a crime, either within or without the state, such person is punishable for such crime in the state in same manner as if crime had been committed in county within the state, must be construed in light of general principle that ordinarily a state does not impose punishment for acts done outside its territory. Pen.Code, § 778a.

6. Criminal Law ⇨97

Statute providing that persons may be punished under laws of the state if they commit, in whole or in part, any crime within the state, applies where acts done within the state are sufficient to amount to an attempt to commit a crime but not otherwise. Pen.Code, § 27, subd. 1.

7. Criminal Law ⇨97

Statute providing that whenever a person, with intent to commit a crime, does any act within the state in execution or part execution of such intent, culminating in commission of a crime, either within or without the state, such person is punishable for such crime in the state in the same manner as if crime had been committed entirely within the state, should be construed as applying only where acts done within the state amount to an attempt. Pen.Code, § 778a.

8. Criminal Law ⇨44

The two elements necessary to establish an "attempt" to commit a crime are a specific intent to commit a crime and a direct ineffectual act done towards its commission.

See publication Words and Phrases, for other judicial constructions and definitions of "Attempt".

9. Criminal Law ⚖️44

Preparation alone for a crime is not enough to constitute an "attempt," but there must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of will of attempter, and act must not be equivocal in nature.

10. Conspiracy ⚖️47

Evidence that defendants allegedly agreed to transport women from California to Mexico for purpose of having abortions performed on them in Mexico, was insufficient to justify convictions for conspiracy to induce abortions. Pen.Code, §§ 27, subd. 1, 182, 184, 274, 778a.

11. Criminal Law ⚖️382

In prosecution in California for conspiracy to induce abortions in Mexico, trial court committed error in admitting evidence that Penal Code of Mexico provides that any one who causes a woman to abort, unless she is in danger of death, will be sentenced to prison, and that a doctor who commits such an offense will be suspended from exercising his profession. Pen.Code, §§ 182, 274.

12. Conspiracy ⚖️28

As respects prosecution in California for conspiracy to induce abortions in California, if agreement was to have abortions performed in California, offense was completed when alleged agreement was followed by acts in California, and subsequent transportation of women across border into Mexico for performance of alleged abortions did not operate to nullify acts which had already been done in California. Pen. Code, §§ 182, 184, 274.

13. Conspiracy ⚖️45

In prosecution in California for conspiracy to induce abortions in California, events which took place in Mexico, where abortions were allegedly performed, were relevant to show object of conspiracy was use of instruments and other means with intent to procure abortions. Pen.Code, §§ 182, 184, 274.

14. Conspiracy ⚖️28

Though language of conspiracy statute is sufficiently broad to include any agree-

ment to procure an abortion, statute is general and must yield to specific provisions of statute making it an offense for a woman to solicit of any person any drug or substance for purpose of procuring an abortion. Pen.Code, §§ 182, 275.

15. Criminal Law ⚖️507(6)

In prosecution for conspiracy to induce abortions, women, on whom abortions were allegedly performed, were not "accomplices" within meaning of statute requiring corroboration of an accomplice, since they were not subject to prosecution for conspiracy to induce abortions, but were subject instead to prosecution under statute punishing a woman who solicits an abortion. Pen.Code, §§ 182, 274, 275, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

16. Criminal Law ⚖️824(1)

In a criminal case, trial judge must instruct jury on his own motion on law relating to facts of the case and on matters vital to proper consideration of evidence.

17. Criminal Law ⚖️824(5)

In prosecution for conspiracy to induce abortions, court erred in failing to give, on its own motion, an instruction concerning statute providing that on trial for procuring or attempting to procure an abortion, or aiding or assisting therein, testimony of woman on whom offense was committed, must be corroborated. Pen.Code, §§ 182, 274, 1108.

18. Criminal Law ⚖️780(1)

In prosecution for conspiracy to induce abortions, wherein there was evidence that mother of one of the women, on whom abortions were allegedly performed, was an accomplice, court erred in refusing to instruct that testimony of accomplice must be corroborated. Pen.Code, §§ 182, 274, 1111.

19. Conspiracy ⚖️40

It is unnecessary that each conspirator see others or know who all members of the conspiracy are.

20. Conspiracy ⚖️40

It is unnecessary that each conspirator participate in overt acts.

21. Criminal Law ⇐1169(1), 1173(2)

Where trial court, in prosecution for conspiracy to induce abortions, erred in admitting evidence concerning Mexican Penal Laws relating to abortions, and erred in failing to give instructions on necessity of corroboration of accomplices, cumulative effect of errors required reversal of convictions. Pen.Code, §§ 182, 274, 1108, 1111.

Joseph A. Ball, Long Beach, Leonard Wilson, Los Angeles, and Robert P. Dockera, Burbank, for appellants.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Roy L. Buffum, a physician and surgeon, and Reginald L. Rankin were indicted for and convicted of violating section 182 of the Penal Code¹ in that they conspired to use certain means to induce miscarriages contrary to action 274.² Defendants appeal from the judgments and from an order denying their motions for a new trial.

Four women who were pregnant went separately to the office of Buffum in Long Beach to solicit his aid in inducing miscarriages. One of the women was accompanied by her mother. Buffum refused to perform the abortions but took the telephone numbers of three of the women and told each she would receive a call. Rankin later telephoned them, told them the amount they must pay, arranged to meet them at a designated intersection in Long Beach, and indicated that he would transport them to the place where the abortions were to be performed. Buffum gave Rankin's telephone number to the fourth woman, and she called Rankin and made similar arrangements.

Rankin met the women at the appointed place and drove them in his automobile to Tijuana, Mexico. There, with the assistance of Rankin, another man performed an operation upon each of them. While in the operating room, three of the women gave money to Rankin. Later the same day Rankin returned the women to Long Beach, where they again went their separate ways. Subsequently three of them required hospitalization. Buffum treated one of them without preliminary examination or inquiry as to the nature of her illness, and reimbursed her family for the hospital bill.

The principal questions raised on this appeal are: (1) Can the convictions be supported on a showing that defendants conspired in California to perform abortions in Mexico? (2) Did the court err in admitting proof of the law of Mexico on abortions? (3) Is the evidence sufficient to support a finding that defendants conspired in California to perform abortions in this state? (4) Did the court err in failing to instruct upon the necessity for corroboration?

Conspiracy to Perform Abortions
in Mexico

[1-3] A conspiracy may be established by showing that there was an agreement between two or more persons to commit a crime and that an act was done in California to effect the object of the agreement. Pen.Code, §§ 182, 184; see *People v. Daener*, 96 Cal.App.2d 827, 831, 216 P.2d 511; *People v. Benenato*, 77 Cal. App.2d 350, 358, 175 P.2d 296; *People v. Huling*, 71 Cal.App. 144, 146, 234 P. 924. The object of defendants' agreement, as alleged in the indictment, was "to violate section 274, Penal Code of the State of California." No other unlawful purpose

1. Penal Code, section 182, provides: "If two or more persons conspire: 1. To commit any crime; * * *. They are punishable as follows: When they conspire to commit any felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony. * * *"
2. Penal Code, section 274, provides: "Every person who provides, supplies, or ad-

ministers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

was stated, and defendants, of course, cannot be punished for conspiracy unless the doing of the things agreed upon would amount to a violation of section 274. The statute makes no reference to the place of performance of an abortion, and we must assume that the Legislature did not intend to regulate conduct taking place outside the borders of the state. See *People v. Chapman*, 55 Cal.App. 192, 197, 203 P. 126; *Foley Bros. v. Filardo*, 336 U.S. 281, 284-286, 69 S.Ct. 575, 93 L.Ed. 680; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-357, 29 S.Ct. 511, 53 L.Ed. 826. Similarly, section 182 of the Penal Code, standing alone, should not be read as applying to a conspiracy to commit a crime in another jurisdiction.

[4, 5] The People rely upon subdivision 1 of section 27 of the Penal Code, which provides that persons may be punished "under the laws of this state" if they "commit, in whole or in part, any crime within this state", and also upon section 778a of that code, which provides: "Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state." These sections were not mentioned in the indictment, but if it be assumed that they may properly be considered here, they do not authorize a conviction on the evidence presented. The statutes must be construed in the light of the general principle that, ordinarily, a state does not impose punishment for acts done outside its territory. See *People v. McGowan*, 127 Cal.App. 39, 42, 14 P.2d 1036; *State v. Volpe*, 113 Conn. 288, 155 A. 223, 226, 76 A.L.R. 1083; *Rest., Conflict of Laws*, §§ 425, 427.

[6] It is apparent from the authorities which have discussed subdivision 1 of section 27 and similar statutes in other jurisdictions that such a provision can apply where the acts done within the state are sufficient to amount to an attempt to commit a crime but not otherwise. *People v.*

MacDonald, 24 Cal.App.2d 702, 709-711, 76 P.2d 121; *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786, 789 (opinion by Judge Cardozo); see *Rest., Conflict of Laws*, § 428, Comment e; *People v. Botkin*, 132 Cal. 231, 233, 64 P. 286; *People v. Sansom*, 37 Cal.App. 435, 438-439, 173 P. 1107; *People v. Chapman*, 55 Cal.App. 192, 196-199, 203 P. 126 (act constituting an "essential ingredient" of the crime); cf. *People v. Harden*, 14 Cal.App.2d 489, 58 P.2d 675; *People v. Lakenan*, 61 Cal.App. 368, 214 P. 1021; *Reass v. United States*, 4 Cir., 99 F.2d 752, 755 (stating that certain acts were only preparation and not "part" of the crime itself). To read such a statute as authorizing the punishment by one state of acts which do not amount to an attempt but are merely preparatory to the commission of a crime in another state would seem tantamount to an effort to regulate conduct in the other jurisdiction. Cf. *Foley Bros. v. Filardo*, 336 U.S. 281, 284-286, 69 S.Ct. 575, 93 L.Ed. 680.

[7] Section 778a of the Penal Code should also be construed as applying only where the acts done within the state amount to an attempt. By its terms the section is limited to acts done "in execution or part execution of" an intent to commit a crime, and these words are comparable to the expression "in whole or in part" as used in subdivision 1 of section 27. The statute further requires that what is done in the state must be of such a nature that it "culminates" in the commission of an offense, and this is analogous to the requirement in attempt cases that there must be a "direct" ineffectual act towards consummation of the crime. Cf. *People v. Miller*, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913. Our construction of section 778a is in accord with the decision in *People v. MacDonald*, supra, 24 Cal.App.2d 702, 709-711, 76 P.2d 121, which held that the section did not warrant a conviction for contracting an incestuous marriage where it appeared that the defendant and his daughter, while in California, formed an intent to marry and then travelled on a train from California to Arizona, in which jurisdiction the ceremony was performed. The cases of *People v. Marvin*, 48 Cal.App.2d 180, 192, 119 P.2d

413, and *People v. Harden*, 14 Cal.App.2d 489, 492, 58 P.2d 675, are not in conflict with what we have said. The opinions in those cases indicate that sufficient acts were performed within the state to constitute attempts to commit crimes.

The questions presented here are different from those arising in venue cases. In *People v. Anderson*, 90 Cal.App.2d 326, 330-331, 202 P.2d 1044, it was held that the defendants, who were prosecuted for abortion and conspiracy to commit abortion, could properly be tried in the county where the conspiracy was formed and from which they transported one of the women involved, even though the abortions were performed in another county. Sections 182 and 184 of the Penal Code, however, specifically provide that a conspiracy case may be tried in any county where an overt act is done. The *Anderson* case also relied on section 781 of the Penal Code,³ relating to venue where acts occur in two or more counties, but under this section venue may lie in a particular county even though the acts done there are not sufficient, considered alone, to constitute an attempt. See *People v. Megladdery*, 40 Cal.App.2d 748, 774-777, 106 P.2d 84. Moreover, the courts, in construing the venue statutes, obviously are not limited by the operation of the general principles, discussed above, that a state ordinarily does not impose punishment for acts done in other jurisdictions and that, in the absence of a contrary intent, its statutes will not be read as seeking to regulate conduct beyond its own borders.

[8, 9] Since section 778a and subdivision 1 of section 27 do not apply unless acts are done within the state which amount at least to an attempt, we must next determine whether defendants could properly be convicted of an attempt to violate section 274 upon a showing that they transported the four women from a place in California to a place in Mexico with the intention of performing abortions upon them in that country. Sections 663 and 664 of the Penal

Code prescribe punishment for attempts to commit crimes but do not define the offense. This court has held that two elements are necessary to establish an attempt, namely, a specific intent to commit a crime and a "direct" ineffectual act done towards its commission. *People v. Miller*, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913; see *People v. Anderson*, 1 Cal.2d 687, 689-690, 37 P.2d 67. Preparation alone is not enough, there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature. *People v. Miller*, supra, 2 Cal.2d at pages 530-532, 42 P.2d 308. No case has been cited or found which holds that persons can be convicted of an attempt to commit abortions if they do no more within the state than make arrangements for transportation and then take women from California to Mexico for the purpose of performing abortions upon them in that country. It is our opinion that, under the rules set forth in the *Miller* case, such conduct is merely preparatory and does not constitute a direct, unequivocal act done toward the commission of the offense specified by section 274 of the Penal Code. Cf. *People v. MacDonald*, supra, 24 Cal.App.2d 702, 76 P.2d 121 (where defendant and his daughter travelled from state intending to contract incestuous marriage elsewhere); *People v. Miller*, supra, 2 Cal.2d 527, 42 P.2d 308; *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786, 789; *Reass v. United States*, 4 Cir., 99 F.2d 752, 755. There is nothing in the section which indicates that transportation or arrangement therefor has a direct relation to the acts prohibited by the statute. Decisions upholding convictions under statutes which expressly make transportation for certain purposes a crime or an element of a crime are not helpful in construing provisions like those involved here. See, e. g., *Gregg v. United States*, 8 Cir., 113 F.2d 687, 690-691, judgment re-

3. Section 781 of the Penal Code provides: "When a public offense is committed in part in one county and in part in another, or the acts or effects there-

of constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

versed on other grounds upon rehearing, 8 Cir., 116 F.2d 609.

[10] It follows that the judgments cannot be sustained upon the showing that defendants agreed to transport the four women from California to Mexico and perform the abortions there because our statutes do not provide a criminal penalty for such conduct. Instructions to this effect requested by defendants were refused, and since no instructions were given on the subject, the ruling was erroneous.

Proof of Mexican Law

[11] The prosecution was permitted to prove, over objection, that the Penal Code of Mexico provides that anyone who causes a woman to abort, unless she is in danger of death, will be sentenced to prison, and that a doctor who commits such an offense will, in addition, be suspended from exercising his profession. Admission of this evidence was clearly erroneous. As we have seen, the charge was not conspiracy to violate Mexican law, but, rather, conspiracy to violate the law of California, and it was not proper for the prosecution to prove that defendants' activities in Mexico were punishable under the laws of that country. The placing of such a criminal label on the acts done in Mexico obviously made defendants' position more unfavorable in the minds of the jurors and may have led them to believe that defendants could be convicted upon the basis of Mexican law instead of upon the charge in the indictment. In this connection it should be noted that the court refused to give instructions requested by defendants which in substance would have told the jury that defendants could not be prosecuted in California for a violation of the law of Mexico, and that, even though they may have conspired to commit an act declared by the laws of that country to be unlawful, they should be acquitted if they did not intend to do any act or accomplish any criminal purpose in California.

Conspiracy to Perform Abortions in California

There is evidence which might, under proper instructions, support a conviction

upon the theory that defendants conspired to perform abortions in California. In a telephone conversation Rankin told one of the women that they "were going to San Diego for the operation" and that they were going there "because it was too warm in Long Beach, the heat was on." He told another of the women that he was taking three women to San Diego and that she could go with them if she had \$250. Still another of the women was told by Buffum that, if she used the telephone number he gave her, someone would take her to San Diego. Buffum told the arresting officer that the first time he knew that Rankin was taking the women to Tijuana was after the trip, although he "knew they were going somewhere down that way."

[12, 13] The evidence meets the requirement of section 184 of the Penal Code that some act, other than the making of the agreement, must be done in California to effect the object of the conspiracy. Buffum gave Rankin the telephone numbers of three of the women and gave Rankin's number to the fourth one. Rankin talked to each of them, quoted prices for the termination of their pregnancies and said that he would take them to a place where the operations would be performed. Thereafter he met the women and transported them over California highways for the purpose of taking them to such place. Under this evidence, if the agreement was to have abortions performed in California, an offense was completed when the agreement was followed by the acts in this state, Pen.Code, §§ 182, 184, and the subsequent transportation of the women across the border into Mexico for performance of the abortions did not operate to nullify the acts which had already been done in California. The events which took place in Tijuana were, of course, relevant to show that the object of the conspiracy was the use of instruments and other means with intent to procure miscarriages, and evidence thereof was properly admitted for this purpose.

Necessity for Instructions on Corroboration

The trial court refused to instruct that the four women were accomplices of de-

defendants and that their testimony required corroboration under section 1111 of the Penal Code,⁴ and it failed to instruct on section 1108,⁵ which provides that in a trial for procuring or attempting to procure an abortion the testimony of the woman upon whom the offense was committed must be corroborated. If the four women come within either of these provisions, their testimony requires corroboration, and an appropriate instruction should have been given.

In a closely analogous case involving section 1111 it was held that a woman who submits to an abortion is not an accomplice of a person who is charged with a violation of section 274 of the Penal Code. *People v. Clapp*, 24 Cal.2d 835, 836 et seq., 151 P.2d 237. The only difference between that case and the present one, with regard to the problem which we are now considering, is that here the defendants are charged with conspiracy to violate section 274 rather than with actual violation of that statute. The rule of *People v. Clapp* has been applied in at least one conspiracy case, *People v. Stone*, 89 Cal.App.2d 853, 869-870, 202 P.2d 333, and possibly in another. *People v. Miner*, 96 Cal.App.2d 43, 53, 214 P.2d 557. Defendants assert that these decisions are erroneous, and they argue that a woman who submits to an abortion, even though not an accomplice insofar as concerns an

actual violation of section 274, is nevertheless a co-conspirator with the person who performs the abortion, that both are subject to prosecution for the identical offense of conspiracy to violate section 274, and that they are, therefore, accomplices within the meaning of section 1111. In order to pass upon this question we must examine the reasoning followed in the *Clapp* case and determine whether it is applicable here.

The Penal Code contains two separate provisions which punish persons who participate in abortions, namely section 274, which, as we have seen, relates to the conduct of persons other than the pregnant woman, and section 275, which concerns only the acts of the woman.⁶ The *Clapp* case held that these statutes, construed together, disclose a legislative intent to subject the woman to punishment under section 275 but not under the distinct offense set forth by section 274 and that the specific provision in section 275 supersedes the general provision in section 31 that all persons who aid and abet in the commission of an offense are principals in any crime so committed.⁷ Although section 31, if considered alone, would by its terms render the woman punishable as a principal for the crime described by section 274, the court concluded that section 275 prevented such an application of section 31 and that the woman was therefore not subject to prosecution as a

4. Penal Code, section 1111, provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

5. Penal Code, section 1108, provides: "Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, * * * the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

6. Penal Code, section 275, provides: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years."

7. Penal Code, section 31, provides: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."

principal under section 274 and was not an accomplice of persons who were charged only with violating section 274. 24 Cal.2d at pages 838-839, 156 P.2d 237; see also, *People v. Wilson*, 25 Cal.2d 341, 346, 153 P.2d 720.

[14] Section 182 of the Penal Code, which proscribes conspiracy to commit a crime, is closely analogous to section 31. Both provisions operate generally with respect to crimes defined in other statutes, and both designate persons who may be punished because of their connection with activities pertaining to such crimes. In our opinion the same reasoning which precludes the application of section 31 for the purpose of prosecuting a woman as a principal under section 274 likewise precludes the use of section 182 in prosecuting her for conspiracy to violate section 274. Since, as held in the *Clapp* case, the Legislature has expressed an intent that a woman who consents and voluntarily submits to an abortion is not punishable under section 274, it clearly did not intend that she should be punished for conspiracy to violate that statute. Although the language of section 182, standing alone, is sufficiently broad to include any agreement to procure an abortion, the provision, like that in section 31, is general and must yield to the specific provision in section 275. Any other construction would mean that the conspiracy law could be used as a device for defeating the legislative intention of imposing a lesser penalty on a woman who violates section 275 than is prescribed for a person convicted under section 274.

There are many cases arising under other statutes in which it has been recognized that a defendant may be liable to prosecution for conspiracy to commit a given crime even though he is incapable of committing the crime itself. See, e. g., *U. S. v. Socomy-Vacuum Oil Co.*, 310 U.S. 150, 224-225, 60 S.Ct. 811, 84 L.Ed. 1129 [footnote]; *United States v. Rabinowich*, 238 U.S. 78, 86, 35 S.Ct. 682, 59 L.Ed. 1211; *People v. Wood*, 145 Cal. 659, 664-665, 79 P. 367; see also cases collected in annotations in 131 A.L.R. 1322, 1327-1329; 74 A.L.R. 1110, 1114-1115; 5 A.L.R. 782, 787-791. This rule, however, does not apply where

the statutes defining the substantive offense disclose an affirmative legislative policy that the conduct of one of the parties involved shall be unpunished. *Gebardi v. United States*, 287 U.S. 112, 121-123, 53 S.Ct. 35, 77 L.Ed. 206; *In re Vince*, 2 N.J. 443, 67 A.2d 141, 145; see *Pinkerton v. United States*, 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489; *State v. McLaughlin*, 132 Conn. 325, 44 A.2d 116, 120-121. Similarly, the rule should not be applied where, as here, the Legislature singles out one of the parties for special treatment by enacting a statute which deals only with the conduct of that person and provides for a lesser punishment than is given to the other party. In some states it has been held that the extrajudicial statements of a woman who solicits and submits to an abortion are admissible against the person who performs it upon the theory that the woman is guilty of conspiracy, but these cases are not helpful here because they do not discuss or show whether, in those jurisdictions, the woman is subject to prosecution as a principal or as an accomplice of the person who committed the abortion. See *State v. Mattson*, 53 N.D. 486, 206 N.W. 778; *State v. Timm*, 244 Wis. 508, 12 N.W.2d 670, 673-674; *Kraut v. State*, 228 Wis. 386, 280 N.W. 327, 332-333. A few courts have declared that she is guilty of conspiracy even though she cannot be punished as an accomplice. See *United States v. Holte*, 236 U.S. 140, 145, 35 S.Ct. 271, 59 L.Ed. 504; *Solander v. People*, 2 Colo. 48, 62-63; *Johnson v. People*, 33 Colo. 224, 80 P. 133, 137-138; *State v. Crofford*, 133 Iowa 478, 110 N.W. 921, 922, 924-925; *Fields v. State*, 107 Neb. 91, 185 N.W. 400, 403. These cases are not persuasive, however, since they do not discuss the factors which we have considered here and which were noted in *People v. Clapp*, *supra*, 24 Cal.2d 835, 838-839, 151 P.2d 237. The Supreme Court of Minnesota, in holding under statutes similar to ours that the woman who submits to an abortion is not an accomplice, has also said that she is not a conspirator. See *State v. Tennyson*, 212 Minn. 158, 2 N.W. 2d 833, 837, 139 A.L.R. 987.

[15] It follows from the foregoing that the four women involved here were not

subject to prosecution for conspiracy to violate section 274 and that none of them was an accomplice within the meaning of section 1111. It likewise follows that, since these women were not accomplices, their testimony does not fall within the rule that the testimony of one accomplice cannot corroborate that of another, and, accordingly, the women could properly corroborate any witness who was an accomplice. *People v. Wilson*, 25 Cal.2d 341, 346, 153 P.2d 720; see *People v. Clapp*, 24 Cal.2d 835, 837, 151 P.2d 237.

A different problem, however, is presented by section 1108 of the Penal Code, which, as we have seen, provides that upon "a trial for procuring or attempting to procure an abortion, or aiding or assisting therein," the testimony of the woman upon whom the offense was committed must be corroborated. While it is true that this section does not specifically refer to a conspiracy to procure an abortion, the language is very broad and, in our opinion, should be construed to embrace the crime charged in the present indictment. It is apparent that the purpose of the Legislature was to provide a safeguard against the danger that the testimony of the woman who submitted to and willingly participated in the abortion may be colored in expectation of immunity or may be otherwise untrustworthy. This purpose is just as applicable where the defendant is charged with conspiracy to commit an abortion as it is where he is charged with committing or attempting to commit an abortion, and it would be incongruous to interpret section 1108 as intended to deny the safeguard in one situation but to require it in the other. Moreover, such an interpretation would make it possible for the prosecution to circumvent the purpose of the section in many cases by the simple expedient of charging the defendant with conspiracy rather than with the substantive offense itself.⁸

[16,17] Defendants did not request an instruction based upon section 1108. In a criminal case, however, the trial judge is required to instruct the jury of his own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence. *People v. Putnam*, 20 Cal.2d 885, 890, 129 P.2d 367; see also *People v. Bender*, 27 Cal.2d 164, 176, 163 P.2d 8; *People v. Warren*, 16 Cal.2d 103, 116, 104 P.2d 1024; *People v. Scofield*, 203 Cal. 703, 709, 265 P. 914. Under this rule it has been held that, in an appropriate case, the jury must be instructed as to sections 1110 and 1111 of the Penal Code, which, like section 1108, provide that the testimony of certain witnesses must be corroborated. *People v. Warren*, supra; *People v. Heddens*, 12 Cal. App.2d 245, 247, 55 P.2d 230; *People v. Curran*, 24 Cal.App.2d 673, 676, 75 P.2d 1090; see *People v. Putnam*, supra, at pages 890-891 of 20 Cal.2d, 129 P.2d 367. It follows, therefore, that the trial court erred in failing to give an instruction on its own motion with respect to section 1108.

[18-20] In addition to the four women who submitted to abortions, the mother of one of them likewise testified concerning some of the events which took place in Buffum's office. There is evidence that she was an accomplice within the meaning of section 1111 of the Penal Code, and, therefore, it was error for the court to refuse an instruction that the testimony of an accomplice must be corroborated. The conduct of this witness does not fall within the prohibition of section 275 of the Penal Code, and for this reason the rule of *People v. Clapp* discussed above has no application to her and cannot serve to prevent sections 31 and 182 from operating so as to render her liable to prosecution as a principal under section 274 or as a member of a conspiracy to violate that section. See *People v. Wilson*, 25 Cal.2d 341, 346,

8. It may be noted, in connection with this discussion, that since the women who submitted to abortions were not accomplices of defendants, their testimony may properly be corroborated by a witness

who was an accomplice. *People v. Wilson*, 25 Cal.2d 341, 346, 153 P.2d 720; *People v. Clapp*, 24 Cal.2d 835, 837 et seq., 151 P.2d 237.

153 P.2d 720 (discussing husband who took wife to defendant for abortion). The witness testified that she accompanied her daughter to Buffum's office, told Buffum that the daughter was pregnant, asked Buffum if he could "help" them, talked to Buffum about whether "it could be done" in Los Angeles County, and asked how much it would cost. During this meeting most of the discussion was between the mother and Buffum, and the daughter said very little. There is no evidence that the mother then knew that Rankin was to take part in performance of the abortion, but the daughter testified that during the conversation between Buffum and the mother, Buffum said: "A man will call you tomorrow." The foregoing testimony is sufficient to show that the mother was an active participant in making arrangements with Buffum for the abortion and that she knew that at least one other man would be involved. It is, of course, unnecessary that each conspirator see the others or know who all the members of the conspiracy are. *Anderson v. Superior Court*, 78 Cal.App.2d 22, 23-25, 177 P.2d 315; see *Blumenthal v. United States*, 332 U.S. 539, 556-557, 68 S.Ct. 248, 92 L.Ed. 154; *Lefco v. United States*, 3 Cir., 74 F.2d 66, 68-69. It is likewise unnecessary that each conspirator participate in the overt acts. *People v. McNamara*, 103 Cal.App. 2d 729, 741, 230 P.2d 411; *People v. Garrison*, 80 Cal.App.2d 458, 463, 181 P.2d 738; *People v. Benenato*, 77 Cal.App.2d 350, 356, 175 P.2d 296; *People v. Corica*, 55 Cal.App.2d 130, 135, 130 P.2d 164. Accordingly, it could be concluded that the mother was a conspirator subject to prosecution for the offense charged in the indictment and therefore was an accomplice within the meaning of section 1111.

Do the Errors Require a Reversal of the Judgments?

[21] The only basis upon which the judgments could be affirmed is that there was a conspiracy to violate the law of California by performing abortions in this state, and, as we have seen, there is evidence which might, under proper instructions, support convictions on this theory.

However, the case apparently was tried on the theory that defendants could be convicted upon a showing that they agreed to and did transport the women from California to Mexico for the purpose of having abortions performed in that country. There is ample evidence that this was the plan agreed and acted upon by defendants, but our statutes do not provide a punishment for such conduct. The court erred in refusing to instruct the jury on this subject and in receiving proof of the law of Mexico. These errors may well have confused the jurors and led them to believe that defendants could be convicted if they agreed to perform the operations in Mexico or if they conspired to violate the law of that country instead of section 274 of the Penal Code as charged in the indictment. Further, as we have seen, the court erred in failing to instruct upon the necessity for corroboration. It is clear that without the testimony of the mother and the four other women it would have been difficult, if not impossible, to convict defendants, and the jury, if properly instructed, might have disregarded their testimony. See *People v. Wallin*, 32 Cal. 2d 803, 809, 197 P.2d 734; *People v. Warren*, 16 Cal.2d 103, 117-119, 104 P.2d 1024; *People v. Papajohn*, 25 Cal.App.2d 193, 195, 76 P.2d 708; *People v. Coakley*, 108 Cal.App.2d 223, 226-229, 238 P.2d 633. In our opinion, the cumulative effect of the errors requires reversal of the judgments.

The judgments and the order denying motions for a new trial are reversed.

EDMONDS and TRAYNOR, JJ., concur.

SPENCE, Justice.

I reluctantly concur in the main conclusions of the Chief Justice, and in the reasoning given in support of those conclusions.

My reluctance stems from the fact that the evidence stands practically uncontradicted, and such evidence points unerringly to the existence of a plan entered into by defendants to commit abortions. Assuming the existence of this plan, the evidence fur-

ther shows numerous overt acts of defendants done in California in furtherance of the plan. It is not at all clear, however, that this plan contemplated the commission of any abortion in California. It is difficult to escape the logic of the Chief Justice's reasoning that under the present state of the law the conspiracy to "commit any crime", contained in Penal Code section 182, is confined to a conspiracy to commit a crime in California. The indictment herein was drawn upon that theory as it charged a conspiracy to violate section 274 of the Penal Code, but the trial was conducted upon the assumption that defendants had conspired to commit a crime in Mexico. I therefore concur in the view that the trial court committed prejudicial error in admitting evidence relating to the laws of Mexico and in refusing defendants' requested instructions relating to the inapplicability of such laws to the charge set forth in the indictment.

With respect to the question of the necessity for instructions on the requirement of corroboration, I agree in general with the views expressed by the Chief Justice. The claimed errors are based on the trial court's refusal to give requested instructions under Penal Code section 1111 and its failure to instruct on its own motion under section 1108 of that code. If these claimed errors stood alone, I do not believe that they should be held to be prejudicial. The four women upon whom the abortions were committed were not accomplices. Therefore, the testimony of each could be used to corroborate the testimony of the mother and of each of the other women. *People v. Wilson*, 25 Cal.2d 341, 346, 153 P.2d 720; *People v. Kendall*, 111 Cal.App.2d 204, 210, 244 P.2d 418; *People v. Malone*, 82 Cal.App.2d 54, 63, 185 P.2d 870; *People v. Collins*, 80 Cal. App.2d 526, 534, 182 P.2d 585. Furthermore, there was abundant evidence, apart from that given by the mother and the four women, which corroborated their testimony. As the evidence clearly indicated a plan by defendants to commit abortions either in Mexico or California, there is little likelihood that the jury would have reached a different result in the event that the trial

court had given full and correct instructions on corroboration.

However, as the error in admitting the evidence of Mexican law and in refusing to give the proposed instructions on its inapplicability was prejudicial, I feel compelled to join in the reversal of the judgments and the order denying the motions for new trial.

SCHAUER, Justice.

I concur in the judgment and in the opinion of Chief Justice GIBSON insofar as it holds that the convictions may not be supported on a showing that defendants conspired in California to perform abortions in Mexico, that the trial court erred in admitting proof of the law of Mexico on abortions, that it erred in failing to give the several instructions, or the substance thereof, as requested by defendants, in particular that the court erred in failing to instruct upon the necessity for corroboration whether such instruction was or was not requested, and that the errors require a reversal of the judgment.

I do not agree with, or concur in, any of those portions of the opinion which conclude, or which assertedly lead to the conclusion, that the four women who solicited the performance of abortions upon themselves, and upon which solicitations the claimed abortions were assertedly performed, are not accomplices, within the meaning of section 1111 of the Penal Code, of the persons who assertedly acted on their solicitations, or conspired with them for the alleged objectives, and I do not agree that the testimony of any of such accomplices is competent to corroborate the testimony of any other accomplice or that the competent evidence is sufficient to support a conviction upon the theory that defendants conspired to perform abortions in California.

The portions of the opinion relating to the matter of accomplices and to the law requiring corroboration of accomplices, impress me as evidencing a carefully studied but strained attempt to avoid expressly overruling, and at the same time to avoid so far as possible without completely over-

ruling, the mischief of the cases of *People v. Clapp* (1944), 24 Cal.2d 835, 151 P.2d 237, and *People v. Wilson* (1944), 25 Cal. 2d 341, 153 P.2d 720. The effect of those cases, so far as they are given any effect, is to overturn the age-old rule of the common law and to repeal *pro tanto* the pertinent statutes of California, requiring corroboration of the testimony of the criminal who seeks to pin guilt upon another (and thereby to reap some personal reward) by testimony that such other person acceded to the request of the witness and joined him or her in committing a crime which was initiated and solicited by the witness.

I had thought that the *Clapp* and *Wilson* cases had been substantially overruled, albeit not avowedly, by *People v. Lima* (1944), 25 Cal.2d 573, 579, 154 P.2d 698; *People v. Harper* (1945), 25 Cal.2d 862, 877, 156 P.2d 249; and *People v. Wallin* (1948), 32 Cal.2d 803, 808, 197 P.2d 734. Certainly the three latter cases are substantially inconsistent with the former. In one of the three, *People v. Harper*, the court refused to apply the doctrine where its application would have necessitated acquittal of a convicted murderer; in the other two cases the doctrine was so limited by the "distinguishing" process as to reduce it substantially to the plane of so-called oriental justice, according to which, it is said, the merits of the individual case alone determine the result. Part of the reasoning in the instant case is inconsistent with the *Clapp* and *Wilson* cases and that part is also inconsistent with that portion of the majority opinion in this same case which apparently again gives some effect to the *Clapp* doctrine. Such, I fear, will ever be our bemusement until the *Clapp* doctrine—however attractive it may have originally appeared—is finally abandoned.

It is said in this case that "A different problem [from that presented by section 1111 of the Penal Code], however, is presented by section 1108 of the Penal Code, which * * * provides that upon 'a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, the testimony of the woman upon whom the offense was committed must be corroborated. While it is true that this sec-

tion does not specifically refer to a conspiracy to procure an abortion, the language is very broad and, in our opinion, should be construed to embrace the crime charged in the present indictment. It is apparent that the purpose of the Legislature was to provide a safeguard against the danger that the testimony of the woman who submitted to and willingly participated in the abortion may be colored in expectation of immunity or may be otherwise untrustworthy. This purpose is just as applicable where the defendant is charged with conspiracy to commit an abortion as it is where he is charged with committing or attempting to commit an abortion, and it would be incongruous to interpret section 1108 as intended to deny the safeguard in one situation but grant it in the other. Moreover, such an interpretation would make it possible for the prosecution to circumvent the purpose of the section in many cases by the simple expedient of charging the defendant with conspiracy rather than with the substantive offense itself."

Except for the bald assertion that "A different problem * * * is presented by section 1108," everything in the above quoted excerpt from the majority opinion is good law, good logic, and good sense, and I concur in it. And it is all as fully applicable in relation to sections 31 and 1111 of the Penal Code as it is to section 1108. Likewise such reasoning, and the sound principles therein stated, are wholly incompatible with the *Clapp* and *Wilson* cases. I think that the cause of justice, and of clarity in the law, would be better served by complete abandonment of the split doctrine of the last mentioned cases.

CARTER, J., concurs.

SHINK, Justice.

I dissent.

The evidence is amply sufficient to support the conviction of the defendants. They were charged by indictment with "conspiracy to violate section 274, Penal Code of the State of California"—the abortion statute. The defendant Buffum was charged with four overt acts committed in

Los Angeles County. The defendant Rankin was charged with one overt act committed in Los Angeles County and four in Mexico where the abortions were consummated. Those overt acts were established by competent credible evidence and the defendants did not take the stand to refute them or explain away their obvious implications of guilt.

The defendants make two major contentions. First, that the trial court committed prejudicial error in failing to instruct on the necessity of corroboration of the testimony of the women upon whom the surgery was performed. If the prosecution had been for abortions committed in violation of section 274 they would not have been accomplices under the law of this state. Assuming that they were accomplices in this charge of conspiracy under section 182 of the Penal Code, their testimony was corroborated by the statements of defendant Buffum himself and no prejudice, in my opinion, resulted from the failure to instruct on the requirement of corroboration. The defendant Buffum stated to an arresting officer that the surgery was initially intended to be committed "down that way" and that he did not understand that they were to be taken to Mexico until the trip was completed.

Second, the defendants contend that they cannot be prosecuted in California for the commission of a crime in Mexico and that the admission of evidence to show that the Mexican abortion law is the same as the law of California was prejudicial. This contention calls for the application of section 778a of the Penal Code which provides: "Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state."

The Code Commissioner's note correctly states the purpose of this section as follows: "The section is designed to provide for the punishment of persons who in this state do

an act culminating in the commission of a crime in another [or outside of this] state." The performance of the abortions in Mexico is not questioned. I see no justification for the holding that the acts done in this state, as provided in section 778a, must constitute an attempt to commit the crime in this state. Such a construction makes that section entirely ineffective unless the substantive crime of attempt covered by section 664 of the Penal Code is proved to have been committed within this state. The language of section 778a is not so limited and it should be applied to the facts in this case. The acts done as contemplated by that section were alleged in the indictment and proved. Those acts were followed by the culmination of the commission of the crimes outside of the state. The question of the improper admission of evidence of Mexican law on the subject therefore becomes immaterial in this case. I would affirm the judgments.

Rehearing denied; SHENK and SCHAUER, JJ., dissenting.



40 Cal.2d 343

Ex parte Henry Ford McCracken.

Cr. 5418.

Supreme Court of California, in Bank.

Feb. 26, 1953.

Monroe, Chula & Lines, Santa Ana, for petitioner.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

PER CURIAM.

The writ of habeas corpus heretofore issued on the application of Henry Ford McCracken, having completely fulfilled the function for which it issued, is now therefore discharged. The petitioner is continued in the custody of the warden to await the further order of this court in the appeal proceedings in *McCracken v. Teets*, S. F. 18788.

117 Cal.App.2d 581

NEVAROV et al. v. NEVAROV et al.

Civ. 4620.

District Court of Appeal, Fourth District,
California.

April 30, 1953.

Action for an accounting and for partition of farm land acquired by plaintiff and one defendant as tenants in common and farmed by plaintiff and defendant as partners, wherein defendant cross-complained. The Superior Court of Kern County rendered a judgment adverse to the defendants and they appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that plaintiff gave \$2700 as a contribution to partnership in addition to partnership contribution originally made by plaintiff, but did not justify finding that defendant to whom the money was given did not use money for partnership purposes.

Judgment affirmed as modified.

1. Partnership $\S$ 62

In action for accounting and for partition of farm land acquired by plaintiff and defendant as tenants in common and farmed by plaintiff and defendant as partners, evidence established that partnership ended on or about January 1, 1948, and did not justify finding that plaintiff and defendant had been partners since April 1, 1944.

2. Partnership $\S$ 336(3)

In action for accounting and for partition of farm land acquired by plaintiff and defendant as tenants in common and farmed by plaintiff and defendant as partners, with plaintiff originally contributing \$12,937.63 and defendant \$21,267.26, evidence sustained finding that plaintiff later gave defendant \$2700 as further contribution to partnership, but did not justify finding that defendant did not use money for partnership purposes, and such money was properly added to contribution made by plaintiff but was improperly deducted from contribution made by defendant.

3. Partnership $\S$ 336(3)

In action for accounting and for partition of farm land acquired by plaintiff

and defendant as tenants in common and farmed by plaintiff and defendant for a time as partners, evidence sustained finding that government crop insurance was taken out in behalf of partnership and covered partnership's entire interest in crop and not merely defendant's interest therein, and where defendant collected under policy and retained all of such recovery for himself, plaintiff was entitled to have one-half of amount recovered added to contribution made by defendant to partnership.

4. Tenancy in Common $\S$ 21, 28(1)

Each tenant in common has right to occupy property and in absence of an agreement one cannot collect rent from another who has exercised that right.

5. Partnership $\S$ 336(3)

In action for accounting and for partition of farm land acquired by plaintiff and defendant as tenants in common and farmed by plaintiff and defendant as partners for a time, evidence sustained finding that parties had agreed that defendant who continued farming land after termination of partnership would pay plaintiff \$2400 rent for year following termination of partnership, but did not justify finding of existence of agreement for payment of rent by defendant for subsequent years.

6. Partnership $\S$ 83

Generally one partner is not entitled to more compensation than another in absence of an agreement to contrary. Corporations Code, $\S$ 15018.

7. Partnership $\S$ 336(3)

In action for accounting and for partition of farm land acquired by plaintiff and defendant as tenants in common and farmed by plaintiff and defendant as partners for a time, failure of trial court to find existence of agreement whereunder defendant was to be paid salary of \$400 monthly was not erroneous under evidence.

8. Partnership $\S$ 336(3)

In action for accounting and for partition of farm land acquired by plaintiff and defendant as tenants in common and farmed by plaintiff and defendant as part-

ners for a time, evidence did not justify finding that a house and tank house on such land belonged to partnership.

9. Fixtures 35(2)

In action for accounting and for partition of farm land acquired by plaintiff and defendant as tenants in common and farmed by plaintiff and defendant as partners for a time, evidence sustained finding that house and tank house on such land were attached to and became part of land owned by parties as tenants in common.

Joseph Scott, J. Howard Ziemann, Gordon L. McFarland, Los Angeles, for appellants.

Franklin L. Knox, Jr., Los Angeles, and Johnston, Baker & Palmer, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for partition of real property and for an accounting. John W. Nevarov, who will be referred to as the plaintiff, and Jack A. Nevarov, who will be referred to as the defendant, acquired 160 acres of farm land in Kern County, as tenants in common. They farmed the land as partners during the years 1944 to 1947, inclusive. The defendant lived on the land and devoted his time to the farming operations. The plaintiff lived in Los Angeles and did some work on the ranch over the week-ends. The partnership ended on January 1, 1948, and thereafter the defendant continued to farm the land.

The plaintiff brought this action on May 28, 1948. In an amended complaint he alleged common ownership of the land; that the defendant had at all times been in physical possession of the property and had received rents and profits for which he had not accounted; and that each of the parties had advanced monies for the benefit of the common property. The prayer was for a partition and for an accounting. The defendant filed an answer and cross-complaint, alleging that the real property was held by the parties as tenants in common; that until January 1, 1948, they had

farmed the land as a partnership; and that on January 1, 1948, the plaintiff withdrew from the partnership and thereafter the defendant was in sole possession and farmed the land as an individual operation. The prayer was for a partition of the real property, for an accounting as to the respective advances made for the benefit of the common property, and for an accounting as to the farming operations. The plaintiff answered the cross-complaint admitting the tenancy in common, and admitting the partnership in the farming operations for a portion of the time.

The court found that the parties owned the land as tenants in common; that since about April 1, 1944, they had been copartners; that the report of a public accountant, appointed by the court to make an audit of the books, was true and correct insofar as it went; that this report disclosed that a total of \$12,937.63 had been contributed by the plaintiff and \$21,267.26 by the defendant; that in addition thereto the plaintiff had also contributed \$2700, thereby increasing his contribution to \$15,637.63 and decreasing the contribution of the defendant to \$18,567.26; that the defendant had collected \$8,258.04 during 1947 on an insurance policy covering partnership cotton, for which he had not accounted; that this amount should be deducted from defendant's contribution reducing it to \$10,309.22; that the defendant had agreed to pay the plaintiff one-half of \$30 per acre per year as rental for his one-half of the property; that there was due to the plaintiff \$9600 as such rental for the years 1948 to 1951, inclusive; that the amount of this rental should be added to plaintiff's contribution and deducted from the defendant's contribution, making the plaintiff's contribution \$25,237.63 and the defendant's contribution \$709.22; and that defendant was also entitled to \$989.53 for material furnished, making his contribution \$1,698.75. The court ordered the land sold and appointed a referee for that purpose. It ordered that the proceeds of the sale should be applied first to the payment of debts and expenses; that the sum of \$25,237.63 should then be paid to the plaintiff and the sum of \$1,698.75 to the

defendant; and that the balance, if any, should be equally divided between them. Judgment was entered accordingly, and the defendants have appealed.

The case was tried without regard to whether the various contributions were made for the benefit of the land owned in common, or whether they were used in connection with the partnership farming operation. There is no dispute as to the basic figures adopted by the auditor and approved by the court showing that the plaintiff had contributed \$12,937.63 and that the defendant had contributed \$21,267.26. The controversy on this appeal is as to the allowance or disallowance of certain other items, and the ultimate amounts that should be paid to the respective parties before the remainder is divided on an equal basis.

[1] The defendant first contends that the finding that these parties had been copartners "since" April 1, 1944, is unsupported by the evidence. This contention must be sustained since the evidence shows, without conflict, that the partnership ended on or about January 1, 1948, and the entire case was tried on that theory.

[2] It is next contended that the court erred in allowing three charges against the defendant, and that these charges are not sustained by the evidence. In the first of these items, it was found that the plaintiff had given the defendant \$2700 as a further contribution to the partnership, which was not reflected in the auditor's report; that the defendant retained this money and did not put it in the partnership funds; and that this increased plaintiff's contribution to \$15,637.63 and decreased that of the defendant to \$18,567.26. It is argued that the evidence is insufficient to show that such a contribution was made, or to show, if it was made, that it was not placed in the partnership funds. The evidence, while conflicting, is sufficient to support the finding that this money was furnished by the plaintiff. We are unable to find in the record any evidence whatsoever which would support a finding that this money was not used for partnership purposes, and the plaintiff has pointed out none. While

this amount was properly added to the contribution made by the plaintiff, it was error to deduct it from the contribution made by the defendant. The auditor was asked what should be done in case this amount was allowed by the court and he correctly testified that this would increase the plaintiff's contribution, and would reduce that of the defendant only in the event that he did not use the money in the partnership business. While there was evidence that the money was paid in by the plaintiff, there was no evidence that it was not used in the partnership business.

[3] The next item relates to crop insurance collected by the defendant in 1947, the last year of the partnership. The court found that the defendant, on behalf of the partnership, insured the 1947 cotton crop belonging to the partnership and collected \$8,258.04 under that policy, and charged the defendant with that amount. The defendant admits that he collected and kept that amount. He contends that he took out this insurance as an individual matter, and that the plaintiff refused to have anything to do with it. This was government insurance and no premium was paid in advance, the premium being deducted from the amount due when the loss was paid. While the evidence is conflicting as to whether the plaintiff opposed the taking out of this insurance it amply supports the court's findings that it was taken out in behalf of the partnership, and that it covered the partnership's entire interest in the cotton crop and not merely the defendant's interest therein. The court erred, however, in charging the full amount received from this insurance to the defendant since he was entitled to one-half of the proceeds in any event.

[4,5] The third item relates to the rental charged to the defendant for the use of the land during the years 1948 to 1951, inclusive, being the years after the termination of the partnership and up to the trial of the action in late 1951. The court found that the defendant agreed in writing to pay the plaintiff, as rental for his interest in the land, one-half of \$30 per acre per year; that there was thus

due to the plaintiff \$2400 a year for four years, making a total of \$9600; and that this amount should be added to the plaintiff's contribution and deducted from the contribution of the defendant. The defendant contends that a cause of action for such rent was not pleaded; that each tenant in common has a right to possession of the property, and is not liable to the other for rent in the absence of an agreement therefor; that the only agreement here shown was a unilateral offer made by him which was not accepted; and that this offer applied only to the year 1948. While the pleadings made no specific mention of this item, evidence was introduced on that issue and the pleadings were sufficient to justify the court, in an equity case, in deciding all matters necessary to a full accounting between these parties. It seems to be well settled that each tenant in common has a right to occupy the property, and that in the absence of an agreement one cannot collect rent from another who has exercised that right, although a different rule prevails where one cotenant received rent from a third party. *Swartzbach v. Sampson*, 11 Cal.App.2d 451, 54 P.2d 73; *Johns v. Scobie*, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404; *McWhorter v. McWhorter*, 99 Cal.App. 293, 278 P. 454. The only agreement here was a letter written by the defendant to the plaintiff early in 1948, stating that he was taking possession of the entire acreage "for farming in 1948," that he would pay the plaintiff the reasonable rental value of his one-half interest, and that \$30 an acre was a reasonable rent. There was sufficient evidence that this was accepted and acquiesced in by the plaintiff. The evidence, therefore, supports the court's findings to the extent that the defendant had agreed in writing to pay \$2400 rent for the year 1948. The evidence was not sufficient to support the finding of an agreement to pay rent insofar as the subsequent three years are concerned. This action was commenced in May, 1948, while the agreement for that year was in force, the litigation was pending during the subsequent years, and the plaintiff was not entitled

to sit quietly by and allow the litigation to drag on for three and one-half years and then rely on a written agreement covering one year only. Aside from the year 1948, the established rules apply, and the result is that the defendant was erroneously charged with an additional \$7200.

[6,7] The defendant also contends that the court erred in failing to find that there existed between him and the plaintiff an agreement that he should be paid a salary, and that \$16,800 is due him in this connection. The usual rule is that one partner is not entitled to more compensation than another in the absence of an agreement to the contrary. In *re Estate of McConnell*, 6 Cal.2d 493, 58 P.2d 639; section 15018, California Corporations Code. The defendant testified that it had been agreed that he would receive a salary of \$400 per month during the partnership. Not only was this evidence unsatisfactory in its nature, but it was directly contradicted by the evidence on behalf of the plaintiff. No more than a conflict appears in this regard, and the usual rule applies. While not controlling, it may be observed that from an equitable point of view it would seem that defendant's use of the property for three years would be ample compensation for any extra work he performed.

[8,9] It is further contended that there is no evidence to support the court's finding that a house and tank house on this real property belongs to the partnership, and is attached to and is a part of the real property in question. The evidence is that the plaintiff owned another piece of land some distance away on which was an old house, and that this old house was torn down and some of the material, with other new material, was used in building the house and tank house on this property. While the defendant testified to an understanding that this house was not to be a part of the partnership or cotenancy property, and that the plaintiff was later to erect similar housing accommodation for himself on the common property, there was evidence to the contrary and also evidence that these

PEOPLE v. BOFORD.

Cr. 2396.

District Court of Appeal, Third District,
California.

April 30, 1953.

buildings were attached to the real property in the usual manner and could not be moved without violating the usual rules applying to such cases. The defendant was allowed the value of the old materials he thus furnished. While the court erred in finding that this house and tank house were partnership property, the evidence supports the finding that they were attached to and became a part of the real property owned by the parties as tenants in common, and no prejudice appears.

The defendant's final contention, that the court erred in its accounting methods, as a result of which he was improperly charged for some of the items above mentioned, must be upheld. The evidence supports the finding that defendant's contributions amounted to a total of \$22,256.79, including an allowance for the material from the old house, and that the plaintiff's contributions amounted to \$15,637.63, including \$2700 not covered by the auditor's report. The evidence further shows that the defendant owed the plaintiff \$4,129.02, being one-half of the amount collected on the crop insurance, and \$2400 as rent for the year 1948, a total of \$6,529.02. In making an accounting between the parties this \$6,529.02 should be added to the amount contributed by the plaintiff making a total of \$22,166.65, and should be deducted from the amount contributed by the defendant, leaving a balance of \$15,727.77. These net amounts should be paid to the respective parties instead of the amounts found by the court, before the remainder of the proceeds from the sale of the property is divided between them.

The judgment is modified by changing the provision for the disposition of the proceeds of the sale of the property so as to provide that, after the payment of the expenses and encumbrances mentioned in the judgment, there shall be paid to the plaintiff the sum of \$22,166.65 and paid to the defendant the sum of \$15,727.77, before the remainder is equally divided. As so modified, the judgment is affirmed. The defendant to recover costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.

An accused was convicted in the Superior Court, Colusa County, Belieu, J., of violating statute prohibiting willful and lewd commission of lewd or lascivious act upon a child under age of 14 years, with intent of arousing, appealing to, or gratifying lusts or passions or sexual desires of such child, and of violating statute prohibiting contributing to delinquency of a minor, and he appealed from the judgment and from order denying his motion for new trial. The District Court of Appeal, Van Dyke, P. J., held that defendant under circumstances was entitled to call deputy district attorney to witness stand and attempt to elicit from him that he had shown lewd photographs to certain witnesses before they came into court to testify, but that refusal of trial judge to permit such questions to be answered did not justify reversal of conviction.

Affirmed.

1. Criminal Law ⚡706

In prosecution of a defendant who allegedly showed a 12 year old boy lewd pictures and then allegedly placed his hands on boy's privates, permitting prosecution over defendant's objection to ask complaining witness three times just how defendant did alleged act of placing his hand on boy's privates was not misconduct where repetition was caused by youth of boy and his embarrassment and prosecution was attempting to elicit accurate statement of what occurred. Pen.Code, § 288; Welfare and Institutions Code, § 702.

2. Criminal Law ⚡660

Action of trial court in criminal prosecution in failing to rule upon an objection made by defendant's counsel to a question asked of complaining witness by prosecution was not misconduct by trial court where such failure was due to inadvertence and defendant's counsel must have been aware that objection had not been ruled upon but did not press for a ruling.

3. Criminal Law ⚖️656(1)

In prosecution of a defendant who allegedly showed a 12 year old boy lewd pictures and then allegedly placed his hands on boy's privates, discussion relative to what witness had said which followed objection of defendant's counsel that prosecuting attorney in asking a question had in effect misstated evidence did not indicate bias against defendant on part of trial court. Pen.Code, § 288; Welfare and Institutions Code, § 702.

4. Criminal Law ⚖️382

In prosecution of a defendant who allegedly showed a 12 year old boy lewd pictures and then allegedly placed his hands on boy's privates, evidence as to defendant's reason for quitting his employment by father of boy was immaterial. Pen. Code, § 288; Welfare and Institutions Code, § 702.

5. Witnesses ⚖️252

In prosecution of a defendant who allegedly showed a 12 year old boy lewd pictures and then allegedly placed his hands on boy's privates, sheriff was properly permitted to illustrate his testimony by drawing a diagram which related to floor plan of house or cabin in which defendant was arrested and which tended to show that defendant was in possession of photographs found therein. Pen.Code, § 288; Welfare and Institutions Code, § 702.

6. Criminal Law ⚖️655(1)

In prosecution of a defendant who allegedly showed a 12 year old boy lewd pictures and then allegedly placed his hands on boy's privates, record did not justify ascribing indication of bias or prejudice to remark made by trial judge when defendant requested drink of water while undergoing cross-examination, to effect that defendant gets thirsty and that jug should be brought up. Pen.Code § 288; Welfare and Institutions Code, § 702.

7. Witnesses ⚖️67, 68, 198(1)

Attorney of opposing side and trial judge, and any juror, may be called as a witness by either party in criminal prosecution, and attorneys are excepted only when their testimony would reveal communica-

tions declared privileged. Code Civ.Proc. §§ 1879-1881, 1883.

8. Criminal Law ⚖️1186(4)

Witnesses ⚖️68

In prosecution of a defendant who allegedly showed a 12 year old boy lewd pictures and then allegedly placed his hands on boy's privates, wherein witnesses testified that defendant had shown them involved photographs shortly before date of alleged offenses, and that they had not seen such photographs between such time and trial, defendant was entitled to call deputy district attorney to witness stand and attempt to elicit from him that he had shown photographs to such witnesses before they came into court to testify, but refusal of trial judge to permit answer to such questions did not justify reversal of conviction where it could not have resulted in miscarriage of justice. Pen.Code, § 288; Welfare and Institutions Code, § 702; Code Civ.Proc. §§ 1879-1881, 1883; Const. art. 6, § 4½.

Lawrence Girolami, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, and Leo V. McInnis, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was convicted of a violation of Section 288 of the Penal Code of this State and of a violation of Section 702 of the Welfare and Institutions Code. He has appealed from the judgment and from the order denying his motion for new trial.

In support of his appeal he contends: 1. That he was denied a fair trial and his liberty was taken without due process of law; and, 2. The trial court committed error in that when defendant attempted to impeach two prosecution witnesses the trial court refused to allow him to do so.

In support of his first assignment appellant cites six instances of asserted misconduct on the part of the trial court. (1) The complaining witness, a boy of 12 years of age, had testified on direct examination

that appellant had shown him a number of lewd pictures and that having done so appellant placed his hands on the boy's privates. He was then asked several times just how this was done and his counsel objected to the third question on the ground that it had been twice asked and answered. The court permitted the third question which elicited the same answer. (2) When the complaining witness had been asked a question as to where certain employees of his father had been working at a certain time he answered that he did not know. The question was repeated and counsel objected to the repetition. The court did not rule on the objection. (3) The court, says appellant, permitted the prosecution to misstate evidence through the form of a question asked. (4) When appellant's counsel was engaged in developing from a prosecution witness on cross-examination that appellant had been dissatisfied and unhappy in his employment by the father of the complaining witness and had left his employment for that reason, the court held the point immaterial and prevented further questions along that line. (5) The court permitted the sheriff to illustrate his testimony by drawing a diagram. (6) Appellant had taken the stand in his defense and was under cross-examination. He had denied that the pictures had ever been in his possession. This contradicted a number of witnesses who had testified that he had shown them the pictures and so he was asked the following:

"Q. All the testimony of those individuals is false? A. For those pictures, absolutely. It is the truth, yes, I have another picture, but not those.

"Q. Where are those other pictures? A. May I have a drink of water, please?

"By the Court: Gentlemen, bring that jug up here. Put it right up here. The man gets thirsty."

Says appellant, this remark of the court indicated to the jury that the court did not believe the defendant.

[1-5] Having related the foregoing incidents, appellant cites *People v. Mahoney*, 201 Cal. 618, 258 P. 607, holding that a new trial should be granted when the court has

been guilty of denying a fair trial, and stating that jurors are apt to be greatly influenced by the attitude of the trial judge. Appellant argues that there were numerous utterances and rulings by the court from which the foregoing incidents are selected, which conveyed to the mind of the jury the impression that the judge was convinced of the guilt of the defendant and that his sympathy was wholly with the prosecution. These assignments of misconduct required a reading of the record. That has been done. We find therein no support for the blanket charge that there are other instances indicating bias on the part of the trial judge. Taking the related incidents seriatim the following appears: The first incident where questions were repeated was brought about because of the youth of the complaining witness and his embarrassment while on the stand. The prosecution was endeavoring to elicit from the witness an accurate statement of what had occurred and we think was guilty of no misconduct under the circumstances. The second incident, that is, the failure of the court to rule upon an objection, was quite apparently due to inadvertence on the part of the judge, and counsel for the appellant must have been well aware that the objection had not been ruled upon yet did not press for a ruling. As to the third incident, counsel had objected that the prosecuting attorney in asking a question had in effect misstated the evidence. After some discussion as to what the witness had said, counsel withdrew his objection. We find nothing in the discussion which was indicative of bias on the part of the court, and in view of the withdrawal of the objection there could be no error otherwise. In respect to the fourth incident the record shows that the court itself objected to questions being asked by counsel for the appellant, stating that it thought the questioning was going far afield. Thereupon the prosecution objected and the court sustained the objection. Counsel's statement was that he wanted to show that the reason appellant had left his employment by the father of the complaining witness was because he was unhappy in the work. The court held this immaterial and we think the

court correctly ruled on the matter. The subject matter of the questions had not been gone into by the People and the record does not disclose how appellant's reason for quitting his job was material. As to the fifth incident, we think the court was clearly correct in overruling the objections to the diagram with which the sheriff, as a witness, was illustrating his testimony. It was material to show that the officer found the lewd pictures in the possession of appellant at the time of the arrest and the diagram which related to the floor plan of the house or cabin in which the arrest was made tended to show the probability that it was appellant who was in actual possession of the photographs found therein.

[6] As to the remark of the judge when the appellant asked for a drink of water, it is impossible from the record to even ascribe to the remark any indication of bias or prejudice. We realize that it is often difficult to properly assay such matters from the face of a typewritten record. However, this much can be said about the incident complained of. It could not have been a very material matter or given rise to any definite impression that the court was biased.

When the record is viewed as a whole it is found to be lacking in incidents not related by appellant which show bias or prejudice on the part of the court; and it is clear that as to the incidents related they are quite insufficient to show denial of a fair trial. The incidents relied on are, in reality, trivial, and the proof of appellant's guilt of the offenses charged was convincing.

[7, 8] Coming now to appellant's contention that the trial court was guilty of prejudicial error in restricting impeaching questions, we find the following in the record: The witness Nigsch had testified that he had been shown the photographs by the appellant shortly before the alleged date of

the offenses. On cross-examination he said he had not seen the pictures in the district attorney's office nor had he seen them in the interval between the date they were first shown him and the trial. Following Nigsch's testimony, the witness Pearson gave like testimony as to the appellant having shown the pictures to him and also said that he had not seen them thereafter until they were exhibited to him and identified by him at the trial. Thereafter counsel for the appellant sought to elicit from a deputy district attorney that he had shown the pictures to the two witnesses before they came into court to testify. The court sustained the prosecution's objection to the question. We think the objection should have been overruled. It is true, as stated by the court, that it is unusual when one side calls the attorney of the opposing side to the stand as a witness, but if the testimony sought to be elicited is material it may be done. Even the judge who is trying a case, and any juror, may be called as a witness by either party. C.C.P. Sec. 1883. Section 1879 of the Code of Civil Procedure provides that all persons except certain ones specified in Sections 1880 and 1881 may be witnesses. Attorneys are excepted only when their testimony would reveal communications declared privileged. No privilege was claimed in the instant case nor would the facts have supported such a claim had it been made. However, in view of the quantum of evidence of appellant's guilt as contained in the record, we are satisfied that the error would not justify a reversal of the judgment since the error could not have resulted in a miscarriage of justice. Art. VI, sec. 4½.

The judgment and the order appealed from are affirmed.

PEEK and SCHOTTKY, JJ., concur.

117 Cal.App.2d 565

PEOPLE v. COLEMAN.**Cr. 2872.**District Court of Appeal, First District,
Division 2, California.

April 30, 1953.

Prosecution for assault with a deadly weapon. The Superior Court, City and County of San Francisco, Herman A. Van Der Zee, J., rendered judgment of conviction, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that questions asked of defense witness on cross-examination were properly within scope of cross-examination.

Affirmed.

1. Witnesses ☞350

In prosecution for assault with a deadly weapon in which witness testified on direct examination that assault was not committed by defendant and that defendant was not on premises at time of assault, questions asked by State on cross-examination as to whether witness had been convicted of a felony, and whether witness had been confined in county jail on date of assault, which were answered affirmatively, were properly within scope of cross-examination. Code Civ. Proc. § 2048.

2. Criminal Law ☞1036(2)

Where questions asked on cross-examination were answered by witness without objection, objection that questions were not properly within scope of cross-examination could not be made for first time on appeal.

Marvin G. Giometti, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Wallace G. Colthurst, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty. of San Francisco, and Jack K. Berman, Deputy Dist. Atty., San Francisco, for respondent.

NOURSE, Presiding Justice.

Defendant was tried to a jury and convicted on an information charging an assault with a deadly weapon—a knife. On a former trial the jury disagreed and was dis-

charged. On the second trial positive evidence of the assault and of identification of the defendant was made. He appeals from the adverse judgment and from the order denying a new trial. On his appeal he is represented by counsel assigned by this court for that purpose. Counsel has presented his case ably, but his grounds are not convincing.

There is no question of the sufficiency of the evidence to sustain the verdict and no claim of error other than the assigned misconduct. Alice Mortensen, the victim of the alleged assault, was seated at the counter of a crowded bar room with Tolonen, a second victim, when defendant approached the former and placed an envelope in her pocket. She went to the rest room where she opened the envelope and found that it contained a number of striped capsules. On a previous occasion the defendant had asked her to keep a gun for him and, on her refusal, had slipped the gun into her pocket. When he failed to obtain the envelope he drew a knife and a disinterested witness saw him strike both Mortensen and Tolonen in the back and throw the knife on the barroom floor as he disappeared from the premises. Another witness who was present at the time identified defendant as the one who committed the assault. When apprehended defendant was taken to the hospital where Mortensen identified him by name and charged him with the assault. He did not deny it other than to say: "She said I did, didn't she?"

[1,2] At the trial defendant produced a former cell-mate in the county jail who testified that he witnessed the assault, that it was committed by another person, and that defendant was not present in the premises at the time. On cross-examination he was asked if he had been previously convicted of a felony which he first denied and later admitted. He was then asked if he had not been convicted of a felony in this state—violation of the gun law—which he admitted. He was then asked if he had not been confined in the county jail on October 30, 1951, the date of the assault. He answered the "city prison."

The inquiries were all proper cross-examination. They developed that on the night of the assault the witness was confined in

the city prison and could not have witnessed the assault which was committed at a place in San Francisco far remote from the location of the city prison.

There appears to be no error or misconduct in this examination. It is in accord with section 2048, Code of Civil Procedure. See also *People v. Cornett*, 93 Cal.App.2d 744, 748, 209 P.2d 647. Furthermore the inquiries were made without objection and the complaint cannot be made for the first time on appeal. *People v. Dye*, 81 Cal. App.2d 952, 960, 185 P.2d 624.

Judgment and order affirmed.

GOODELL and DOOLING, JJ., concur.



117 Cal.App.2d 610

WATKINS v. WATKINS.

Civ. 19365.

District Court of Appeal, Second District,
Division 2, California.

May 4, 1953.

Action to quiet title to a lot. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that where court, in prior divorce action brought by defendant against plaintiff, adjudged defendant to be sole owner of the lot in question, over plaintiff's contention that his quitclaim deed of lot to defendant was given as a mortgage, such adjudication was *res judicata* of plaintiff's cause.

Judgment affirmed.

1. Judgment ◊713(2)

A prior judgment is *res judicata* on all matters which have been, or could have been, raised in controversy in which such judgment was entered.

2. Judgment ◊540

Doctrine of "*res judicata*" rests upon ground that party to be affected, or some

other with whom he is in privity, has litigated or has had an opportunity to litigate same matter in former action in court of competent jurisdiction, and should not be permitted to litigate it again to the vexation of his opponent.

See publication *Words and Phrases*, for other judicial constructions and definitions of "*Res Judicata*".

3. Divorce ◊255

Where court, in wife's divorce suit, adjudged wife to be owner of a lot previously quitclaimed by husband to wife, over husband's contention that quitclaim deed was given as a mortgage, husband's subsequent action against wife to quiet title to lot, based upon same claim, was barred by doctrine of *res judicata*.

Ivan J. Johnson III, Los Angeles, for appellant.

Sidney H. Rivkin and Sydney S. Finston, Hollywood, for respondent.

MOORE, Presiding Justice.

From a judgment of nonsuit in an action to quiet title, plaintiff appeals.

On October 11, 1951, appellant filed his complaint alleging that on January 4, 1948, he was owner of lot 119, tract 557 in Los Angeles County; that he borrowed \$600 from respondent to make up delinquent payments on his note secured by a lien on the lot; that at the time of the loan appellant executed a deed of the lot to himself and respondent in joint tenancy with the agreement that when the amount of the loan should be repaid, respondent would reconvey the lot to appellant as his "sole and separate property" and the joint tenancy would be terminated; that the deed was executed as a mortgage to secure the loan and was executed by reason of the false representations of respondent.

In a second count he alleged that on February 17, 1951, he "did issue a quitclaim deed" conveying to respondent lot 119, reasonably worth \$30,000 with the agreement that (1) the deed should not be recorded; (2) on his repayment to her

of \$695, respondent would return the deed to appellant. He further alleges that on March 5, 1951, she filed the instrument for recordation; he is ready, willing and able to pay respondent \$695 loaned to him; he made the quitclaim deed for the sole purpose of securing his debt to respondent by reason of his reliance upon her promise to return the deed upon her receipt from him of \$695.

The parties were married June 30, 1947. Prior thereto appellant acquired lot 119. In November 1950 respondent filed suit for divorce. In his answer in the latter action, appellant alleged that the quitclaim deed was intended to serve as a mortgage of the lot. At the trial Mrs. Watkins produced the quitclaim deed from her husband who then and there contended that it was given as a mortgage. Upon the proof adduced upon the issue thus raised with reference to the deed, the court found Mrs. Watkins to be sole owner of lot 119 and directed her to amend her pleadings to conform with the proof. Basing its decree upon the amended pleadings and the evidence introduced by each of the parties, the court adjudged respondent to be the owner of the lot.

When the instant action to quiet title came on for trial, appellant was met with a plea of *res judicata*, and upon submission of the matter, the court granted the motion of respondent for a nonsuit.

[1-3] An order dismissing an action constitutes a judgment. Code Civ.Proc. § 581d. A prior judgment is *res judicata* on all matters which have been, or could have been, raised in the controversy in which such judgment was entered. *Bennett v. Forrest*, 24 Cal.2d 485, 497, 150 P.2d 416; *Panos v. Great Western Packing Company*, 21 Cal.2d 636, 637, 134 P.2d 242; *Sutphin v. Speik*, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497. In the *Panos* case the doctrine is emphasized by the pronouncement that it "rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to

litigate it again". [21 Cal.2d 636, 134 P.2d 243.] Appellant's cause comes under the ban thus announced.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.



117 Cal.App.2d 511

PEOPLE v. HARMON.

Cr. 2850.

District Court of Appeal, First District,
Division 1, California.

April 30, 1953.

Defendant was convicted in the Superior Court, City and County of San Francisco, Twain Michelsen, J., of two counts of robbery and of assault with a deadly weapon, and he appealed from judgment of conviction and order denying his motion for new trial. The District Court of Appeal, Peters, P. J., held, *inter alia*, that evidence sustained convictions.

Judgment and order affirmed.

1. Assault and Battery ☞92

Robbery ☞24(1)

Evidence sustained conviction of defendant on two counts of robbery and of assault with a deadly weapon.

2. Criminal Law ☞741(2)

In prosecution of defendant on two counts of robbery and for assault with a deadly weapon, wherein defendant was identified by victim at trial, and at police line-up about a month after the robbery, and defendant challenged the police line-up identification on ground that police had pointed him out to victim before identification was made, conflicting testimony made question for jury on fairness of identification.

3. Criminal Law ☞517(4)

A confession is not admissible in a criminal case until proof of the corpus delicti.

4. Criminal Law ⇨563

Proof of the corpus delicti does not involve proof of the identification of the defendant as the culprit.

5. Criminal Law ⇨522(1), 1158(4)

A confession which is not free and voluntary in that it has been obtained by force and threats, is not admissible in evidence, but if there is substantial conflict in testimony as to commission of acts relied upon to show that confession was involuntary, then question of admissibility is one of fact on which the determination of the trier of facts is conclusive.

6. Criminal Law ⇨736(2)

In prosecution of defendant on two counts of robbery and for assault with a deadly weapon, wherein defendant contended that a confession made by him was involuntary in that it had been result of a brutal beating which was denied by officers to whom confession had been made, which denial was corroborated by police stenographer, question of voluntariness of confession was properly submitted to jury under proper instruction.

7. Criminal Law ⇨1158(4)

Where question of voluntariness of confession of defendant charged on two counts of robbery and for assault with a deadly weapon was submitted to jury under proper instructions, implied finding of jury that confession was free and voluntary could not be disturbed on appeal.

8. Criminal Law ⇨372(1), 783(1)

In prosecution of defendant on two counts of robbery and for assault with a deadly weapon, wherein confession of defendant which was admitted in evidence, also included reference to another armed robbery not included in information, evidence of the uncharged crime showed a common plan or scheme, and instruction to effect that evidence of such crime was introduced for a limited purpose and not to prove a distinct offense or continual criminality, but was relevant upon whether it showed identity, motive, intent or plan, scheme or design, was proper.

9. Criminal Law ⇨829(11)

Refusal of proper instruction on legal effect of confession was not error when substance thereof was covered by given instruction which was simpler, clearer and fairer than proffered instruction.

10. Criminal Law ⇨1169(6)

Where information charged defendant with three counts of armed robbery and one count of assault with intent to commit murder, defendant was not entitled to complain on appeal of improper admission of evidence relative to count of armed robbery of which he was acquitted.

11. Criminal Law ⇨1166½(12)

In prosecution of defendant for armed robbery and assault with a deadly weapon, wherein court observed that defendant was deliberately evasive, and then immediately told jury that he made comment under his constitutional power to comment on evidence, and directed defendant to answer questions without argument or evasions, such statement as to source of power of court to comment, coupled with subsequent prompt instruction to jury on effect of comment, and that jury was sole judge of credibility of witnesses, and a similar instruction at end of trial, cured any error which might have been made.

12. Criminal Law ⇨655(1), 1166½(12)

The trial judge should be careful to be a judge and not an advocate, and should not throw the weight of his judicial position against the accused, but he is not required to remain silent when counsel for defendant is obstructive, technical, and irritating in manner of making and arguing his objection, and where defendant is evasive and argumentative as a witness, and, in such instance, the occasional comments of judge and his attempts to clarify the testimony, do not constitute prejudicial error.

13. Criminal Law ⇨1119(3)

Assignment of error that trial court committed prejudicial error by forcing jury to reach verdict by threatening to send them to hotel for night if they did not reach verdict in half an hour, was not based upon the record, and when no steps

to augment record had been made, assignment could not be considered by appellate court.

14. Criminal Law ⇨1168(2)

Where defendant did not claim surprise nor move for a continuance, nor ask to introduce further evidence, when his accomplice was permitted to testify as a prosecution rebuttal witness, purportedly on theory that defendant as witness on his own behalf had repudiated a confession which such evidence was offered to rebut, admission of such evidence did not constitute prejudicial error, since trial court has wide discretion in permitting prosecution, upon motion, to reopen the case in chief.

Alfred J. Hennessy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and David K. Lener, Deputy Atty. Gen., San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant was charged by information with three counts of armed robbery, and with one count of assault with intent to commit murder. He also was charged and admitted two prior felony convictions. He was convicted of two counts of robbery and of assault with a deadly weapon. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1] An examination of the record demonstrates that the evidence is sufficient to support all three convictions. The facts are as follows:

Robbery and the Assault Committed Against David Pelsinger.

Pelsinger on June 14, 1951, was robbed and shot while in the garage of his home in San Francisco. He had returned home about 6:45 a. m., when two men, one of whom he identified as defendant, followed him into the garage and at gun point demanded his money. Defendant wielded the gun. Pelsinger testified that he handed his money, which he claimed was \$1,100 and which the accomplice later testified was

\$900, over to the bandits; that he then grappled with defendant; that defendant shot at him twice, one shot hitting him in the neck; that the two bandits then escaped by automobile.

[2] Pelsinger identified defendant at the trial as the robber who had shot him. He also identified him in a police line-up about a month after the robbery. Defendant challenges the police line-up identification on the ground that, according to his testimony, the police pointed defendant out to Pelsinger before the identification was made. Defendant's testimony on this point was corroborated by a fellow prisoner, but was directly and unequivocally contradicted by the police officer who conducted the line-up, and by Pelsinger. In view of this conflict the determination of the fairness of the identification was for the jury.

Defendant's accomplice and fellow bandit, Jack Stanton, was called by the prosecution in rebuttal. He testified in detail as to how he and defendant planned the robbery, trailed Pelsinger to the garage, and committed the robbery and the assault. At the time he testified, Stanton was in San Quentin for another crime and had been charged with the Pelsinger robbery. He admitted that by reason of his testifying against defendant he was hopeful of receiving leniency on the Pelsinger charge, but denied that the prosecuting or other officials had made any promises to him of leniency or immunity.

Defendant testified that he was home in bed during the time when Pelsinger was held up and shot.

In addition to this testimony, defendant made two confessions to the police officers in which he admitted that he had committed the Pelsinger robbery and assault. The admissibility of this confession is challenged on this appeal, but, for reasons hereafter stated, we are of the opinion that the confession was properly admitted. This being so, the confession constitutes additional evidence that appellant committed the two crimes charged. The evidence in support of these two charges is obviously sufficient.

Robbery of Samuel W. Pearce.

Defendant was acquitted of this charge, so that the evidence relating to it will not be reviewed.

Robbery of Thomas S. Pothier.

Pothier, the operator of a grocery store, testified that on June 28, 1951, he was held up by a man with dark glasses and a soft hat, wearing a top coat. The top coat was open, disclosing that the bandit carried an automatic pistol in the waistband of his trousers. The robber demanded money. Pothier thereupon handed him \$45 from the cash register, and, while doing so, grabbed the robber's gun hand and started to wrestle with him. During the melee Pothier hit the robber in the head with a beverage bottle and then hit him across the hand causing him to drop the gun. While Pothier was picking up the gun the robber escaped without the money. The gun was loaded. When arrested, defendant had a cut across the back of his hand. He claimed that he received this cut while changing a tire, and was corroborated by his brother-in-law.

The identification of defendant as the robber by Pothier is equivocal. He testified that he got a look at the robber while wrestling with him and after he hit him with the bottle, but was unable positively to identify defendant in the Municipal Court hearing or on this trial. He did testify that he had the impression from the size and appearance of the robber as compared with those of the defendant that they were similar.

[3, 4] It must be conceded that the evidence of identification by Pothier is most unsatisfactory and, standing alone, would be insufficient. But it does not stand alone. The confession, if properly admitted into evidence, supplied this missing link in the chain of proof. While a confession is not admissible until proof of the *corpus delicti*, see cases collected 8 Cal.Jur. p. 234, § 303, here the *corpus delicti*, the fact that a crime was committed, was fully established by the evidence of Pothier. Proof of the *corpus delicti* does not involve proof of the identification of the defendant as the culprit. See cases collected in 8 Cal.Jur. p.

165, § 247, particularly cases cited in fn. 11 on p. 166. Thus the confession, if properly admitted, is substantial evidence of identification. In our opinion, the confession was properly admitted. This being so, the evidence is sufficient to sustain the judgment on this count.

[5] Defendant strenuously contends that the confession was not free and voluntary, but was obtained by force and threats. Of course, if the evidence so showed and was believed, the confessions should not have been admitted. *People v. Borello*, 161 Cal. 367, 119 P. 500, 37 L.R.A., N.S., 434; *People v. Siemsen*, 153 Cal. 387, 95 P. 863. But if there is a substantial conflict in the testimony as to the commission of the acts relied upon to show that the confession was involuntary then it becomes a question of fact as to who is telling the truth. The determination of the trier of the facts in such cases, as with other fact questions, is conclusive. *People v. Cucco*, 85 Cal.App.2d 448, 193 P.2d 86; *People v. Lisenba*, 14 Cal.2d 403, 94 P.2d 569, affirmed 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166; *People v. Doty*, 31 Cal.2d 696, 192 P.2d 454.

Here the evidence on the issue was directly conflicting. Defendant testified that, before he confessed, assistant inspector Maguire of the police department subjected him to a brutal beating, which he described in detail, and threatened to continue unless defendant confessed. He then, in fear of his life, orally confessed to inspector Cruickshank, who repeated the threats, and then, still in fear of further mistreatment, confessed in the presence of the two police officers and a police stenographer. A cell mate of defendant's corroborated this story to the extent of testifying to Maguire shoving defendant to his knees and warning him to give the right answers when Maguire summoned defendant from his cell for questioning, and in testifying that defendant appeared normal when he left the cell but when he returned he had a bad cut on his head, his arm was sore, his ribs and stomach were bruised, his hand was bleeding and he looked beaten and dishevelled. If these stories were believed, the confession obviously should not have been admitted into evidence.

But these stories were not believed. The trier of the facts elected to believe the conflicting testimony. Cruickshank and Maguire directly and unequivocally denied that there had been any violence, threats or promises of immunity in any phase of the questioning. They also testified that none of the proceedings in relation to the confessions took place in the inner office where defendant had testified he had been taken and beaten, but took place in the outer office of the department in full view of all present. This phase of their testimony was corroborated by the police stenographer. Defendant's description of the room where he claims he was beaten was quite inaccurate.

[6, 7] In view of these major and substantial conflicts, the determination of the trial judge to admit the confession, and the implied finding of the jury, based on proper instructions, that the confession was free and voluntary, cannot be disturbed on this appeal.

[8] The confessions, both the one told to the two police officers without a reporter being present, and the one taken down by the reporter but unsigned by defendant, are complete and detailed. They cover all the essential elements of the crimes of which defendant has been convicted, and most of their details. The confession also included another armed robbery not included in the information. Defendant contends that evidence of this crime should not have been admitted over his objection, and that the instruction based on this evidence should not have been given. The instruction, a long and involved one, was to the effect that the evidence of the uncharged crime was introduced for a "limited purpose," and not to prove a "distinct offense" or "continual criminality" but could be considered as relevant on the issue of guilt on the charges involved dependent upon whether it showed identity, motive, intent or a plan, scheme or design. The evidence of the uncharged crime did show a common plan or scheme, the *modus operandi* being precisely the same as that employed in the charged crimes. The evidence, and the instruction based thereon, were therefore proper. *People v. Baker*, 25 Cal.App.2d 1, 76 P.2d

111; *People v. McMonigle*, 29 Cal.2d 730, 177 P.2d 745; *People v. Albertson*, 23 Cal. 2d 550, 145 P.2d 7; *People v. Kynette*, 15 Cal.2d 731, 104 P.2d 794; *People v. Burns*, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9.

[9] The defendant complains that an instruction proffered by him on the legal effect of a confession should have been given. The proffered instruction correctly told the jury that a confession could not establish the fact that a crime had been committed, that the *corpus delicti* had to be established by independent evidence, but that such independent evidence need not prove identity. The proffered instruction undoubtedly correctly stated the law, but its substance was given by the trial court in another instruction. The one given was much simpler, clearer and fairer than the proffered instruction. This being so, it was not error to refuse to give the proffered instruction.

[10] Defendant next objects to certain evidence which he claims was erroneously admitted over his objections, or which should have been stricken on his motion. This evidence related to the count dealing with the Pearce robbery. Defendant was acquitted of this charge, so that he cannot complain of the improper admission of evidence relating to that count.

[11] Defendant also contends that the trial judge committed prejudicial misconduct in his comments to the jury during the cross-examination of defendant. An examination of that portion of the record discloses that many of defendant's answers were argumentative and not responsive. Finally the court observed that defendant, in the trial judge's opinion, was "deliberately evasive," and then immediately told the jury that he made that comment under his constitutional power to comment on the evidence, and directed defendant to answer the questions without argument or evasions. On the next day defendant's counsel made a motion for a mistrial based on this comment, and the motion was extensively argued out of the presence of the jury. The court, in the presence of the jury, denied the motion, and then gave a full, complete

and lengthy instruction to the effect that the jury was the sole judge of the credibility of the witnesses. A similar instruction was given at the conclusion of the trial.

The comment probably should not have been made, but we cannot hold that, as a matter of law, the making of it constituted prejudicial misconduct. The statement as to the source of the power to comment, the prompt instruction to the jury on the effect of the comment, and the instruction at the end of the trial, cured any error that had been made. *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193; *People v. Van Wie*, 72 Cal.App.2d 227, 164 P.2d 290; *People v. Robinson*, 73 Cal.App.2d 233, 166 P.2d 17; *People v. King*, 30 Cal.App.2d 185, 85 P.2d 928.

[12] Defendant makes the contention, without specific assignment of error, that the trial court threw its weight behind the prosecution by occasionally taking over the examination of witnesses and by other actions. The trial judge should, of course, be very careful to be a judge and not an advocate, and should not throw the weight of his judicial position against the accused. *People v. Boggess*, 194 Cal. 212, 228 P. 448; *People v. Cole*, 113 Cal.App.2d 253, 248 P.2d 141. But the trial judge is not a sphinx. He is not required to remain silent when, as the record here shows, counsel for the defendant was frequently obstructive, technical, and irritating in the manner of making and arguing his objections, and where, as the record also shows, defendant as a witness was in fact evasive and argumentative. Under the circumstances, the occasional comments of the trial judge, and his attempts to clarify the testimony, cannot be held to have prejudiced defendant improperly.

[13] The defendant next contends that the trial court committed prejudicial error by forcing the jury to reach a verdict by threatening to send the jurors to a hotel for the night if they did not reach a verdict in half an hour. The trouble with this contention is that the facts upon which it is based do not appear in the record.

The record shows that the case was given to the jury a little after noon. It deliberated for several hours, and twice returned to the courtroom for instructions. It again returned to the courtroom at 12:35 a. m. The trial court asked the jury how it stood, and was told that it had reached verdicts on two counts, but stood eleven-to-one on the other two counts. The trial judge then stated that he would give the jury the option of further deliberating or of going to a hotel for the night, and suggested that they return to the jury room to discuss the matter. It was ascertained from the jury, by agreement of counsel, that the jury was then undecided on the Pearce and Pothier counts. The jury returned at 1:37 a. m. with verdicts on all four counts, acquitting defendant on the Pearce count and convicting him of the Pothier count. The purported statements by the trial court which might constitute a threat or coercion, and which defendant's counsel claims were made, just do not appear in the record. Not being based on the record, and no steps to augment having been made, the point raised cannot and should not be considered.

[14] The last contention of defendant necessary to mention is his objection to the trial court permitting the accomplice Stanton to testify as to the facts of the crime as a prosecution rebuttal witness. Defendant urges that this evidence should have been introduced by the prosecution as part of its case in chief. The state argues that the defendant as a witness on his own behalf had repudiated the confession and that this evidence was offered to rebut the testimony of defendant. See *People v. Gerbel*, 71 Cal.App.2d 325, 162 P.2d 946; *People v. Moore*, 81 Cal.App.2d 799, 185 P.2d 32. Probably this testimony of Stanton's, being directed to the commission of the two Pel-singer counts, was technically part of the prosecution's case in chief. But defendant did not claim surprise, nor move for a continuance, nor ask to introduce further evidence. The trial court, of course, has wide discretion in permitting, upon motion, the prosecution to reopen the case in chief. This being so, no prejudicial error

occurred in permitting the evidence. *McBride v. Clara Barton Hospital*, 75 Cal. App. 161, 241 P. 941; *Mastro v. City of San Diego*, 17 Cal.App.2d 331, 62 P.2d 407.

The order and judgment appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



117 Cal.App.2d 607

SAMPSON v. SAPOZNIK et al.
Civ. 19596.

District Court of Appeal, Second District,
Division 1, California.
May 4, 1953.

Civil suit wherein the Superior Court, Los Angeles County, rendered money judgment in favor of plaintiff and in another paragraph adjudged that defendants were entitled to assets of corporation and defendants appealed. The Superior Court, Los Angeles County, then granted plaintiff's motion to correct said judgment *nunc pro tunc* by striking last paragraph and defendants appealed and moved that two appeals be consolidated. The District Court of Appeal, White, P. J., held that question as to whether trial court exceeded its jurisdiction or abused its discretion in correcting judgment *nunc pro tunc* had no relation to issues to be raised in attack or defense of judgment on appeal and appeals would not be consolidated.

Motion to consolidate appeals denied.

1. Appeal and Error ⇨816

The granting or denying of motion to consolidate appeals is entirely in discretion of reviewing tribunal.

2. Appeal and Error ⇨816

In view of fact that in consideration of motion for consolidation it is factual question as to whether issues presented are so related as to make it advisable to consolidate, every motion for consolidation must, of necessity, be disposed of on its own merits.

3. Appeal and Error ⇨863

Appeal from order correcting judgment *nunc pro tunc* would turn on question of whether error was clerical or judicial and, hence, whether trial court had jurisdiction to correct judgment after appeal had been taken.

4. Appeal and Error ⇨816

Question as to whether trial court exceeded its jurisdiction or abused its discretion in correcting judgment *nunc pro tunc* by striking part of judgment awarding defendants assets of corporation after appeal had been taken had no relation to issues to be raised in attack or defense of judgment awarding money to plaintiff and assets of corporation to defendants on appeal and appeals would not be consolidated.

Pacht, Tannenbaum & Ross and Maxwell E. Greenberg, Los Angeles, for appellants.

Dryer, Burris & Lagerlof and H. Melvin Swift, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

Judgment in favor of respondent in the above entitled action in the Superior Court of Los Angeles County was filed on June 26, 1952, and was entered on June 27, 1952. Said judgment, after recitals of fact, reads as follows:

"Now, therefore, by reason of the findings of fact and conclusions of law aforesaid,

"It is ordered, adjudged and decreed that judgment be given for plaintiff and against defendants Benjamin A. Sapoznik, Theodore J. Ticktin, and Joseph Landfield in the sum of Nineteen Thousand Five Hundred Dollars (\$19,500.00) with interest at the rate of Seven per cent (7%) per annum from October 6, 1950 in the sum of \$2,354.63, and that plaintiff recover from said defendants his costs of suit in the sum of \$191.85.

"It is further ordered, adjudged, and decreed that said defendants are entitled to the assets of Scarfanet Co., a California corporation which remain

in the possession of the plaintiff, consisting of office equipment and the balance of merchandise inventory."

Notice of appeal was duly and timely filed by appellant Theodore J. Ticktin on September 3, 1952, and by appellant Benjamin A. Sapoznik on September 22, 1952.

On November 12, 1952, respondent filed a notice of motion to correct the aforesaid judgment nunc pro tunc by striking therefrom the last paragraph. This motion was accompanied by an affidavit of Attorney Joseph J. Burris, of counsel for respondent, to the effect that "three successive and separate sets of findings of fact and conclusions of law had been prepared and two successive judgments had been submitted pursuant to instructions of the court, the final set of findings of fact and conclusions of law having been prepared after a conference in chambers between the attorneys for all parties and the court." Said affidavit of Joseph J. Burris further stated that the court "had signed the set of findings of fact and conclusions of law prepared last in point of time, but had signed the judgment prepared first in point of time; that the judgment signed did not express the intention of the court."

On December 3, 1952, the court by minute order granted the motion to correct the judgment nunc pro tunc "on all the grounds stated in the motion." Appellants thereupon filed their notice of appeal from said minute order.

Appellants now make application to this court for an order consolidating the two aforesaid appeals.

As grounds for consolidation the appellants urge:

"1. Said consolidation will reduce the time required of this Honorable Court in giving proper consideration to the matters on appeal.

"2. Said consolidation will substantially reduce the costs on appeal, including costs of the Clerk's Transcript and costs of printing briefs.

"3. The subject matter of the appeals is related so as to make it entirely

proper for the two appeals to be considered at one time."

[1] It is well established that the granting or denying of a motion to consolidate appeals is entirely in the discretion of the reviewing tribunal. *Silver v. Bank of America*, 43 Cal.App.2d 835, 838, 111 P.2d 666.

[2] Since in the consideration of a motion for consolidation it is a factual question as to whether the questions presented are so related as to make it advisable to consolidate and whether the consideration of the appeals will be expedited by the consolidation, every motion for consolidation must, of necessity, be disposed of on its own merits.

[3] In the motion now engaging our attention we are persuaded that the appeal from the order correcting the judgment nunc pro tunc will manifestly turn on the question of whether the error was clerical or judicial, and hence whether the trial court had jurisdiction to correct the judgment after an appeal had been taken.

[4] The original judgment awarded respondent a money judgment against appellants and also held that the latter were entitled to the assets of a corporation. This last-mentioned clause was stricken by the order amending the judgment. It might well be that appellants' brief on the appeal from the judgment would depend upon a determination by this court as to whether the order correcting the judgment was valid. We fail to see where the question as to whether the trial court exceeded its jurisdiction or abused its discretion has any relation to the issues to be raised in attack or defense of the judgment on appeal. We are impressed that it might be that the second appeal, taken from the order correcting the judgment, might well have to be determined before the appeal from the judgment could be properly briefed.

For the foregoing reasons, the motion to consolidate the aforesaid appeals is denied.

DORAN, J., concurs.

**MYRICK v. SUPERIOR COURT OF
STATE, IN AND FOR SANTA
CLARA COUNTY. ***

Civ. 15683.

District Court of Appeal, First District,
Division 1, California.

April 29, 1953.

Hearing Granted June 19, 1953.

Petition for writ of prohibition to restrain trial court from further proceeding in personal injury action in which petitioner was a defendant, and in which he was served with process while residing outside of state. The District Court of Appeal, Peters, P. J., held that statute authorizing acquisition of jurisdiction in personam by service on defendant outside state, where defendant was resident at time of commencement of action or at time of service, gave reasonable notice and opportunity to defend, and was not violative of due process clause of federal Constitution.

Alternative writ discharged and petition for peremptory writ denied.

1. Automobiles $\S$ 235

Constitutional Law $\S$ 309(2, 3)

Statutes providing for service on non-resident defendants outside the state, or upon the registrar of motor vehicles in the state, in causes of action arising out of use of motor vehicles within the state, do not violate due process, but such service will suffice to give jurisdiction in personam on theory of an implied consent. Vehicle Code, $\S$ 404.

2. Constitutional Law $\S$ 309(2)

The test of whether a statutory mode of service for obtaining jurisdiction in personam over an absent defendant is violative of due process, is whether the statute under consideration is reasonably calculated to give the defendant notice and an opportunity to defend. Code Civ.Proc. $\S\S$ 412, 413, 417.

3. Constitutional Law $\S$ 70(3)

The determination of policy, such as policy with respect to obtaining of jurisdiction in personam by personal service on a nonresident if he was a resident when the action was commenced or when service was made, is matter for the legislature in

the first instance, and function of courts is merely to interpret and pass on the validity of such policy. Code Civ.Proc. $\S\S$ 412, 413, 417.

4. Constitutional Law $\S$ 309(2)

Process $\S$ 70

Statute which in effect purported to give jurisdiction in personam by personal service of a copy of summons and complaint on a defendant outside the state, if defendant was a resident of state at time of commencement of action or at time of service, gives reasonable notice and opportunity to defend, and is not in violation of due process clause of federal Constitution. Code Civ.Proc. $\S\S$ 412, 413, 417; U.S.C.A. Const. Amend. 14.

5. Process $\S$ 70

Statute providing for acquiring of jurisdiction in personam over absent defendant by service on him outside state, if defendant was resident at commencement of action or at time of service, was not intended by legislature to become effective only when and if Supreme Court might reverse or modify rule of previous case that existing statutes relating to constructive service, did not authorize out of state service. Code Civ.Proc. $\S\S$ 412, 413, 417.

6. Constitutional Law $\S$ 106

A person has no vested right in the mode and manner of service existing at time a cause of action arises, and consequently, fact that cause of action arose before effective date of statute permitting acquisition of jurisdiction in personam by service on defendant outside the state, where defendant was a resident at commencement of action or at time of service, did not render service under such statute invalid. Code Civ.Proc. $\S\S$ 412, 413, 417.

Sidney L. Weinstock, Roger Anderson and Harold J. Chase, San Francisco, for petitioner.

James F. Boccardo, San Jose, for respondent.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

* Subsequent opinion 261 P.2d 255.

By this proceeding petitioner seeks to restrain the trial court from further proceeding in a personal injury action in which he is a defendant, and in which he was served with process while residing outside of California, it being his contention that such service was void and conferred no jurisdiction on the California courts.

The facts, stated chronologically, are as follows:

July 19, 1951—On this date petitioner and the real party in interest were involved in an automobile accident in California. Petitioner was then a resident of California.

September 22, 1951—This is the effective date of section 417 of the Code of Civil Procedure, which purports to permit service outside of the state on persons who were residents of this state when the cause of action was filed. Stats. of 1951, p. 2537, Chap. 935.

November 28, 1951—On this date the real party in interest filed an action in Santa Clara County against petitioner, who was then still a resident of California.

November 28, 1951, to February 5, 1952—Some time between these dates petitioner was arrested at the request of the New York authorities and taken to New York. The real party in interest made diligent but unsuccessful efforts to serve petitioner in this state before he left the state.

February 5, 1952—Petitioner alleges that on this date he became a resident of New York, and ever since such date has continued to reside there. There is no averment as to the domicile of petitioner.

April 8, 1952—The real party in interest filed an affidavit averring that the defendant in the civil action, petitioner here, had left the state and was on said date a resident of New York in a designated penitentiary. On this same date an order for publication of summons, and for personal service of the summons and complaint on petitioner in New York, was made. As a basis for this order the trial court found that on July 19, 1951, the date of the accident, and on November 28, 1951, the date the civil action was filed, the defendant in the civil action was a resident of Califor-

nia, but has since left the state and now resides in New York.

April 18, 1952—It is admitted that on this date petitioner was personally served with process in the civil action in New York.

November 10, 1952—Petitioner moved to quash the service of summons upon the ground that the trial court had not acquired jurisdiction over him or over the subject matter.

January 6, 1953—Motion to quash denied.

January 13, 1953—This petition for a writ of prohibition was filed.

In addition, the petition avers that it is impossible for petitioner to return to California to defend the action, and that to uphold the validity of the service would deprive him of due process.

Before discussing the legal issues presented, reference should be made to the statutes involved. The basic problem involves the interpretation and validity of section 417 of the Code of Civil Procedure, which became effective September 22, 1951. It provides: "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Section 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service."

This section on its face purports to be a limitation on sections 412 and 413 of the Code of Civil Procedure. Both of these sections were amended, in minor respects, in 1951 at the same time that section 417 was adopted. Stats. of 1951, Chap. 1737, § 48, p. 4099; Chap. 43, p. 167. As amended, they read in part as follows:

"Sec. 412. Where the person on whom service is to be made resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; * * * and it also appears by such affidavit, or by the veri-

fied complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; * * * such court, or judge, may make an order that the service be made by the publication of the summons."

"Sec. 413. The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week; but publication against a defendant residing out of the State, or absent therefrom, must be pursuant to Section 6065 of the Government Code, except in proceedings instituted pursuant to the provisions of Chapter 4, Title 3, Part 3, of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. Service is complete upon the making of such personal service or at the expiration of the time prescribed by the order for publication, whichever event shall first occur. * * *"

It is the basic theory of petitioner that under the decisions of the California courts it constitutes a denial of due process to provide by statute that this state may secure *in personam* jurisdiction, by publication or by service outside the state, over an absent nonresident defendant. It is urged that if section 417 so provides it is unconstitutional. This argument is predicated upon the case of *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, decided in 1896, which, in turn, is based upon *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, decided in 1877. In the *De la Montanya* case, in a four-to-three de-

cision, it was held that sections 412 and 413 of the Code of Civil Procedure should not be interpreted to permit the obtaining of jurisdiction over an absent defendant in an *in personam* action because if such sections were so interpreted they would be unconstitutional under the rule of *Pennoyer v. Neff*. It is argued that since the rule of the *De la Montanya* case has not been limited by any subsequent California decision so as to make the sections applicable to personal service over absent defendants, and since this court in 1945, in *Pinon v. Pollard*, 69 Cal.App.2d 129, 158 P.2d 254, expressly rejected the argument that subsequent federal cases had broadened the concept of jurisdiction over absent defendants, the *De la Montanya* case remains as binding authority on this intermediate appellate court, and compels a holding that the service here challenged was void.

The *De la Montanya* case undoubtedly supports petitioner. It was there held that California could not secure jurisdiction over an absent domiciliary by publication under sections 412 and 413 of the Code of Civil Procedure so as to render a valid judgment against him for alimony and support, child custody and suit money. An order refusing to vacate such judgment was reversed, even though defendant was not only domiciled in California but had left this state to evade service. The court held that California had no power, even over one of its own domiciliaries, to secure jurisdiction over such absent defendant because to so hold would be to encroach upon the independence of the sister state. Throughout the opinion it is broadly implied, if not expressly held, that to thus provide that service by publication is sufficient to secure jurisdiction over an absent defendant in an *in personam* action would be to deny to such defendant due process under the federal Constitution. The basic case relied upon is *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565.

It will be noted that both the *De la Montanya* and *Pennoyer* cases involved service by publication. Although sections 412 and 413 of the Code of Civil Procedure still permit service by publication, the newly enacted section 417 of that code limits those

sections by requiring actual personal service outside the state. While the *De la Montanya* case contains a dictum to the effect that the rule there announced invalidated not only constructive service but actual service outside the state, such problem was not there involved. This distinction will become of vital importance when, later in this opinion, we discuss the reasonableness of the method provided in the statute.

There is no doubt that the rule of the *De la Montanya* case, together with its dictum on personal service outside the state, if it is still the law, would invalidate the service here involved. But the real party in interest contends, and we agree, that that case is no longer the law and should not be followed in situations covered by section 417.

As already pointed out, the *De la Montanya* case is predicated upon *Pennoyer v. Neff* which held that one state lacked power to acquire jurisdiction *in personam* over a defendant in another state by such method of service. This is no longer the law. In recent years there have been many limitations placed on the concept of lack of power in a state to thus acquire jurisdiction over an absent defendant, as well as a repudiation of the concept that due process is somehow involved in the problem.

[1] One such great limitation is illustrated by such cases as *Kane v. New Jersey*, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222, *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091, and the cases following them. They involved the validity of statutes providing for service on nonresident defendants outside the state, or upon the registrar of motor vehicles in the state, in causes of action arising out of the use of motor vehicles within the state. The United States Supreme Court held that it was within a state's powers to provide that by the use of the state's highways, the out-of-state motorist impliedly consents to such service. Due process was not violated by such a provision, it was held. This is getting pretty far from the rigid concept of lack of power enunciated in the *Pennoyer* case. But this new doctrine constitutes but

a limited restriction on that case, being applicable only to statutes providing for such service on nonresidents in automobile accident cases arising in the state of the forum. California has such a statute. § 404, Vehicle Code. Thus, had the petitioner here been a nonresident when the automobile accident here involved occurred, jurisdiction could have been secured over him by service on the registrar and service on defendant outside the state. If some such service cannot be provided by statute as to persons who are residents when the accident occurred and who subsequently leave the state, then such residents who subsequently leave the state are in a favored position as compared with nonresidents.

[2] But the rules of *Kane v. New Jersey*, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222, and *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091, do not represent the only limitation on the concepts announced in the *Pennoyer* case. Gradually throughout the years the United States Supreme Court has abandoned the older formalistic concept of territorial limitation upon state power, and the restrictive operation of the Fourteenth Amendment, and that court has now determined that the real test is whether the statute under consideration is reasonably calculated to give the absent defendant notice and an opportunity to defend. If so, the statute will be upheld, at least in some situations, where it provides for outside or substituted service on defendants. One of the leading cases so holding is *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278. There a person domiciled in Wyoming left the state to avoid service and to evade his creditors. A Wyoming statute provided for constructive service, or personal service outside the state, in such cases. The defendant was served outside the state, and the Wyoming court granted a judgment *in personam* against him. Colorado refused to enforce the judgment. The Supreme Court of the United States upheld the Wyoming statute, held the service valid and the Wyoming judgment entitled to full faith and credit. That court abandoned the old formalistic notion of territorial limitation upon state power announced in *Pennoyer v. Neff*, and declar-

ed that, under due process, the test was one of fairness. At page 462 of 311 U.S., at page 342 of 61 S.Ct. the court stated: "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state * * as well as where he was personally served without the state. * * * Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice * * * implicit in due process are satisfied." Thus did the court overrule the basic premise of *Pennoyer v. Neff*.

Of course the *Milliken* case is distinguishable from the instant case in that it involved a domiciliary of Wyoming who apparently was seeking to evade service in that state. The statute involved, however, and upheld in the decision, spoke of "residence" and not of "domicile." Petitioner argues that all that the *Milliken* case decided was that domicile, with its continuing relationship of duties, privileges and obligations, may, within the limits of due process, constitute a basis for acquiring jurisdiction by outside service, but that mere residence when the cause of action arose and when the complaint was filed is not a sufficient legal basis for that purpose. That argument presents the basic question involved in this proceeding.

[3] Before directly discussing this problem some mention should be made of petitioner's argument that the rule of the *Milliken* case has not operated to change the rule in California announced in the *De la Montanya* case. This argument is predicated upon the fact that this court in *Pinon v. Pollard*, 69 Cal.App.2d 129, 158 P.2d 254 held, in 1945, that the *Milliken* case had not operated to change the rule of the *De la Montanya* case. But see, *Sampsell v.*

Superior Court, 32 Cal.2d 763 at page 775, 197 P.2d 739, broadly intimating that, because of the *Milliken* case, perhaps the rule of *De la Montanya* should be reexamined. But the *Pinon* case was decided before section 417 of the Code of Civil Procedure was adopted. It is for the Legislature in the first instance to determine policy and for the courts to interpret and to pass on the validity of such policy. The *De la Montanya* case stood for the principle that, until 1951, this state did not believe, as a matter of state policy, that even domicile was sufficient to constitute a basis for jurisdiction. But now the Legislature, in 1951, has determined that as a matter of state policy, jurisdiction *in personam* may be acquired by personal service on a nonresident if he was a resident when the action was commenced or when service was made. Thus the Legislature has attempted to overrule the rule of the *De la Montanya* case. The question is no longer what the state policy on this question should be, as it was in 1945 when *Pinon v. Pollard* was decided, because that policy has been determined by the Legislature in adopting section 417 of the Code of Civil Procedure. The question now is one of the validity of that policy under the federal Constitution.

[4] That brings us to the key question—can a state validly provide, under the due process clause of the federal Constitution, that a state may acquire jurisdiction *in personam* by service on the defendant outside the state, where the defendant was a resident at the commencement of the action or at the time of service? Is residence of this type a valid basis for jurisdiction?

This question cannot be finally decided except by the United States Supreme Court. Until that court speaks, the most a state court can do is to make an informed guess as to what that court will do. But we are not without some guide posts. The basic theory of the *Milliken* case (although it involved a domiciliary) was that the test to be applied was one of reasonableness—does the statute reasonably provide for notice and an opportunity to defend? If so, it is constitutional. In that case it held that domicile was a sufficient contact with

the state to make outside service valid. In *International Shoe Co. v. State of Washington*, 326 U.S. 310, at page 316, 66 S.Ct. 154, at page 158, 90 L.Ed. 95, Chief Justice Stone expressed the prevailing view in the following language: "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' [Citing *Milliken v. Meyer* and other cases.]" See, also, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

The statute under consideration obviously gives reasonable notice because it requires personal service outside the state. The only question left for determination is whether it gives the defendant so served a reasonable opportunity to defend. Is it fair and reasonable to require a defendant who was a resident when he became involved in the accident that gives rise to the action and was a resident when the complaint was filed, to return to California to defend the action after he has left the state and now resides elsewhere? Does that procedure offend "traditional notions of fair play and substantial justice"? Certainly, if domicile is a basis for so acquiring jurisdiction, residence (at some time) can also be made a basis. Residence, in fact, is a much clearer and fairer basis than domicile. The latter depends largely upon the subjective and frequently undisclosed intent of the party involved, which he can put on or discard like a cloak at his uncontrolled whim or caprice, dependent upon whether it is or is not to his benefit to be domiciled in the jurisdiction.

Residence is a much more objective concept and can be proved or disproved by the actual facts. If the duties, privileges and obligations of domicile are sufficient to confer jurisdiction, then certainly the somewhat similar duties, privileges and obligations of residence are also sufficient. Thus, the only real question is when such residence must exist. Residence at the time of service and prior thereto is clearly sufficient. Is residence at the time of the accident and time the complaint was filed sufficient? We think it is. We think that this is a matter of policy to be determined by the Legislature. It certainly does not shock our "traditional notions of fair play and substantial justice" to compel the defendant to return to defend rather than to compel the plaintiff to search out the defendant and sue him in the jurisdiction of defendant's present residence. If it is fair and reasonable to compel a person who is a nonresident of California who is a participant in an accident here to return to California to defend the cause of action filed as a result of such accident, then it must also be fair and reasonable to compel one who is a resident when the cause of action arose and is filed to return and defend. It was for the Legislature in the first instance to weigh the factors involved, and to determine whether to inconvenience the defendant or the plaintiff. The Legislature has determined that if the defendant was a resident when the cause of action was filed, it is fair and just to compel him to return to this state to defend such action. Inasmuch as such determination is not shocking but rather is fair, just and reasonable, the legislatively declared policy cannot and should not be set aside.

[5] It is next argued by petitioner that section 417 of the Code of Civil Procedure, properly interpreted, accomplished no change in the law at all but was passed by the Legislature to become effective when, as, and if the Supreme Court of California might reverse or modify the rule of the *De la Montanya* case. It is contended that this must be so because by its terms it refers to the previously existing sections 412 and 413 of the Code of Civil Procedure and those sections, it was held in

the *De la Montanya* case, do not authorize out-of-state service. It seems to us that this is a strange and strained interpretation of section 417. It amounts to saying that the busy Legislature took time out in 1951 to pass a meaningless statute that would only become effective if the Supreme Court reversed its holding that sections 412 and 413, insofar as they provide for constructive service on nonresidents, are unconstitutional. The declaration of unconstitutionality is not a static thing that can only be changed by the state Supreme Court. Before section 417 was adopted, sections 412 and 413 simply provided for constructive service. It is very likely that such sections, if not limited in their application, would still be invalid. But section 417 provided limitations on sections 412-413, namely out-of-state service, and residence at least when the cause of action was filed, so that with such limitations, the sections are now valid. That is the obvious effect of section 417.

[6] The last contention of petitioner is that even if section 417 is constitutional, it has no application to him because such section did not become effective until September 22, 1951, while the accident occurred in July of 1951. It is contended that to apply the statute to petitioner would be to apply it retroactively and that cannot be done because petitioner had some sort of a "vested right" in the manner of service existing when the cause of action arose. In support of this somewhat startling concept that the manner of service is substantive and not procedural, and that a person has a vested right in the manner of service existing at the time the cause of action arose, petitioner cites the recent case of *Allen v. Superior Court*, Cal.App., 251 P.2d 358. The Supreme Court has granted a hearing in that case, so that it no longer constitutes a precedent. Moreover, there is a fundamental difference between the *Allen* case and the instant one. In that case the cause of action was filed July 12, 1948, three years *before* the passage of section 417. In the instant case the complaint was filed November 28, 1951, two months *after* the effective date of the statute, and service was, of course, subsequent

to that. The statute comprehends one was a resident "at the time of the commencement of the action". Defendant was a resident at the commencement of the action and on that date section 417 was effective. Thus, to apply section 417 in the instant case is to give it prospective and not retroactive operation.

The concept that one has a vested right in the mode and manner of service as they existed when the cause of action arose, is, in our opinion, unsound. One does not secure a vested right in a mere rule of procedure. Certainly, the method of service is a matter of procedure, and not of substantive law. That being so, the Legislature had the power to make the change in the law applicable to pending causes of action, at least where the complaint was not filed until after the statute changing the law became effective.

The alternative writ is discharged and the petition for a peremptory writ is denied.

BRAY and FRED B. WOOD, JJ., concur.



117 Cal.App.2d 870

Lionel BARRIGAN, Marvin Franke, Ray Couch and Paul Serr, Petitioners and Appellants, v. Daniel J. TOBIN et al., Defendants and Respondents.

Civ. 19475.

District Court of Appeal, Second District,
Division 2, California.

May 6, 1953.

Hearing Denied July 2, 1953.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Kenny & Morris, Los Angeles, for appellants.

John C. Stevenson and Lionel Richman, Los Angeles, for respondents.

PER CURIAM.

It appearing from the record herein that the question presented on appeal has become moot, the appeal is dismissed.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

117 Cal.App.2d 410

PEOPLE v. DEIBERT et al.

Cr. 4915.

District Court of Appeal, Second District,
Division 2, California.

April 23, 1953.

Hearing Denied May 21, 1953.

Defendants were convicted in Superior Court, San Luis Obispo County, Ray B. Lyon, J., of contributing to delinquency of minors by selling them intoxicating liquor, and they appealed. The District Court of Appeal, Fox, J., held that evidence sustained conviction.

Judgment affirmed.

1. Infants ⇨16

The main purpose of the Juvenile Court Law is to prevent the delinquency of children. Welfare and Institutions Code, §§ 700(k), 702.

2. Infants ⇨20

In prosecution for contributing to delinquency of minors by selling them alcoholic beverages, it was not necessary to show that sale to the minors resulted in their actual entry upon an idle or immoral course of conduct, but case would be established when evidence proves acts or omissions on part of defendants which tend to cause or encourage minors to lead an idle, dissolute, lewd or immoral life. Welfare and Institutions Code, §§ 700(k), 702.

3. Infants ⇨20

Whether serving alcoholic beverages to a minor tends to cause him to become an idle, lewd, dissolute or immoral person within juvenile delinquency statutes, is essentially a question for jury. Welfare and Institutions Code, §§ 700(k), 702.

4. Infants ⇨20

Evidence sustained conviction for contributing to delinquency of minors, by selling them alcoholic beverages. Welfare and Institutions Code, §§ 700(k), 702.

5. Infants ⇨16.1

In statute extending jurisdiction of Juvenile Court to minor who is leading, or for any cause is in danger of leading, an "idle" life, quoted word has no reference to sexual misconduct, but means not

occupied or employed, or to loaf or dissipate one's time. Welfare and Institutions Code, § 700(k).

See publication Words and Phrases, for other judicial constructions and definitions of "Idle".

6. Statutes ⇨161(1)

When Legislature repeals certain statutes and excludes mention of other statutes even though they refer to same subject, intention of Legislature is to leave standing those acts which are not mentioned.

7. Infants ⇨13

Alcoholic Beverage Control Act does not diminish the effectiveness of juvenile delinquency statute in dealing with conduct involving alcoholic beverages which tends to contribute to delinquency of minors, which conduct is not covered by Alcoholic Beverage Control Act, but, by legislative design constitutes an independent offense. Gen.Laws, Act 3796, § 1 et seq.; Welfare and Institutions Code, §§ 700(k), 702.

8. Statutes ⇨47

Where a statute contains a reasonably adequate disclosure of legislative intent regarding an evil to be combatted in language giving fair notice of practices to be avoided, courts will be slow to say that such statute is too indefinite to be enforced.

9. Statutes ⇨188

Complexities of social problems dealt with by Legislature require that practical construction be given to language employed by draftsmen of legislation, lest their purposes be too easily nullified by over-refined inquiries into meanings of words.

10. Criminal Law ⇨13

Reasonable certainty in describing prohibited act is all that is required of statute, and liberal effect is always to be given to the legislative intent when possible.

11. Criminal Law ⇨13

Words used in statutes designed to enable Legislature to come to grips effectively with problems of juvenile delinquency, should be upheld where their frequent use in penal statutes give assurance that they

are understood by men of ordinary intelligence. Welfare and Institutions Code, §§ 700(k), 702.

12. Constitutional Law ⚖258

To comply with constitutional requirement of due process of law, crime for which defendant is being prosecuted must be clearly defined, but it is not necessary that statute furnish detailed plans and specifications of the prohibited acts or conduct, but only that words used in statutes be well enough known to enable those persons within its reach to understand and correctly apply them. U.S.C.A.Const. Amend. 14.

13. Criminal Law ⚖13

Though higher standards of certainty are required of penal than of civil statutes, a statute is sufficiently certain if it employs words of long usage or with common-law meaning, notwithstanding element of degree in definition as to which estimates might differ.

14. Criminal Law ⚖13

Juvenile delinquency statutes making criminal any act or omission which tends to cause or encourage a minor to lead an idle, dissolute, lewd or immoral life, meet constitutional standards of certainty and definiteness, and the words "dissolute" and "immoral", contained therein, are sufficiently definite to inform those subject to its sanctions of the type of conduct thereby denounced. Welfare and Institutions Code, §§ 700(k), 702; U.S.C.A.Const. Amend. 14.

15. Infants ⚖20

In juvenile delinquency statutes making criminal any act or omission which tends to cause or encourage a minor to lead an "immoral" life, quoted word is not confined to sexual matters, but has accepted definition of something that is inimical to good order, against welfare of general public and contrary to good morals. Welfare and Institutions Code, §§ 700(k), 702.

See publication Words and Phrases, for other judicial constructions and definitions of "Immoral".

16. Criminal Law ⚖822(1)

Instructions must be read as a whole.

17. Infants ⚖20

In prosecution for contributing to delinquency of minors, instruction that offense was not necessarily complete even if it were established beyond reasonable doubt that defendants did provide intoxicating liquor to a minor, but that guilt was established only where such act caused or tended to cause or encourage minor to lead an idle, lewd, dissolute or immoral life, properly and specifically advised jury of the kind, quality and degree of proof required to convict. Welfare and Institutions Code, §§ 700(k), 702.

18. Criminal Law ⚖822(1)

In prosecution for contributing to delinquency of minors, defendants could not predicate error on a single instruction when the charge viewed in its entirety fully and fairly informed jury on requirements of the law. Welfare and Institutions Code, §§ 700(k), 702.

19. Criminal Law ⚖552(3)

In prosecution for contributing to delinquency of minors, each fact in chain of circumstances establishing guilt was not required to be proved beyond a reasonable doubt. Welfare and Institutions Code, §§ 700(k), 702.

20. Criminal Law ⚖561(1)

The doctrine of reasonable doubt applies to proof of guilt and not to establishment of each incident or event inculcating defendants.

21. Criminal Law ⚖561(1)

A reasonable doubt that warrants acquittal is one that results or arises from a consideration of all the evidence in the case.

22. Infants ⚖20

In prosecution for contributing to delinquency of minors, instruction which in effect indicated that if jury believed that defendants had furnished liquor to minors such act would bring them within Juvenile Court Law, was based on evidence properly admissible as part of res

gestae of offense and was pertinent to issue of whether such conduct had tendency to encourage minors to lead idle, lewd, dissolute or immoral lives. Welfare and Institutions Code, §§ 700(k, m), 702.

23. Infants $\hookrightarrow$ 20

In prosecution for contributing to delinquency of minors, instruction which set forth purposes of the Juvenile Court Law, was not argumentative or improper. Welfare and Institutions Code, §§ 700(k), 702.

24. Criminal Law $\hookrightarrow$ 790

A judge is not bound to instruct on history, object, or purpose of a law, but it is proper to add to knowledge of jury on the subject at hand, as an aid to their deliberations, a correct statement of purpose of such law in explanation of the instructions which follow.

25. Criminal Law $\hookrightarrow$ 800(2)

In prosecution for contributing to delinquency of minors, it was unnecessary for court to define the commonplace words "idle, lewd, dissolute or immoral", as used in juvenile delinquency statute, but they would be presumed to be within the understanding of jurors. Welfare and Institutions Code, §§ 700(k), 702.

26. Infants $\hookrightarrow$ 13

Where proprietor of club, who had duty not to allow furnishing of intoxicants to minors in his establishment, was present when minors entered and was aware that they ordered alcoholic beverages from the bartender, and acquiesced therein, proprietor was guilty of contributing to delinquency of minors, if, as result of the serving of the intoxicants with his knowledge and acquiescence, the minors were in danger of leading an idle, dissolute, lewd or immoral life. Gen.Laws Act 3796, § 61; Welfare and Institutions Code, §§ 700(k), 702.

27. Criminal Law $\hookrightarrow$ 768(1)

Cautionary instruction, ordinarily given in prosecution for sex offenses, that charge is easily made and difficult to prove, and that testimony of prosecuting witnesses should be examined with caution for that reason, was unnecessary in prosecution for contributing to delinquency of

minors by selling them alcoholic beverages. Welfare and Institutions Code, §§ 700(k), 702.

28. Criminal Law $\hookrightarrow$ 1173(2)

In prosecution for contributing to delinquency of minors, by selling them intoxicating liquor, rejection of defendants' requested instructions, to effect that club where liquor was served was a bona fide public eating place, in which minors had right to be, was not prejudicial error, in view of fact that defendants were not being tried for permitting minors to be in a place where intoxicating liquor was sold. Welfare and Institutions Code, §§ 700(k), 702.

29. Criminal Law $\hookrightarrow$ 829(1)

In prosecution for contributing to delinquency of minors, defendants' proposed instruction defining alcoholic beverages was properly refused, where definition was given in another instruction and proposed instruction would have been repetitious. Welfare and Institutions Code, §§ 700(k), 702.

30. Criminal Law $\hookrightarrow$ 834(2)

Where all phases of law applicable to facts adduced were fully and correctly covered by other instructions, defendants were not entitled to have instructions on like matters given in any particular phraseology.

31. Criminal Law $\hookrightarrow$ 814(18), 1186(4)

In prosecution for contributing to delinquency of minors, witnesses who testified as to matters peculiarly within knowledge of any drinking layman did not testify as experts, and instruction on expert testimony was unnecessary, but even if it be assumed that failure to give such instruction was error, such error did not result in miscarriage of justice where, from review of all evidence and charge as a whole, it would be unreasonable to conclude that a different result would have been reached had the instruction been given. Welfare and Institutions Code, §§ 700(k), 702; Const. art. 6, § 4½.

32. Criminal Law $\hookrightarrow$ 507(1)

In prosecution for contributing to delinquency of minors by selling them alco-

holic beverages, minors who testified to sale of the beverages were not "accomplices" whose testimony was required to be corroborated. Welfare and Institutions Code, §§ 700(k), 702; Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplices".

33. Criminal Law ⇨1035(3), 1044

Where remarks of judge appeared to be no more than proper attempts to explain his rulings, expedite trial, and obviate confusion in testimony, and were of such nature that any possible prejudicial effect could have been cured by appropriate admonition to jury to disregard them, defendants, who neither moved to strike, nor assigned as prejudicial, remarks, nor suggested that jury be instructed to disregard them, could not successfully assail such remarks on appeal as prejudicial misconduct by which a fair trial was denied.

Morris Lavine and Albert E. Isenberg, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendants were convicted by a jury on three counts of violation of section 702 of the Welfare and Institutions Code. Each appeals from the judgment and from the order denying his motion for a new trial.

About 10:30 p. m., on April 17, 1952, Bob and Leonard, who were each 17 years old and high school students, entered the Pilot Wheel Club at Pismo Beach, California. Bob had a brief conversation with defendant Deibert, who was one of the owners of the cafe. The boys took seats at the bar; Deibert stood only some six feet away when they ordered two "coke highs"; the bartender, defendant Longley, looked up past the boys for a minute and then mixed the drinks. Bob paid \$1.00 for the two drinks, which consisted of whiskey and Coca Cola. During their visit they imbibed several more drinks of the same variety for which they paid fifty cents

each. Their friend, Larry, also 17 years old and a high school student, joined Bob and Leonard and took a taste from the glass of each. Thereupon Bob bought a "coke high" for Larry. The boys remained there for about an hour. The trio left the cafe but Bob and Leonard returned about 1:00 a. m., when they were joined by another boy. All were served more "coke highs." Bob testified that he and Leonard were served about six such drinks during the evening and early morning.

Longley testified that he did not serve alcoholic beverages to any of these boys and would not have served them such drinks without checking first to see whether they were over 21 because they looked young. Deibert denied having had any conversation with Bob that night. He testified that he did not see the boys on his premises prior to their apprehension by Mr. Sutherland, a State liquor control officer.

[1-4] Defendants contend that the evidence was insufficient to support the verdict in that it failed to show that any of the minors was "encouraged to use intoxicating liquor to such an extent that he became idle, dissolute and immoral." It was not necessary, however, to show that the sale of alcoholic beverages to these minors resulted in their actual entry upon an idle or immoral course of conduct. *People v. Wilhite*, 49 Cal.App. 246, 250, 193 P. 151. The main purpose of the Juvenile Court Law is to prevent the delinquency of children. By the provisions of section 702, Welfare and Institutions Code, any act or omission which "tends to cause or encourage" a minor to become a delinquent is made criminal. A case is therefore established when the evidence proves acts or omissions on the part of the defendants which tend to cause or encourage the minors to lead an idle, dissolute, lewd or immoral life. *People v. Calkins*, 48 Cal. App.2d 33, 35, 119 P.2d 142; *People v. Cohen*, 62 Cal.App. 521, 526, 217 P. 78; *People v. Kinser*, 99 Cal.App. 778, 782, 279 P. 488. Whether serving alcoholic beverages to a minor tends to cause him to become an idle, lewd, dissolute or immoral person is essentially a question for the jury. *People*

v. Calkins, *supra*; *People v. McDougal*, 74 Cal.App. 666, 674, 241 P. 598. The jury impliedly found that the minors were served "coke highs," containing whiskey and Coca Cola, by the defendants at the Pilot Wheel Club bar and that the furnishing of such drinks tended to cause them to come within the purview of section 700(k) of the Welfare and Institutions Code. Such a finding is reasonable and is fully justified by the evidence. *People v. Perfetti*, 88 Cal.App. 609, 614, 264 P. 318; *People v. De Leon*, 35 Cal.App. 467, 470-471, 170 P. 173; *People v. Haney*, 100 Cal.App. 295, 299, 279 P. 1054.

Deibert claims the evidence fails to show that he "participated in any act or omitted to perform any duty which would tend to cause the minors to lead an idle, dissolute and immoral life." The testimony of Bob that he engaged Deibert in conversation when he and Leonard first went into the club; that Deibert was only about six feet away when he ordered two "coke highs" from Longley; that the latter, upon receiving Bob's order for such alcoholic beverages, looked past him briefly in the direction of Deibert and then filled the order, justified an inference on the part of the jury that Longley, the bartender, sought and received the approval of Deibert before he served the minors the first "coke highs." The minority of the boys must have been apparent in view of Longley's statement that he would not have served them because they looked so young. Furthermore, the jury had an opportunity to see them on the stand and appraise the youthfulness of their appearance. It would, of course, have been unnecessary for Longley to secure Deibert's consent to serve the boys if the drinks ordered had been nonalcoholic. Such tacit approval could reasonably be inferred to apply to the serving of subsequent alcoholic drinks. It is thus plain that Deibert did participate in an act and omit to perform a duty which resulted in these boys being served a number of drinks containing alcohol. The jury could reasonably have concluded that such conduct had a tendency to cause the minors to become delinquent.

[5] Defendants also challenge the sufficiency of the evidence on the theory that the words "idle, dissolute, lewd, or immoral" (see sec. 700(k) Welfare & Institutions Code) refer to sexual misconduct and that none was shown. They are in obvious error. "Idle" certainly does not have such a connotation. It means: not occupied or employed; to loaf or dissipate one's time. See Webster's New International Dictionary, 2d Ed. The term "immoral" is not confined to sexual matters. *Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 740, 227 P.2d 449.

[6, 7] Defendants contend that section 22, Article XX of the California Constitution and the Alcoholic Beverage Control Act, Gen.Laws, Act 3796, cover the entire field of liquor control and any violations thereof, thereby precluding the prosecution of defendants under section 702 of the Welfare and Institutions Code on a contributing charge. This argument is without foundation. Section 69 of the Alcoholic Beverage Control Act repeals certain specific statutes. It does not include among them section 702 of the Welfare and Institutions Code. "* * * when the Legislature repeals certain acts and excludes mention of other acts even though they refer to the same subject, it is the intention of the Legislature to leave standing those acts which are not mentioned." In *re Zadro*, 16 Cal.App.2d 398, 399-400, 60 P.2d 577, 578, 986. Thus the effectiveness of section 702 of the Welfare and Institutions Code in dealing with conduct involving alcoholic beverages which tend to contribute to the delinquency of minors remains undiminished. Here the acts of the defendants are punishable because they have a tendency to cause minors to become delinquent. This aspect of defendants' acts is not covered by the Alcoholic Beverage Control Act. By legislative design such acts constitute an independent offense. See *People v. Baker*, 38 Cal.App. 28, 31-32, 175 P. 88.

[8-11] Defendants attack the constitutionality of section 702 of the Welfare and Institutions Code as applied in the instant case, asserting that it is too vague, in-

definite and uncertain to form the basis of a criminal charge and hence invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States. They contend that the words "dissolute" and "immoral" contained in the language of the statute and incorporated in the charging clause of the information are not sufficiently definite to inform those subject to its sanctions what type of conduct is thereby denounced. This challenge is not well taken. Where a statute contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided, a court will be slow to say that such a statute is too indefinite to be enforced. The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by over-refined inquiries into the meanings of words. "Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." *People v. Kennedy*, 21 Cal.App. 2d 185, 193, 69 P.2d 224, 229. The use of words of general meaning is the essence of our code system. Thus, in a sphere so vital to the community as the welfare of its youth, the words used in a statute designed to enable the Legislature to come to grips effectively with the problems of juvenile delinquency should be upheld where their frequent use in penal statutes gives assurance that they are understood by men of ordinary intelligence.

[12] "To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. 'To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited.' [Citation.]

[13] "Although higher standards of certainty will be required of penal than of civil statutes [citation], a statute is sufficiently certain if it employs words of long usage or with a common law meaning, 'notwithstanding an element of degree in the definition as to which estimates might differ [citations].'" *Lorenson v. Superior Court*, 35 Cal.2d 49, 60, 216 P.2d 859, 866. This same decision notes, with appropriate citations of authority, that California courts have upheld statutes employing such terms as: "to make diligent effort to find the owner"; "unreasonable speed"; "unjustifiable physical pain or mental suffering"; and "to the annoyance of any other person".

[14] Applying these criteria and considering the relative certainty of words employed in the statutes referred to whose validity has been upheld, it is manifest that the words "dissolute" and "immoral" meet the constitutional standards of certainty and definiteness. A person charged with being a dissolute person is given sufficient warning of the nature of his offense. In *re McCue*, 7 Cal.App. 765, 766, 96 P. 110. "Lewd" and 'dissolute' are terms often used interchangeably. * * * 'Dissolute' is defined to mean: '2. * * * loose in morals and conduct; wanton; lewd; debauched.' Webster's New Inter. Dict., 2d Ed." *People v. Babb*, 103 Cal. App.2d 326, 330, 229 P.2d 843, 846.

[15] Likewise, the relatively comprehensive word "immoral" is one which conveys concrete impressions to the ordinary person. It is in constant use in popular parlance and is found in every dictionary. When used in a legal sense in relation to statutes involving an exercise of the police power to promote the general welfare, it has an accepted definition of something that is inimical to good order and contra bonos mores. *People ex rel. First Nat. Pictures v. Dever*, 242 Ill.App. 1, 4; *Davenport v. Dist. of Columbia*, D.C.Mun. App., 61 A.2d 486, 488; 42 C.J.S., Immoral, p. 395. In the case of *Orloff v. Los Angeles Turf Club*, 36 Cal.2d 734, 227 P.2d 449, the court had under consideration a statute authorizing the exclusion from a place of public amusement of any

person having an "immoral character." Though holding that the evidence of alleged immorality did not justify plaintiff's exclusion from a race track, the court made the following observation in the face of plaintiff's contention that the phrase "immoral character" was too vague and uncertain to be applied as a standard, 36 Cal.2d at page 740, 227 P.2d at page 453: "The term 'immoral' has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. 20 Words and Phrases, pp. 159-160.

"The legislature did not specify who was to be considered a person of immoral character. * * * But the omission in the present statute is not fatal to any use of the standard of immorality as a guide. Here it becomes a matter of construction and application conformable to the legislative objective in providing the various standards. * * *" It is thus clear that the word "immoral," as used in the context of the statute here involved, possesses sufficient certainty of meaning to forewarn men of common intelligence as to the character of the proscribed conduct.

The authorities defendants cite in support of their contention are not applicable: in the first instance, because none of them involve consideration of the terms "dissolute" or "immoral," and second, because the statutory terms there involved were broad, sweeping, and ill-defined generalities which were too uncertain to furnish an adequate standard of culpability.

Defendants predicate error on the giving of particular instructions.

[16-21] 1. After defining "alcoholic beverages" in the language of the Alcoholic Beverage Control Act, the court instructed the jury that: "Subdivision (b)

of Section 61 provides as follows: 'Any person under the age of twenty-one years who purchases any alcoholic beverage or any person under the age of twenty-one years who consumes any alcoholic beverages in any on-sale premises, is guilty of a misdemeanor.'" Defendants argue that the instruction was confusing and misleading on the grounds that proof that the minors in this case might have violated the Alcoholic Beverage Control Act was not proof that the defendants violated the Welfare and Institutions Code, and that the jury was in effect told that the owner of the establishment where a minor purchased liquor was guilty of violating section 702 of the Welfare and Institutions Code. When all the instructions are read as a whole, as they must be, *People v. Kendall*, 111 Cal.App.2d 204, 244 P.2d 418, the jury could not reasonably have drawn the conclusion asserted by defendants. The court further specifically instructed the jury that the offense charged was not necessarily complete even if it was established beyond a reasonable doubt that the defendants did provide intoxicating liquor to a minor, but that guilt was established only where such act caused or tended to cause or encourage the minor to lead an idle, lewd, dissolute or immoral life. This instruction properly and specifically advised the jury of the kind, quality and degree of proof required to convict the defendants. Defendants cannot predicate error on a single instruction when the charge viewed in its entirety fully and fairly informs the jury on the requirements of the law. *People v. Cornett*, 93 Cal.App.2d 744, 750, 209 P.2d 647. In connection with this same instruction, defendants contend that even if it be argued that a duty was imposed upon them by the Alcoholic Beverage Control Act not to furnish liquor to the minors, it was improper not to submit a further instruction that the jury must be convinced beyond a reasonable doubt that the minors did in fact violate the Alcoholic Beverage Control Act. This is without merit. The broad duty imposed on defendants was to abstain from any act tending to cause the minors to lead an idle, lewd, dissolute

or immoral life. It was not necessary to instruct that each fact in the chain of circumstances establishing defendants' guilt be proved beyond a reasonable doubt. "The doctrine of reasonable doubt applies to proof of *guilt* and not to the establishment of each incident or event inculpatory of the defendant. [Citation.] A reasonable doubt that would warrant acquittal is one that results or arises from a 'consideration of all the evidence' in the case [citations]." *People v. Klinkenberg*, 90 Cal. App.2d 608, 632, 204 P.2d 47, 62, 613; *People v. Kross*, 112 Cal.App.2d 602, 615, 247 P.2d 44.

[22] 2. The court instructed the jury as follows: "when alcoholic beverages are sold or delivered to a minor under the age of twenty-one, the purchasing or receiving of the alcoholic beverages by a minor brings the minor within subdivision (m) of section 700 of the Welfare and Institutions Code." Defendants complain that they were thereby placed on trial for an offense with which they were not

charged in the information. This instruction, which in effect indicates that if the jury believed that defendants had furnished liquor to the minors then this act would bring them within the Juvenile Court law, was based on evidence properly admissible as a part of the *res gestae* of the offense and was therefore pertinent to the issue of whether such conduct had a tendency to encourage the minors to lead idle, lewd, dissolute or immoral lives. Furthermore, in reading the charge as a whole¹ we are persuaded that this instruction cannot be deemed to have prejudiced defendants in view of the complete instructions given to the effect that no conviction shall be rendered unless the jury also believed that by permitting such purchase and receipt of the liquor, defendants caused or tended to cause the minors to lead idle, dissolute or immoral lives.

[23-25] 3. Defendants suggest the second paragraph of the instruction last quoted,¹ setting forth the purposes of the Juvenile Court Law, was argumentative

1. The court instructed the jury in part as follows:

"You are instructed that the offense of contributing to the delinquency of a minor is not necessarily complete, even if it should be established beyond a reasonable doubt that the person charged did wilfully furnish, sell or give intoxicating liquor to a person under the age of twenty-one (21) years. In the case of each of the defendants, who are here charged with the offense of contributing to the delinquency of a minor, guilt of the offense charged is established only where the evidence shows beyond a reasonable doubt not only that the particular defendant did wilfully furnish, sell or give intoxicating liquor to a person under the age of twenty-one (21) years, but that such conduct by the defendant caused or tended to cause or encourage the minor involved to lead an idle, dissolute, lewd or immoral life.

"You are instructed that the basic purpose of the Juvenile Court Law is to safeguard children and all other persons under the age of twenty-one years from those influences which tend to cause or encourage them to become delinquent, and it is not necessary that the prosecution show that the juvenile has in fact become delinquent, provided you find from all the evidence of the case that the acts alleged in the information have been

committed and that such acts would manifestly tend to place the minor in a position where he would be in danger of leading an idle, lewd, dissolute, or immoral life.

"If you should find from the evidence, beyond a reasonable doubt, that the defendants Eugene H. Deibert and Leo Longley, sold, furnished or gave any alcoholic beverages to Alexius Wierbinski, Calvin L. Epp and Larry Oren Knight, minors under the age of twenty-one years and that such act caused or tended to cause or encourage the said minors to be or become persons who are in danger of leading an idle, dissolute or immoral life, you should find the defendants guilty as charged in the information.

"If you find from the evidence beyond a reasonable doubt, that the minors named in the Information, or any of them, were present in the Pilot Wheel Club at any time during the evening of April 17, 1952, or early morning of April 18, 1952, and that they, or any of them, were served at any time intoxicating liquor by the defendant, Leo Longley, with the knowledge or consent of the defendant, Eugene H. Deibert, and as a result thereof, they were in danger of leading an idle, dissolute, lewd or immoral life, then you should find the defendants guilty of the count naming the minors served."

and improper. While a judge is not bound to instruct on the history, object, or purpose of a law, it is proper to add to the knowledge of the jury on the subject at hand, as an aid to their deliberations, a correct statement of the purpose of such law in explanation of the instructions which follow. See *People v. Calkins*, 48 Cal.App.2d 33, 36, 119 P.2d 142; 24 Cal.Jur. pp. 846-7. They also assert that as the words "idle, lewd, dissolute or immoral" were not defined, the jury was left to speculate on their meaning and it cannot be told on what theory they may have reached their verdict. That this argument is fundamentally untenable is apparent from our previous discussion of the certainty of the words referred to. It is unnecessary for the court to define commonplace words which may normally be presumed to be within the understanding of jurors. *People v. Roth*, 137 Cal. App. 592, 606, 31 P.2d 813; *People v. Halbert*, 78 Cal.App. 598, 612, 248 P. 969. The terms enumerated above are used in a non-technical sense and are within the ken of average laymen. In *People v. Young*, 44 Cal.App. 279, 282, 186 P. 383, 384, the court states: "It will be seen that this instruction quotes section 21 of the Juvenile Court Law in full, and that it also quotes that portion of section 1 of the Juvenile Court Law contained in subdivision 11 thereof, which provides that the law shall be given application to any person under the age of 21 years, 'who is leading or from any cause is in danger of leading an idle, dissolute, or immoral life.' We are satisfied that the jury was by these instructions informed that if they found that the defendant had committed the acts with which he stood charged in the information he should be found guilty of a violation of these provisions of the Juvenile Court Law. And, since, as we have seen, we have held in the case of *People v. De Leon*, supra, that these provisions of the Juvenile Court Law are neither vague nor indefinite in their terms, we cannot here say that the charge of the court which embodies those terms is so vague and indefinite that the jury would be either insufficiently instructed or be misled thereby."

[26] 4. The following instruction is also challenged:

"If you find from the evidence beyond a reasonable doubt, that the minors named in the Information, or any of them, were present in the Pilot Wheel Club at any time during the evening of April 17, 1952, or early morning of April 18, 1952, and that they, or any of them, were served at any time intoxicating liquor by the defendant, Leo Longley, with the knowledge or consent of the defendant, Eugene H. Deibert, and as a result thereof, they were in danger of leading an idle, dissolute, lewd or immoral life, then you should find the defendants guilty of the count naming the minor served." It is asserted that this authorizes the conviction of defendant Deibert merely by reason of knowledge or consent without requiring an affirmative act of contribution as provided by the statute. According to section 702 of the Welfare and Institutions Code, a person who "omits the performance of any duty, which * * * causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of the subdivisions of Section 700 [of said code] or which * * * contributes thereto * * * is guilty of a misdemeanor * * *." Defendant Deibert had a duty under section 61 of the Alcoholic Beverage Control Act, as well as by virtue of his proprietorship of the club, not to allow the furnishing of intoxicants to minors in his establishment. He was present when the minors entered and was aware of what they ordered from the bartender. Therefore the instruction relating to such knowledge and acquiescence was properly given, regardless of any affirmative act on his part. *People v. Bliss*, 41 Cal.App. 65, 73, 182 P. 63. Moreover, it has been held that an employer is criminally liable for an illegal sale of liquor by a clerk made with the employer's knowledge. In *re Souza*, 65 Cal.App. 9, 11, 222 P. 869. The case of *People v. Weber*, 84 Cal.App.2d 126, 190 P.2d 46, is readily distinguishable by virtue of completely different factual circumstances. There the court found not only the absence of any duty owed to the minors,

but further found the evidence did not establish that defendant had knowledge of any impropriety that would result from his giving the minors the right to occupancy of his barn.

[27, 28] Defendants assign as error the court's refusal to give a series of instructions requested by them. These instruc-

tions, consecutively numbered for convenience, are set forth in the margin.² As to No. 1, the rule is stated in *People v. Reznick*, 75 Cal.App.2d 832, 839, 171 P.2d 952, 957, that: "While it is the law that in prosecutions for sex offenses, it is the duty of the trial court on its own motion to give a cautionary instruction to the effect that

2. No. 1. "You are instructed that the charge of contributing to the delinquency of a minor is easily made and difficult to disprove, for which reason the testimony of the prosecuting witnesses should be examined with caution.

2. "You are instructed that intoxicating liquors may be lawfully sold, served and consumed in the Pilot Wheel Club, and that the Pilot Wheel Club is a bona fide restaurant, cafe and public eating place.

3. "You are instructed that Section 51 of the Civil Code of California, which was in full force and effect on the 17th day of April, 1952, provides that all citizens, including minors, within the jurisdiction of the State of California are entitled to be present in bona fide restaurants, cafes and public eating places.

"You are further instructed that whoever denies the right to any citizen, including minors, to be present in any bona fide restaurant, cafe or public eating place, shall be liable in damages to the person or persons denied the use of such facilities.

4. "You are instructed that Section 2 (b) of the Alcoholic Beverage Control Act, which was in full force and effect on the 17th day of April, 1952, provides that alcoholic beverage means and includes alcohol, spirits, liquor, wine, beer and every liquid or solid containing alcohol, spirits, wine or beer and which contains one half ($\frac{1}{2}$) of one (1) per cent or more of alcohol by volume. Therefore, I charge you that if you are not convinced beyond a reasonable doubt that the defendants did wilfully furnish, sell or give beverages containing one half ($\frac{1}{2}$) of one (1) per cent or more of alcohol by volume to Bob Wierbinski, Calvin Leonard Epp or Larry Oren Knight, then you must acquit the defendants of the offenses charged against them in the complaint.

5. "You are instructed that to cause or tend to cause a person to become idle means more than that such person should become or tend to become occasionally or even frequently idle. Therefore, I charge you that unless you are convinced beyond a reasonable doubt that

Eugene H. Deibert did cause or tend to cause Bob Wierbinski, Calvin Leonard Epp or Larry Oren Knight to become more than frequently idle, then you must find the defendant, Eugene H. Deibert, not guilty.

"I further charge you, that unless you are convinced beyond a reasonable doubt that Leo Longley did cause or tend to cause Bob Wierbinski, Calvin Leonard Epp or Larry Oren Knight to become more than frequently idle, then you must find the defendant, Leo Longley, not guilty.

6. "You are instructed that lewd and dissolute are terms often used interchangeably. Each applies to the unlawful indulgence in lust. Lewd is defined to mean: lustful, libidinous, lascivious, unchaste. Dissolute is defined to mean: loose in morals and conduct, wanton, lewd, debauched.

"Therefore, I charge you, that unless you are convinced beyond a reasonable doubt that Eugene H. Deibert did cause or tend to cause Bob Wierbinski, Calvin Leonard Epp or Larry Oren Knight to become or tend to become lustful, libidinous, lascivious, unchaste, loose in morals and conduct, wanton or debauched, then you must find Eugene H. Deibert not guilty.

"I further charge you, that unless you are convinced beyond a reasonable doubt that Leo Longley did cause or tend to cause Bob Wierbinski, Calvin Leonard Epp or Larry Oren Knight to become or tend to become lustful, libidinous, lascivious, unchaste, loose in morals and conduct, wanton or debauched, then you must find Leo Longley not guilty.

7. "Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable."

the charge is easily made and difficult to disprove, for which reason the testimony of the prosecuting witness should be examined with caution (*People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367), it is difficult to understand how such an instruction could be considered necessary in a case such as this. And even if it may have been proper to give such an instruction, the failure to give one could not constitute prejudicial error upon the record here." This statement is apposite to the instant case, which was not a prosecution for a sexual offense. There was no prejudicial error in rejecting defendants' requested instructions 2 and 3. Defendants were not being tried for permitting the minors to be in a place where intoxicating liquor was sold, but for contributing to their delinquency by furnishing them with such liquor. The jury was correctly instructed on the subject of what it must find before it could find defendants guilty of the offense charged.

[29] It was not error to reject defendants' instruction No. 4. The jury was instructed as to the definition of "alcoholic beverage" contained in the Alcoholic Beverage Control Act, and since the proposed instruction would have been repetitious, it was properly refused. *People v. Becker*, 94 Cal.App.2d 434, 443, 210 P.2d 871; *People v. Eggers*, 30 Cal.2d 676, 687, 185 P.2d 1.

[30] No prejudicial error was committed in declining to give instructions 5 and 6. We need not reiterate that the terms "idle" and "lewd" are words of general knowledge requiring no definition to the jury in a case of this nature, and certainly not in the tendentious verbiage requested by defendants. Where, as here, all phases of the law applicable to the facts adduced were fully and correctly covered by other instructions, defendants were not entitled to have instructions on like matters given in any particular phraseology. *People v. Tedesco*, 1 Cal.2d 211, 220, 34 P.2d 467. Furthermore, they were not a correct statement of the law in the manner presented. Section 700 of the Welfare and Institutions Code is couched in the disjunctive, and a

defendant may be found guilty if his act or omission causes or tends to cause a minor to lead a life that is either idle, lewd, dissolute or immoral. The tenor of the refused instructions was such as would compel the jury to acquit unless they found that defendants' acts or omissions caused or tended to cause the minors to come within all of the named categories of delinquency.

[31] Defendants contend that the court's failure to give instruction No. 7 on the matter of expert testimony constitutes reversible error. Mr. Sutherland, in testifying that the minors were served with liquor, was not testifying as an expert nor was it necessary that he be so qualified as long as he was familiar with the taste of the intoxicants in question. *People v. Mueller*, 168 Cal. 526, 528-529, 143 P. 750; *People v. Bassetti*, 58 Cal.App. 390, 392, 208 P. 696. Likewise, the testimony of Johnson, Deibert and Longley to the effect that a person, after drinking straight whiskey and water, could not discern whether or not "a bourbon and coke" actually contained whiskey, does not seem to have been given as that of experts. In fact, Longley testified that this phenomenon had been complained of by some of his customers, and he had made the experiment the night before his testimony was given. It would appear, therefore, that this was a matter peculiarly within the knowledge of any drinking layman. Even if it be assumed that the failure to give the instruction was error, from a review of all the evidence and the charge as a whole, it would be unreasonable to conclude a different result would have been reached had the omitted instructions been given. The jury was instructed that it was the sole judge of the effect and weight of the evidence, and of the credibility of witnesses. Thus, if error there was, it did not result in a miscarriage of justice. *Calif. Const.*, Art. VI, sec. 4½; *People v. Brac*, 73 Cal.App.2d 629, 639, 167 P.2d 535; *People v. Morris*, 110 Cal.App. 2d 469, 478, 243 P.2d 66.

[32] Defendants urge as error the court's refusal to give an instruction on the need for corroboration of the testimony of

accomplices, contending the minors were accomplices whose testimony required corroboration under section 1111 of the Penal Code. In answer to an identical argument the court stated, in *People v. Stanley*, 78 Cal.App.2d 358, 361, 177 P.2d 968, 969: "In a prosecution for contributing to the delinquency of a minor pursuant to Section 702 of the Welfare and Institutions Code, corroboration of the minor's testimony is unnecessary since in such case the minor is regarded as a victim and not as an accomplice whose testimony it is necessary to corroborate under the provisions of section 1111 of the Penal Code. (*People v. Lucas*, 16 Cal.2d 178, 181, 105 P.2d 102, 130 A.L.R. 1485; *People v. Dorland*, 2 Cal. 2d 235, 239, 40 P.2d 474; *People v. Doetschman*, 69 Cal.App.2d 486, 489, 159 P.2d 418.)"

[33] Finally, defendants contend that the trial court was guilty of prejudicial misconduct by which a fair trial was denied. They base this argument upon comments and remarks made by the judge during the course of the trial. They claim that he threw "his weight in connection with the evidence toward the prosecution." There is no merit whatever in this charge. Without reciting the remarks about which complaint is made, they appear to be no more than proper attempts by the judge to explain his rulings, expedite the trial, and obviate confusion in testimony. They were of such a nature that any possible prejudicial effect could have been cured by appropriate admonition to the jury to disregard them. Defendants, however, did not move to strike, nor assign as prejudicial, any remarks of the court. Neither did they suggest that the jury be instructed to disregard any of them. Failing thus to establish their record, defendants may not successfully assail on appeal the conduct of the trial judge. *People v. Galuppo*, 81 Cal. App.2d 843, 849, 185 P.2d 335; *People v. Harris*, 87 Cal.App.2d 818, 827, 198 P.2d 60.

The judgment and order denying a new trial are, and each is, affirmed.

MOORE, P. J., and McCOMB, J., concur.

**SECURITY TRUCK LINE v. CITY OF
MONTEREY et al.**

Civ. 15230, 15367, 15704.

District Court of Appeal, First District,
Division 1, California.

April 28, 1953.

Rehearing Denied May 28, 1953.

See 237 P.2d 755.

Action by trucking company against city and its officers to have declared unconstitutional municipal ordinance, which imposes license tax upon business of fish hauling in municipality and which bases tax upon weight of trucks used, and to have enforcement of such ordinance enjoined. The Superior Court, County of Monterey, Anthony Brazil, J., granted a preliminary injunction, denied motion of city and its officers to set aside the default judgment obtained against them, and city and its officers appealed. The District Court of Appeal, Peters, P. J., held that, under the ordinance, standard selected, being number of individual trucks making deliveries rather than number of delivery or tonnage carried into city, has no relation to taxable event occurring in city or quantum of business carried on there, and, therefore, the tax was discriminatory and void.

Judgments and orders affirmed.

1. Appeal and Error ⇨957(1)

Judgment ⇨139

Determination whether motion for relief from default judgment should be granted is matter within discretion of trial court, and, in absence of abuse of such discretion, trial court's determination will not be set aside upon appeal. Code Civ. Proc. § 473.

2. Judgment ⇨143(3)

An honest mistake of law is valid ground for granting motion for relief from default judgment, and, in proper case, where mistake is honest one, problem involved is complex and debatable, and there are no elements of negligence, laxness, or indifference, honest mistake of law may compel granting of such relief. Code Civ. Proc. § 473.

3. Judgment ⇨143(16)

Ignorance of law, at least where coupled with negligence in failing to look up law, will not justify trial court in grant-

ing relief from default judgment, and such facts will sustain finding denying relief. Code Civ.Proc. § 473.

4. Judgment ⇨143(3, 16)

Line between mistake of law and ignorance of law is somewhat tenuous, and difference is probably only one of degree, and, therefore, all factors involved must be considered to determine whether relief from default judgment should be granted. Code Civ.Proc. § 473.

5. Judgment ⇨143(3)

There is a strong public policy in favor of permitting trial of case on its merits, but determination whether particular mistake of law warrants granting of relief from default judgment reposes largely in trial court's discretion. Code Civ.Proc. § 473.

6. Appeal and Error ⇨957(2)

Assertion of defaulting party that they believed that appeal from preliminary injunction acted as stay and made appearances in main action unnecessary was not sufficient to compel reversal of order denying relief from default judgment. Code Civ.Proc. § 473.

7. Judgment ⇨143(3)

Where plaintiff warned defendants that appearances were necessary and did not take default judgment until two weeks had elapsed after warning, trial court was justified in believing that defendants' failure to look up law concerning necessity of making appearances in main action after having appealed from preliminary injunction indicated at least indifference, and, therefore, denial of relief from default judgment was matter within trial court's discretion. Code Civ.Proc. § 473.

8. Appeal and Error ⇨865

Upon appeal from default judgment holding ordinance unconstitutional, question of constitutionality would be determined from facts alleged in complaint, which would be considered as an affidavit, and from affidavits and evidence produced at hearing on motion for preliminary injunction.

9. Licenses ⇨51/2

City, under its powers over local affairs to raise revenue, can impose a proper license tax. Const. art. 11, § 1 et seq.

10. Automobiles ⇨71

A city may not tax a carrier whose trucks pass through the city nor who does not maintain place of business in city and makes only occasional deliveries therein.

11. Municipal Corporations ⇨956(1)

A city cannot base a tax on an extraterritorial event, but taxable event must occur in taxing city.

12. Automobiles ⇨73

Municipal ordinance, which imposes license tax upon business of fish hauling in municipality and which bases tax upon weight of trucks used, violates rule that city cannot tax carrier established elsewhere to extent ordinance applies to occasional or incidental deliveries, and violates Public Utilities Code provision prohibiting city from levying license tax upon regulated carrier when delivery of merchandise by carrier in city is occasional and incidental to business conducted elsewhere. Public Utilities Code, § 4302.

13. Automobiles ⇨71

Where trucking company engaged in regular and continuous course of fish deliveries during season, planned and carried out pursuant to previous agreement with canneries, and company's trucks did not simply pass through city but used city as terminus for such hauls, company's activities constituted doing of business in city, and city was empowered to tax such business by proper and nondiscriminatory ordinance.

14. Constitutional Law ⇨68(4)

Question whether it is unfair and unsound to permit cities, which are termini for hauls made by regulated carriers, to tax business of such carriers in such cities is not a judicial problem, and, therefore, the District Court of Appeal would not declare such tax invalid on such ground.

15. Constitutional Law ⚡67

The courts, under guise of interpretation, should not attempt to create exemptions to present constitutional provisions.

16. Carriers ⚡8

A city has a wide discretion in determining base for imposing taxes, but tax ordinances must be scrutinized carefully to see that a city measures its tax by a taxable event which occurs in city and does not measure tax in such manner that an unfair or discriminatory burden is imposed upon carriers.

17. Automobiles ⚡73

Under municipal ordinance which imposes license tax upon business of fish hauling and which bases tax upon weight of trucks used, the standard selected, being number of individual trucks making deliveries rather than number of delivery or tonnage carried into city has no relation to taxable event occurring in city or quantum of business carried on there, and, therefore, the tax is discriminatory and void. St.1925, c. 32; Public Utilities Code, § 4302; Const. art. 11, § 1 et seq.

Russell Zaches, Monterey, for appellant.

Rankin, Oneal, Luckhardt, Center & Hall and Marshall S. Hall, San Jose, for respondent.

PETERS, Presiding Justice.

The Security Truck Line is a corporation licensed as a highway carrier by the Public Utilities Commission. During the winter fish packing season it hauls fish by its own trucks and by subcontracts with subhaulers into Monterey from outside the county, and delivers the fish to several canneries there located. The city,¹ by ordinance, and by an amendment thereto specifically covering seasonal fish haulers, has imposed upon the plaintiff a business license tax based upon the weight of each of its trucks and upon each truck of the subhaulers employed or used by plaintiff in such hauling. The plaintiff's principal place of business is in San Jose, located

in a county different from the city of Monterey, and the sole acts performed by plaintiff in Monterey are the deliveries of such fish. The ordinance recites that it was passed solely as a revenue measure.

The plaintiff brought this action against the city and its officers to have the ordinance declared unconstitutional and to have its enforcement enjoined. Upon posting a bond, plaintiff then secured a temporary restraining order, and, after a hearing, secured a preliminary injunction, prohibiting the defendants from enforcing the ordinance during the pendency of the action. Defendants have appealed from that order—appeal No. 15,230.

Thereafter, the defendants failed to file an answer or demurrer, and, after a warning from plaintiff's counsel, the default of defendants was entered. Defendants moved to set aside the default under section 473 of the Code of Civil Procedure. The motion was denied. Defendants have appealed from the order denying their motion to set aside their default—appeal No. 15,367.

As a result of these proceedings a default judgment was entered against defendants. An appeal has been taken from that default judgment—appeal No. 15,704. The three appeals have been consolidated.

But two basic questions are presented on these appeals. First, we must decide whether or not the trial court properly denied the motion for relief from default. Second, we must decide, at least if the order denying the motion for relief from default is affirmed, whether the conclusion that the ordinance as amended is discriminatory and unconstitutional is supported.

It is our opinion that the order of the trial court refusing to set aside defendants' default must be affirmed. The complaint was filed on October 11, 1951. The defendants were properly served within the county on that day or immediately thereafter. A temporary restraining order was issued, and a hearing had on the application for the preliminary injunction on October 22, 1951. The preliminary injunction issued

1. (Monterey is a chartered city—see Stats. of 1925, Chap. 32 of Resolutions, p. 1292).

October 25, 1951, and defendants appealed therefrom on November 14, 1951. On November 16, 1951, some five weeks after the filing of the complaint and proper service on defendants, plaintiff's counsel requested entry of defendants' default and it was entered. On November 20, 1951, defendants gave notice of a motion to be heard on November 26, 1951, to set aside their default under section 473 of the Code of Civil Procedure, claiming mistake, inadvertence, surprise and excusable neglect. On this same day counsel for defendants appeared at the hearing at which the court was considering whether to enter judgment based on the default, and objected to the entry of the judgment. Various affidavits were introduced, some testimony taken, and the evidence taken upon the hearing at which the preliminary injunction was granted was introduced. The court thereupon ordered judgment to be entered, and a permanent injunction issued.

By a minute order dated December 17, 1951, and filed on December 24, 1951, the court denied the motion to set aside the default. This order also recites that by oral stipulation that motion was expanded to include a request to set aside the judgment, and this portion of the expanded motion was also denied.

The affidavits of the defendants in support of their motion to be relieved of default admit that on November 1, 1951, counsel for plaintiff wrote to the city attorney reminding him that no appearances had as yet been made by defendants and asking his intention in this regard, and then they aver press of business in various respects as an excuse for failing to file such appearance. This excuse has been abandoned on this appeal. The sole ground now relied upon to secure a reversal of the order refusing to set aside the default is to be found in the averments contained in the affidavits that the city attorney honestly but erroneously believed that the appeal from the order granting the preliminary injunction operated as a stay of all proceedings in the main action. It is contended that this honest mistake of law, as a matter of law, compelled the granting of the motion for relief from default.

[1] This contention cannot be sustained. The determination as to whether such a motion should or should not be granted is within the discretion of the trial court. In the absence of an abuse of such discretion its determination will not be set aside.

[2,3] An honest mistake of law is, of course, a valid ground for granting relief, *Douglass v. Todd*, 96 Cal. 655, 31 P. 623; *Beard v. Beard*, 16 Cal.2d 645, 107 P.2d 385; *Fickeisen v. Peebler*, 77 Cal.App.2d 148, 174 P.2d 883; *Svistunoff v. Svistunoff*, 108 Cal.App.2d 638, 239 P.2d 650, and, in a proper case, where the mistake is an honest one, where the problem involved is complex and debatable, and where there are no elements of negligence, laxness or indifference, may compel the granting of such relief. *Waite v. Southern Pacific Co.*, 192 Cal. 467, 221 P. 204; *Roehl v. Texas Co.*, 107 Cal.App. 708, 291 P. 262; *Brill v. Fox*, 211 Cal. 739, 297 P. 25. Ignorance of the law, at least where coupled with negligence in failing to look it up, will not justify a trial court in granting relief, *Shearman v. Jorgensen*, 106 Cal. 483, 39 P. 863; *Penryn Land Co. v. Akahori*, 37 Cal.App. 14, 173 P. 612, and such facts will certainly sustain a finding denying relief. *Garroway v. Jennings*, 189 Cal. 97, 207 P. 554; *Miller v. Lee*, 52 Cal. App.2d 10, 125 P.2d 627; *Salazar v. Steelman*, 22 Cal.App.2d 402, 71 P.2d 79; *Ingrim v. Epperson*, 137 Cal. 370, 70 P. 165; *Willett v. Schmeister Mfg. Co.*, 80 Cal.App. 337, 251 P. 932; *Mahana v. Alexander*, 88 Cal.App. 111, 263 P. 260; *Dineen v. San Francisco*, 38 Cal.App.2d 486, 101 P. 2d 736.

[4-7] There is a somewhat tenuous line between a mistake of law and ignorance of law. The difference is probably only one of degree. In such cases all factors involved must be considered to determine whether relief should be granted or denied. While there is a strong public policy in favor of permitting a trial of a case on its merits, the determination as to whether a particular mistake of law warrants the granting of relief reposes largely in the discretion of the trial court. *Beard v. Beard*, 16 Cal.2d 645, 107 P.2d

385. In the instant case we are not interested in the question as to whether the trial court could have granted relief based on the claimed mistake of law, but, since the trial court denied relief, only in whether such holding was within its discretion. The assertion that counsel for the defendants believed that the appeal for the preliminary injunction acted as a stay and made it unnecessary for appearances to be made in the main action is not sufficient to compel a reversal of the order denying relief. The problem of law involved is a simple one. Its solution is readily ascertainable. When this is coupled with the fact that counsel for plaintiff warned counsel for defendants that appearances were necessary and did not take the default until over two weeks had elapsed after the warning, it is clear that the trial court was justified in believing that the failure to look up the law indicated at least indifference. Under the authorities above cited it must be held that the order denying relief is supported by the record and was well within the discretion of the trial court. That being so, this order must be affirmed.

[8] This brings us to the question of the constitutionality of the ordinance as amended. Inasmuch as this is an appeal from a default judgment holding the ordinance as amended unconstitutional, this question must be determined from the facts alleged in the complaint, considering that pleading as an affidavit, and from the affidavits and evidence produced at the hearing of the motion for a preliminary injunction.

The complaint, so far as pertinent here, alleges that plaintiff hauls fish into Monterey pursuant to permits from the Public Utilities Commission designating it as a radial highway common carrier and as a highway contract carrier. It is averred that the principal place of business of plaintiff is in San Jose, and that its principal activities are in hauling fruit and vegetables in Santa Clara County; that its only activity in Monterey is to deliver bulk commodities in that city, and that it has no place of business, no agents and no terminus in Monterey. It is then averred

that the canneries of Monterey formerly relied on sardines caught in Monterey Bay or nearby, but that in recent years the species has been depleted so that the only alternative to closing the canneries has been to bring in sardines from Hueneme, Ventura County, and Avila, San Luis Obispo County; that the only reasonable means of transport is highway transport; that the sardines are highly perishable, and that the canning of such fish is a seasonal industry carried on in the fall and winter months.

It is then averred that plaintiff has sixty trucks; that its other commitments are such that it does not use over four of its own trucks at any one time on these fish hauls; that its other commitments and the nature of the fish hauling business make it necessary to rotate the use of its trucks so that most of its trucks are used in this fish hauling at one time or another during a season; that the uncertainty of the number of trucks needed at any one time makes it necessary for plaintiff to augment its own fleet of trucks by contracting with licensed subhaulers as independent contractors; that many of these subhaulers haul fish for plaintiff only occasionally, and some only once a season. It is then alleged that, except for the above described transactions, plaintiff has never conducted or held itself out as conducting a general transportation business in Monterey; that prorated on a tonnage mile basis, the Monterey deliveries made by it and its subhaulers constitute but one per cent of its total business.

The complaint then sets forth the facts relating to the passage of the original license tax ordinance in 1948, and quotes section 27 thereof that imposes an annual license tax upon the business of operating a truck in or where one terminus is in Monterey, and section 50 providing the penalties for violation; and then recites the passage of and quotes from the September 18, 1951, amendment to section 27, passed as an emergency measure. This amendment specifically provides that trucks delivering fish in Monterey "are engaged in doing business" in that city and "do so

on a seasonal basis." Fees are set forth for the fish packing season of one-half those provided in the original ordinance.

Plaintiff avers that, under the ordinance as interpreted by the city, plaintiff is required to pay a fee of \$13.50 in order to license each one of its fish hauling vehicles, even if it transports but a single load into the city, with the result that, because of the necessary rotation of its trucks, plaintiff, if the ordinance is valid, will be required to license a substantial portion of its fleet plus the trucks of subhaulers that haul for it occasionally. Complaint is made that the rate structure for licensed trucks cannot and does not reflect amounts paid in such taxes.

It is then averred that the ordinance as amended is void upon its face; that it is discriminatory and in violation of several provisions of the federal and state Constitutions; that it represents an attempt to legislate beyond the scope of municipal affairs; and that it invades the powers of the Public Utilities Commission.

Past and threatened future prosecutions for violation of the ordinance are averred, and then it is averred that some of plaintiff's employees and a substantial number of its subhaulers have advised plaintiff that they will have to refuse to haul fish into Monterey unless freed from the threat of prosecution or unless the payment of any fines is guaranteed.

At the hearing of the application for a preliminary injunction certain affidavits were filed, the complaint and a copy of the challenged ordinance introduced, and, after the court had indicated a desire that the parties proceed as if this was a "full proceeding," the plaintiff called its president and its operating manager. The president testified as to the nature of his company's permits and then declared that his firm's principal place of business was San Jose; that it had no place of business, agents, employees, telephone or address in Monterey; that prior to 1950 plaintiff had done no hauling into Monterey except for a few petroleum trucks; that he had never received any complaints from city officials that there was any spillage from the trucks carrying

fish, or that they caused traffic congestion or street damage; that in hauling the fish an overabundance of trucks had to be kept at the two fish landing ports because of the irregular size of the fish catches and due to the fact that fish have to be handled immediately; that subhaulers are hired after the close of their agricultural season; that no subhauler is bound to carry any load so that there is a large turnover in subhauler personnel and equipment; that the fish are hauled in open or partially closed tanks with ice on top; that in order to maintain firm fish for canning the trucks have to be dispatched on a close schedule; that the company is not paid to load or unload the trucks and the drivers do not aid in these acts; that the contracts with the canneries to haul the fish are not made in Monterey. At any one time some seven or eight of plaintiff's trucks are assigned to the fish hauling business. In one month, for example, plaintiff's trucks made twenty-five to thirty separate hauls, while subhaulers made thirty to thirty-five trips. Each load is between fifteen to twenty tons. His testimony in reference to the amount of fish hauling revenue earned by his company is somewhat confusing, but apparently in the months referred to, fish haul income constituted over twenty per cent of plaintiff's total income.

The trucks do not remain in Monterey after they are unloaded. Plaintiff has no parking area in that city for its trucks, nor does plaintiff use the municipal parking area. A clerk at Salinas pays off the drivers.

The operating manager of plaintiff testified that he had received no complaints as to spillage or other infraction; that other trucking concerns haul fish into Monterey; and generally corroborated the testimony of the president and supported most of the factual allegations of the complaint.

The city manager of Monterey testified as to the traffic problems along cannery row created by the hauling of fish, and pointed out that the trucks are given exclusive parking rights on one side of the street. He stated that there was continuous spillage from the trucks, and that the city had

to pave a block and a half in the area to make it easier for the fire department to wash away the spillage. This testimony was corroborated by the affidavit of one James Rodriguez.

Based on this evidence the court announced its view that the ordinance was unconstitutional in its application and wording, and the preliminary injunction issued.

At the hearing to determine whether judgment should issue as a result of the default, at which the city appeared to oppose the entry of judgment, the record above summarized was introduced. On this record the default judgment was entered.

Before directly passing upon the question of the constitutionality of the challenged ordinance, its relevant provisions should be quoted. The original ordinance, before amendment, contained the following relevant provisions:

"Sec. 2: This ordinance is enacted solely to raise revenue for municipal purposes, and is not intended for regulation."

"Sec. 4: There are hereby imposed upon the businesses specified in this ordinance license taxes in the amounts hereinafter prescribed, and it shall be unlawful for any person to transact and carry on any business in the City of Monterey without first having procured a license from said City so to do or without complying with any and all applicable provisions of this ordinance, and each day such business is carried on without a license shall constitute a separate violation of this ordinance."

"Sec. 6: The amount of any license imposed by this ordinance shall be deemed a debt to the City of Monterey, and any person carrying on any business mentioned in this ordinance without having a license from said city so to do, shall be liable to an action in the name of said city in any court of competent jurisdiction, for the amount of license by this ordinance imposed on such business, together with all penalties then due thereon in any such action, and the sum of \$35 which, if judgment be recovered, shall be applied as attorney fees for said plaintiff and included and assessed as recoverable costs in said action."

"Sec. 27: Every person carrying on the business of operating any truck, trailer or other vehicle for the transportation of baggage, freight, household goods, merchandise, or materials for hire, which may or may not operate over a defined route within the City of Monterey, or between any points, one terminus of which is within the City of Monterey, shall pay for each vehicle an annual license tax as follows: [The schedule of truck charges follows, calculated according to unladen weights—it runs from \$8 to \$27 per year]. * * *"

"Every vehicle licensed under this Section shall have conspicuously displayed thereon the license plate furnished by the Collector."

"Sec. 50: Any person, violating any of the provisions of this ordinance, or knowingly or intentionally misrepresenting to any officer or employee of this city any material fact in procuring the license or permit herein provided for, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than \$500.00 or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment."

By an emergency ordinance passed on September 18, 1951, section 27 above quoted was amended by adding the following provision thereto: "Vehicles delivering fish to the fish canneries in Monterey for canning or reduction purposes are engaged in doing business in the City of Monterey and do so on a seasonal basis. Any such vehicle so delivering fish for canning or reduction purposes during the period from August 1st of any year to January 31st of the succeeding calendar year shall pay for each vehicle an annual license fee on the basis of one-half of the fees set forth in subsections (a) and (b) of this section upon complying with the terms and conditions therein set forth."

The effect of the amendment was to halve the fees set forth in the original ordinance that applied to all truck carriers, and to declare, legislatively, that fish deliveries by any vehicle constituted the doing of business in Monterey.

[9] Is this ordinance constitutional? The city claims that in imposing this tax it was merely exercising its powers over local affairs to raise revenue as provided in Article XI of the state Constitution. There can be no doubt that a proper license tax may be imposed under such sections. *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal.2d 516, 95 P.2d 138; *Ainsworth v. Bryant*, 34 Cal.2d 465, 211 P.2d 564.

If the tax here involved is imposed upon a taxable local event that is, if the carrier is doing business in Monterey and if the measure of the tax is not discriminatory, then, in our opinion, the tax is valid. But if the tax is basically upon an event occurring outside the city, or, if the tax is discriminatory as to plaintiff, then it is invalid.

[10, 11] The extremes of these situations can best be illustrated by the cases. A city may not tax a carrier simply because its trucks pass through the city. *Matter of Application of Smith*, 33 Cal. App. 161, 164 P. 618. Nor may it tax a carrier where it maintains no place of business in the city and only makes occasional deliveries there. *California Fireproof Storage Co. v. City of Santa Monica*, 206 Cal. 714, 275 P. 948. Moreover, it cannot base the tax on an extraterritorial event—the taxable event must occur in the taxing city. This was well illustrated in *Ferran v. City of Palo Alto*, 50 Cal.App.2d 374, 122 P.2d 965. There a Palo Alto ordinance was held invalid for imposing a graduated tax upon a laundry collecting and delivering laundry in Palo Alto and other places, but where the laundry work was done in San Francisco, which tax was based upon the number of employees in the San Francisco plant. It was held that measuring a tax by the number of employees in a plant outside the taxing city was similar to a gross receipts tax based in part on receipts collected outside the city, and was void as a denial of equal protection and because of discrimination against the outside business for failure of apportionment. Plaintiff urges that the rule of this case is here applicable.

Defendants rely on *City of Los Angeles v. Tannahill*, 105 Cal.App.2d 541, 233 P.2d 671. There an ordinance of Los Angeles graduated in accordance with unladen weights imposed a graduated license tax on trucks and trailers operated into the city from the neighboring suburban manufacturing city of Vernon. The ordinance excluded “occasional and incidental” operations and defined those terms. The ordinance was upheld.

A similar result was reached in *California Fireproof Storage Co. v. Santa Monica*, 206 Cal. 714, 275 P. 948, where a carrier with a place of business in Los Angeles was required to pay a Santa Monica license tax graduated according to annual tonnage carried into Santa Monica. This case is important because it held that a steady course of deliveries is the doing of business, broadly implying that business is being done by the act of delivering alone.

[12] The ordinance here involved, as amended, purports to define the doing of business as any fish delivery within Monterey. No exception is made for occasional or incidental deliveries. That provision, insofar as it applies to such occasional or incidental deliveries, not only violates the rule stated in the above cases that a city cannot tax a carrier established elsewhere, where it makes only occasional and incidental use of the streets of the taxing city to make deliveries, but also violates section 4302 of the Public Utilities Code which prohibits any city from levying a license tax upon any regulated carrier “when the delivery of merchandise by the motor vehicle carrier in the city is occasional and incidental to business conducted elsewhere.” But the fact that the amended ordinance is invalid in this respect is not decisive of the present proceeding if plaintiff is not one of the class discriminated against.

[13] Plaintiff contends that the record shows that its activities in Monterey are only occasional and incidental to its main business which is located elsewhere. In this connection it refers to its allegation in its complaint that the fish hauling busi-

ness constitutes but one per cent of its total annual business. Its president testified, however, that during the fish season the fish hauling business accounted for a much larger proportion of its income, perhaps twenty per cent or more. However this may be, we entertain no doubt that the activities of plaintiff in Monterey, disclosed by the record, amounted to the doing of business in that city, thus empowering it to impose a proper license tax on such activity. The record shows a regular and continuous course of fish deliveries during the season, planned and carried out pursuant to a previous agreement with the canneries. The trucks do not simply pass through Monterey. That city is the terminus for such hauls. Under the cases already discussed, such activities constitute the doing of business in Monterey, a taxable event occurred there, and that city is empowered to tax such event by a proper nondiscriminatory ordinance.

[14, 15] Plaintiff makes a strong public policy argument to the effect that to permit cities that are simply termini for hauls made by regulated carriers to tax at all is unfair and unsound. It points out that its president testified that it makes over twenty deliveries annually in some seventy-eight different communities. If each such community taxed the carrier, it is claimed, it would be subjected to an unfair burden that could not be reflected in the rate structure. This is undoubtedly a matter of general concern, and suggests that a complete overhaul of the taxing powers of communities over regulated carriers may be needed. But that is not a judicial problem. So far, the state has not seen fit, by constitutional provision or otherwise, to limit or to regulate the power of the cities where carriers do business to tax. Until that is done, the courts, under the guise of interpretation, should not attempt to create exemptions to the present constitutional provisions.

[16] This public policy argument, while it does not result in a holding of lack of power to tax, does suggest that such tax ordinances must be scrutinized carefully to

see that a city measures its tax by the taxable event that occurs in the city, and does not measure in such a manner that an unfair or discriminatory burden is imposed on such carriers. The city has a wide discretion in determining the base for such taxes, but there are limitations. The courts have not always been consistent in determining what those limitations are. See *Continental Baking Co. v. City of Escondido*, 21 Cal. App.2d 388, 69 P.2d 181; *Ex parte Haskell*, 112 Cal. 412, 44 P.2d 725, 32 L.R.A. 527; *E. A. Hoffman Candy Co. v. City of Newport Beach*, 120 Cal.App. 525, 8 P.2d 235, as compared with *Bueneman v. City of Santa Barbara*, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895, and then compare *Sivertsen v. City of Menlo Park*, 17 Cal.2d 197, 109 P.2d 928, and *Hansen v. Town of Antioch*, 18 Cal.2d 110, 114 P.2d 329.

[17] In the present case, although the power to tax is clear, the method provided for the measurement of the tax, is, in our opinion, invalid for the reason that it measures the tax by factors not entirely based on the taxable event occurring in Monterey. The tax is therefore discriminatory and void. As already pointed out, an occasional delivery cannot be taxed. The tax is imposed upon each truck making a delivery or deliveries during the fish hauling season. If that truck makes one hundred deliveries during the season, the maximum tax is but \$13.50 for that truck. But if the carrier uses one hundred different trucks to make the one hundred deliveries, it must pay \$13.50 for each truck, or a total of \$1,350. The taxable event is the doing of business in Monterey—the making of regular, continuous and planned deliveries during the season. The taxable event in both cases is the same—the delivery of one hundred loads of fish in Monterey—yet one company would pay one hundred times what the other had to pay. It seems clear that the measure of the tax set forth in the ordinance has no reasonable connection with that taxable event. Keeping in mind that the city cannot tax an occasional delivery, and the nature of the business here involved, it seems quite clear to us that a tax based upon whether the carrier uses one truck to make

one hundred deliveries or one hundred trucks to make such deliveries is based upon an arbitrary standard and a purely extraneous event. The record here shows that because of the nature of the fish hauling business, and because of the demands of its business outside of Monterey, plaintiff is forced to rotate its trucks so that in the course of a season it uses practically its entire fleet. The use of subhaulers made necessary because of the nature of the business, and for whose license fees plaintiff is responsible, aggravates this situation.

None of the decided cases seems to have considered the factual and legal situation thus disclosed. The problem falls somewhere between the holding in *Ferran v. City of Palo Alto*, 50 Cal.App.2d 374, 122 P.2d 965, on one side, and *City of Los Angeles v. Tannahill*, 105 Cal.App.2d 541, 233 P.2d 671, and *California Fireproof Storage Co. v. Santa Monica*, 206 Cal. 714, 275 P. 948, on the other. An analysis of the factual situation involved, however, and considering the nature of the business taxed and the impact of the tax on it, leads to the conclusion that the method of measurement of the tax here involved most nearly resembles that held invalid in the *Ferran* case than it does the methods approved in the other cases. In the *Ferran* case the tax was measured by a purely extraneous event that had no relation to the quantum or nature of the business done in Palo Alto. That is equally true in the instant case. Here, the standard selected, the number of individual trucks making deliveries, rather than the number of such deliveries or the tonnage carried into the city is a purely accidental and extraneous event that has no relation to the taxable event occurring in Monterey or the quantum of business there carried on. For these reasons, it is our opinion that the measure provided in the taxing ordinance as amended is capricious, arbitrary and discriminatory. The injunction was, therefore, properly granted.

The judgments and orders appealed from in the three cases are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

MEYER et al. v. STATE BOARD OF EQUALIZATION. *

Civ. 8193.

District Court of Appeal, Third District,
California.

April 29, 1953.

Rehearing Denied May 19, 1953.

Hearing Granted June 18, 1953.

Action to recover sales tax paid on amount which represented transportation charges for coke sold. The Superior Court, Sacramento County, entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Schottky, J., held, *inter alia*, that since the title to the coke did not pass until delivery at buyer's place of business, the transportation charges were part of the gross receipts and subject to the sales tax.

Reversed.

1. Licenses ⇐15.1(6)

Where coke purchase order was placed by California corporation with California company, which in turn placed order with out-of-state company, which issued sales contract to California company, as buyer, with California corporation named as consignee, and coke was shipped directly to California corporation under uniform straight bill of lading, the original of which, together with weight certificate and invoice, was sent to California company, which sent its own invoice, together with original bill of lading and weight certificate, to California corporation, there was a "taxable sale" within meaning of Sales and Use Tax Law, and California company was not a "broker." Revenue and Taxation Code, § 6006.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Broker" and "Taxable Sale."

2. Pleading ⇐129(2), 264

In action to recover sales tax paid on amount which represented transportation charges for coke sold, failure of defendant to deny allegation of complaint that plaintiff was a broker for buyer was not an admission of such alleged fact, and allowance after trial and argument of amendment to answer traversing such allegation was not error and was effective to change facts es-

* Subsequent opinion 267 P.2d 257.

tablished by original pleading. Revenue and Taxation Code, §§ 6006, 6012(c, g).

3. Evidence ⇨208(6)

Where pleadings are amended by leave of court, original pleadings do not bind pleader to untrue and erroneous admission against interest which was inadvertently contained therein and which is subsequently disavowed and corrected in amended pleading which satisfactorily explains cause of original erroneous statement.

4. Courts ⇨87

The primary function of courts is to ascertain truth and real facts of case and to administer justice accordingly.

5. Appeal and Error ⇨959(3) Pleading ⇨236(4)

A court may in its discretion permit amendment of pleadings after evidence is all in, and pending argument of counsel, and even after submission of the cause, and exercise of such discretion will not be interfered with upon appeal except in case of its manifest abuse.

6. Commerce ⇨63

Where coke purchase order was placed by California corporation with California company, which in turn placed order with out-of-state company, which issued sales contract to California company, as buyer, with California corporation named as consignee, and coke was shipped directly to California corporation under uniform straight bill of lading, the original of which, together with weight certificate and invoice, was sent to California company, which sent its own invoice, together with original bill of lading and weight certificate, to California corporation, imposition of sales tax upon such sale of coke was not burden on interstate commerce, although coke was shipped from without the state. Revenue and Taxation Code, § 6006.

7. Licenses ⇨29

Sales ⇨23(3), 201(1)

Where there was not express contract for sale of coke but buyer thereof merely gave purchase order to buy certain amount of coke, delivery was only method of accepting offer and title to coke did not pass until delivery, and therefore sales tax was

due on transportation charges. Revenue and Taxation Code, § 6012(c, g).

8. Licenses ⇨29

Sales ⇨201(2)

Even if express contract existed between parties for sale of coke, which seller was to deliver to buyer, title thereto did not pass until delivery, in view of Civil Code provision relating to passage of title in case of contracts requiring seller to deliver goods, and therefore sales tax was due on transportation charges. Revenue and Taxation Code, § 6012(c, g).

9. Licenses ⇨29

Sales ⇨216

Where shipment of coke was made f. o. b. cars at buyer's place of business, title to coke passed from seller to buyer at delivery point, and therefore sales tax was due on transportation charges. Revenue and Taxation Code, § 6012(c, g).

10. Sales ⇨216

Where sales contract provides for f. o. b. delivery at point of destination, title to goods passes upon delivery at point designated, in absence of contrary intention between parties.

11. Licenses ⇨29

Where title to coke sold did not pass until delivery at buyer's place of business, transportation charges were part of "gross receipts" and subject to sales tax. Revenue and Taxation Code, § 6012(c, g).

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Receipts".

Edmund G. Brown, Atty. Gen., James E. Sabine, Irving H. Perluss and Norman B. Peek, Deputy Attys. Gen., for appellant.

Anthony J. Kennedy, Sacramento, for respondents.

SCHOTTKY, Justice.

Plaintiffs, H. L. E. Meyer, Jr., and Bess Taylor Meyer, doing business as H. L. E. Meyer, Jr., & Co., commenced an action against defendant State Board of Equalization to recover the amount of sales tax paid on certain transportation charges on

coke. The trial court rendered judgment in favor of plaintiffs in the sum of \$2,452.35 with interest. Defendant Board of Equalization has appealed from said judgment.

The facts are not in dispute and are substantially as follows:

Plaintiffs Meyer had paid to the State Board of Equalization a sales tax on gross receipts arising from sales of coke by Meyer to various companies throughout the state, from April 1, 1943, to and including March 31, 1946. Meyer had not included transportation charges incurred in shipping the coke as part of the gross receipts. Revenue and Taxation Code section 6012 includes as a part of taxable gross receipts, which is the measure of the sales tax, "(c) The cost of transportation of the property prior to its sale to the purchaser." The Board determined that these transportation charges were subject to the measure of the sales tax and made a determination assessing an additional sales tax against Meyer for this reason. Meyer paid the tax and, after exhausting their administrative remedy, then filed a complaint for recovery of sales tax. For the purpose of that action, the parties stipulated that a sale of coke to the General Metals Corporation of Oakland, California, was representative of the sales made to other purchasers during the taxable periods involved. The facts of that transaction were as follows: General Metals gave Meyer a purchase order for coke. A "coke sales contract" was issued by Pickands, Mather & Co., agents for Interlake Iron Corporation as seller, to Meyer as buyer, with General Metals named as consignee. The seller shipped 65,020 pounds of coke from South Chicago, Illinois, to the consignee under a uniform straight bill of lading, the original of which, together with weight certificate and invoice, were sent to Meyer; the invoice recited that 65,020 pounds of coke had been sold to Meyer "F.O.B. Cars Oakland, California, Transportation Charges Collect and Allowed." Meyer then prepared their own invoice and sent it to General Metals together with the original bill of lading and weight certificate; this invoice showed that Meyer had sold 65,020 pounds of coke to General Metals, and was in the amount of \$752.28, computed

at "\$23.10 per 2,000# (pounds) fob car Oakland, Calif. Transportation charges collected and allowed"; a deduction of \$328.35 for freight was allowed, leaving a balance of \$423.93 to which was added a \$5.83 charge for sales tax, making a total of \$429.76.

The trial court found, in part, that Meyer at no time either had or transferred possession or title to the coke, and that Meyer collected from General Metals and remitted to Pickands the purchase price of the coke exclusive of transportation charges. The conclusions of law below were that Meyer had acted as brokers, that they did not make a sale of the coke within the meaning of the Sales and Use Tax Law, Revenue and Taxation Code, section 6006, that the assessment by the Board constituted an unlawful burden on interstate commerce and that the transportation charges upon which the assessment had been based were exempt from sales or use taxation under the provisions of section 6352 of the Revenue and Taxation Code. Judgment was entered granting plaintiffs the refund they sought. The documents covering the representative sale to General Metals together with the pleadings and exhibits constitute the record on appeal.

In contending that the judgment should be reversed appellant Board of Equalization makes three major contentions:

"I. Meyer made a taxable sale within the meaning of the Sales and Use Tax Law, and the holding of the trial court that Meyer acted as a broker in this transaction is erroneous.

"II. The imposition of the tax was not a burden on interstate commerce, and the holding of the trial court to the contrary was erroneous.

"III. Title to the coke passed from Meyer to General Metals at the point of delivery and the transportation charges properly were included in the measure of the tax."

[1] Appellant first urges that respondents made a taxable sale and that the trial court's holding that they were brokers is erroneous. Revenue and Taxation Code section 6006, in so far as here material, defines a "sale" as "Any transfer of title or posses-

sion * * *." Appellant points to the coke sales contract between Pickands and Meyer as showing that Pickands agreed to sell and the Meyers agreed to buy; the Meyers were described as the buyer; the Meyers were obligated to buy, receive and pay for the coke. Pickands' invoice to Meyer stated: "Sold to H. L. E. Meyer, Jr. & Company"; Meyer's invoice to General Metals recites the phrase "Bought of H. L. E. Meyer, Jr. & Co." Further, appellant points out that there were no dealings between Pickands and the consignee General Metals, because Pickands sent the original bill of lading, weight certificate and invoice to Meyer, whereupon Meyer sent the bill of lading, weight certificate and their own invoice to General Metals. Respondents in no way brought the shipper and consignee together so that they contracted among themselves. Appellant contends that the facts do not support respondents' position that the sale was by the shipper Pickands to the consignee General Metals because the shipment was pursuant to the contract between Pickands and Meyer, and that in so far as Pickands was concerned, delivery to General Metals was delivery to Meyer. The authority relied upon by appellant is *Graybar Electric Co. v. Curry*, 1939, 238 Ala. 116, 189 So. 186, affirmed per curiam 308 U.S. 513, 60 S. Ct. 139, 84 L.Ed. 437, rehearing denied 308 U.S. 638, 60 S.Ct. 259, 84 L.Ed. 530, which involves facts almost identical with those here in that Graybar, upon receipt of a purchase order, would order the goods from the manufacturer consigned to the customer, the manufacturer would send its invoice to Graybar and Graybar would send its own invoice to the customer; the manufacturer billed Graybar and Graybar paid the manufacturer; Graybar billed the customer and the customer paid Graybar. The transaction was held to be a taxable sale, both Graybar and the customer being Alabama concerns, although the manufacturer was out of state. In the course of its opinion the Supreme Court of Alabama said, 189 So. at page 190:

"These goods were ordered by the customers in Alabama, from the complainant in Alabama, for consumption here. In the orders the cost price of

the goods which the customers were to pay was stated and fixed, and agreed on, in each order. These orders were accepted by the complainant in Alabama, and carried with them the agreement that the goods were to be delivered to the purchasers in Alabama. It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case."

[2] Respondents in reply assert that it was established by the pleadings that, for tax purposes, they were not the sellers. They point out that Paragraph VIII of the complaint alleged: "That said sales were made by Pickands Mather & Co., Cleveland, Ohio, as agent for Interlake Iron Corporation, South Chicago, Illinois, and plaintiffs as broker to purchasers in California." They point out further that this allegation was admitted by the answer by failure to deny it, although specifying other paragraphs as being denied in whole or in part.

This contention cannot be sustained. It appears from the record that after the cause was argued and briefed the court in its memorandum opinion granted appellant permission to file an amendment to its answer and a fourth paragraph was added to the answer reading as follows: "Admits the allegations contained in Paragraph VIII of said complaint, save and except that defendant denies generally and specifically each and every allegation of said Paragraph VIII of said complaint commencing with the word 'plaintiffs' in line 4, page 3, of said complaint, and ending with the word 'California' in line 5, page 3 of said complaint." By this amendment appellant traversed the allegation in the complaint that plaintiffs were brokers, but respondents argue that since the trial was had on September 7, 1951, upon a stipulation of facts executed on Au-

gust 29, 1951, the amendment to the answer on November 27, 1951 is ineffective to change the facts established by the pleadings. However, an examination of the stipulation of facts discloses no admission or statement that respondents were acting as brokers and it is clear that no such admission could have been intended by appellant or they would not have contested the action. The failure to deny it in the original answer was undoubtedly an oversight and when appellant's attention was called to it in the argument or briefs before the trial court permission to file the amendment was sought and was granted by the court. Respondents now claim that: "It would indeed be a treacherous jurisprudence which permitted a party to lure his adversary to trial upon a stipulation of facts through admissions made in the pleadings and after trial withdraw those admissions so as to leave his adversary short of proof on what then became an issue. Our jurisprudence is not of that order." However, counsel for respondents could and should have moved to reopen the case for further testimony, although it is difficult to conceive how further testimony could have changed the documentary evidence.

[3,4] As this Court said in *Jackson v. Pacific Gas & Electric Co.*, 95 Cal.App.2d 204 at page 211, 212 P.2d 591, at page 595:

"We think the correct rule with respect to reference to former pleadings which have been substituted by amended pleadings filed by leave of court is that the abandoned and substituted pleadings may be considered only for certain limited purposes, but not to bind the pleader to an untrue and erroneous admission against interest which was inadvertently contained therein, but which has been subsequently disavowed and corrected in an amended pleading filed by leave of court, in which, or accompanying which, satisfactory explanation is made of the reason which caused the original erroneous statement. Otherwise, it would be useless and futile to correct an innocent mistake of fact by stating the truth with respect thereto and explaining the cause of the erroneous statement. The

primary function of our courts of justice is to ascertain the truth and real facts of a case and to administer justice accordingly. If courts were to bind litigants to inadvertent untrue statements of facts and forbid them the inherent right to correct the false by substituting the true facts, they would become partisans to miscarriages of justice."

[5] And as we said in *Feigin v. Kutchor*, 105 Cal.App.2d 744 at page 747, 234 P.2d 264, at page 267:

"Plaintiff argues also that the trial court erred in permitting the filing of defendant's Second Amendment to Answer denying plaintiff's right to possession, but there is no merit in this contention, for as stated in 21 Cal.Jur. 193, 'A court may, in its discretion, permit amendment of pleadings * * * after evidence is all in, pending argument of counsel, and even after submission of the cause. It is unusual to find it necessary to amend the complaint after a case has been submitted, but there is, under the power given by section 473 of the Code of Civil Procedure, no limitation as to the time before judgment entered when the power of the court ceases.' And as stated in *Andrus v. Smith*, 133 Cal. 78, at page 81, 65 P. 320, at page 321: 'The court did not err in allowing plaintiff to amend her complaint after the cause was tried and submitted, but before findings had been filed or judgment given. The submission was set aside, and defendant allowed to answer the amended complaint and to introduce further evidence. This was the correct practice, and was in furtherance of justice, and for the purpose of having the case disposed of upon its merits.' And in *Burrows v. Burrows*, 18 Cal.App.2d 275, at page 279, 63 P.2d 1135, at page 1136, the court said: 'Under the provisions of section 470 of the Code of Civil Procedure, the trial court is invested with discretionary power to permit and even to order the pleadings of the parties to be amended at any stage of the trial of the cause, and even after its submission, so

as to make such pleadings conform to the proofs; and it has been uniformly held that this discretion will not be interfered with upon appeal except in cases of its manifest abuse.' (Citing cases.) See, also, *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 848, 147 P.2d 558.

"* * * A trial is more than a contest between opposing counsel, and a trial judge is more than an umpire in a battle of wits between opposing counsel. The administration of justice is not improved by slavish adherence to technical rules of pleading, but counsel and court should cooperate in having the pleadings so shaped that the controversy between the parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice."

Appellant next attacks the conclusion of the trial court that the imposition of the tax involved in the instant case was an unlawful burden upon interstate commerce in violation of Article I, section 8, clause 3, of the Constitution of the United States.

Appellant contends that the transaction was between a California seller (respondents) and a California buyer (General Metals, the consignee), and that under such circumstances the fact that the coke was shipped from outside of California is immaterial. Appellant cites *Wiloil Corporation v. Com. of Pennsylvania*, 294 U.S. 169, 55 S. Ct. 358, 79 L.Ed. 838, in which it was held that a gallonage tax imposed by a state upon a distributor of liquid fuel is not rendered repugnant to the commerce clause of the Federal Constitution by the fact that the distributor caused fuel sold to customers in the State to be shipped from another state for delivery in tank cars on the purchaser's siding as agreed. In that case the court said, 294 U.S. at page 174, 55 S.Ct. at page 359, 79 L.Ed. at page 840:

"* * * The precise question is whether the mere fact that appellant caused the fuels to be shipped from Delaware for delivery in tank cars—deemed original packages (*Askren v. Continental Oil Co.*, 252 U.S. 444, 449, 40 S.Ct. 355, 64 L.Ed. 654 [659])—on

purchasers' sidings as agreed makes imposition of the tax repugnant to the commerce clause. There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the state in which they are found merely because brought from another state, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff v. Parham*, 8 Wall. 123, 137, 19 L.Ed. 382 [385]."

And in the *Graybar* case, *supra*, the court said, 189 So. at page 190:

"It is not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause.' *Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox*, Attorney General, 280 U.S. 390-396, 50 S.Ct. 169, 170, 74 L.Ed. 504; *Browning v. [City of] Waycross*, 233 U.S. 16, 23, 34 S.Ct. 578, 58 L.Ed. 828-832.

"The facts of the case must determine whether it falls within the protection of the commerce clause of the Federal Constitution, and not the words of the contract. The desire to make its act an act in commerce among the states is unimportant, when the facts show it to be otherwise."

[6] We are unable to agree with respondents' contention that there was no contract between themselves and General Metals, or that "all that took place in California was the placing by General Metals Corporation of a purchase order with respondents." Nor can we agree with respondents' contention that the various invoices involved did not create a contract, or that the transaction was entered into by a broker on behalf of his principal and formed a contract between the seller and principal, thus necessarily involving interstate commerce. Indeed, if respondents were merely brokers

in the transaction it is difficult to understand why they would pay the sales tax on the coke itself, and yet they paid that tax without protest. As we analyze the various documents relating to the transaction, it was one between a California seller (respondents) and a California buyer (General Metals). Respondents by reason of their coke sales contract purchased the coke from Pickands and resold it to General Metals in California. The taxable sale here involved was made between respondents and General Metals, both of whose activities were localized and centered in California and the fact that the coke was shipped from without the state was immaterial.

Appellant's final contention is that title to the coke passed from respondents to General Metals at the point of delivery and the transportation charges were properly included in the tax. Respondents in reply contend that the tax is invalid because, they assert, it was levied upon transportation charges, separately stated, which accrued after sale.

Under the Sales and Use Tax Law the measure of the sales tax is the gross receipts of a retailer from the sale of tangible personal property. *Bigsby v. Johnson*, 1941, 18 Cal.2d 860, 863, 118 P.2d 289, 291.

Section 6012 of the Revenue and Taxation Code provides in part that:

"'Gross receipts' mean the total amount of the sale * * * price, * * without any deduction on account of any of the following:

* * * * *

"(c) The cost of transportation of the property * * * to its sale to the purchaser."

This section further provides that:

"'Gross receipts' do not include any of the following:

* * * * *

"(g) Transportation charges separately stated, if the transportation occurs after the sale of the property is made to the purchaser."

[7] Thus, whether these transportation charges are properly includible within the

measure of the tax depends on where title to the coke passed.

In general, the cases dealing with the question of passage of title usually are concerned with the interpretation of a contract of sale or contract to sell. However, respondents and General Metals never entered into any express contract to sell. It would seem that there was merely an offer (purchase order) to buy a certain amount of coke. See *Harvey v. Duffey*, 1893, 99 Cal. 401, 406, 33 P. 897, 899; *Imported Liquors Co. v. Los Angeles Liquor Co.*, 9 Cir., 1945, 152 F.2d 549. The only way this offer could be accepted was by delivery of the coke to General Metals. Title to the coke could not as a matter of elementary contract law pass until delivery. See *Auto Spring Repairer Co. v. Mutual Auto Accessories Co. of America*, 1911, 72 Misc. 402, 130 N.Y.S. 140. While perhaps respondents might be able to show an implied contract to sell or an acceptance of the offer of General Metals by the purchase of the coke from Pickands and consignment to General Metals, nevertheless the fact that no express contract to sell was entered into by the parties indicates that they never intended title to pass until the coke was actually received.

[8] However, even assuming that there existed a contract by which respondents agreed to sell to General Metals, title did not pass until the goods were delivered to General Metals.

Rule 5 of Section 1739 of the Civil Code provides as follows: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

It immediately is apparent that this case falls precisely within Rule 5 of Section 1739, because the contract between the parties required delivery of the coke in Oakland.

Thus, the purchase order of General Metals given to respondents contained instructions to ship to "Iron Plant" at "701—105th Ave., Oakland 3, California;" the invoice

from Pickands to respondents is for \$32.51 "Net Tons Chicago Solvay Foundry Coke At \$22.10 Per Ton F.O.B. Cars Oakland, California, Transportation Charges Collect And Allowed:" and the invoice from respondents Meyer to General Metals is for "65,020 lbs." of coke at "\$23.10 per 2,000# (pounds) fob car, Oakland, Calif. Transportation charges collected & allowed."

[9,10] That this evidence demonstrates that title passed from Meyer to the purchaser at the delivery point is supported by the general rule applicable to f. o. b. shipments: "Where the contract provides for a sale f. o. b. the point of destination, the title is generally held not to pass, in the absence of a contrary intention between the parties, until the goods have been delivered at the point designated." 46 Am.Jur., Sales, sec. 442, p. 609. This rule was adversely applied to State of California in the case of Standard Oil Co. v. Johnson, 1944, 24 Cal.2d 40, 45, 147 P.2d 577, 580, wherein the court stated:

"Whether or not delivery to a carrier constitutes delivery to the buyer depends upon the intention of the parties as ascertained from the contract and the other circumstances of the case, and ordinarily, unless a contrary intent appears, where the seller contracts to deliver goods at a given destination and he delivers them to a carrier consigned to the buyer with freight charges paid by the seller (f. o. b. point of destination), the delivery to the carrier does not constitute delivery to the buyer and title does not pass until the goods have arrived at their destination."

[11] We are satisfied that the record clearly shows that the title to the coke passed from respondents to General Metals at the point of delivery in California and that the transportation charges were incurred prior to the passage of title and were properly a part of the "gross receipts" and subject to the sales tax.

In view of the foregoing we conclude that the court erred in determining: (1) That respondents acted as brokers instead of sellers; (2) That the assessment of the tax was an unlawful burden upon interstate

commerce; and (3) That the transportation charges upon which the assessment was based were exempt from sales or use taxation under Section 6352 of the Revenue and Taxation Code.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.



BURGE v. CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 15252.

District Court of Appeal, First District,
Division 2, California.

April 27, 1953.

Hearing Granted June 18, 1953.

Action for injuries to minor child. The Superior Court, City and County of San Francisco, rendered adverse judgment, and plaintiff appealed. The District Court of Appeal, held that where divorce decree gave both parents joint custody and control of minor child, and father was living and had not deserted or abandoned child, mother had no authority to negotiate and compromise child's injury claim against third person, and judgment approving such compromise was absolutely void.

Reversed.

Nourse, P. J., dissented.

1. Infants ☞73

Proceedings to compromise a minor's claim are purely statutory, which means that ordinary rules of code pleading must be observed, and it must be shown to court by pleading and proof that petitioner has legal capacity to negotiate and settle for minor. Probate Code, § 1431.

2. Parent and Child ☞8

Divorce decree awarding joint custody and control of minor child to both parents with personal custody in mother did not give "care or custody" to mother within statute giving mother right to compromise minor's claim against third person, if par-

* Subsequent opinion 262 P.2d 6.

ents are living separate and apart and mother has care or custody of minor. Probate Code, § 1431.

See publication Words and Phrases, for other judicial constructions and definitions of "Care or Custody".

3. Divorce ⚖️302

Essential element of "custody" of child of divorced parents is right to make decisions regarding child's care, control, education, health and religion.

See publication Words and Phrases, for other judicial constructions and definitions of "Custody".

4. Parent and Child ⚖️8

Words in phrase "care or custody" within statute giving mother right to compromise minor's claim against third person, if parents are living separate and apart and mother has care or custody, are used synonymously. Probate Code, § 1431.

5. Judgment ⚖️489

Where parties admit or stipulate, or fail to object to evidence of, facts showing lack of jurisdiction, court must declare judgment based upon such facts void.

6. Judgment ⚖️505

Parent and Child ⚖️8

Where divorce decree gave both parents joint custody and control of minor child, and father was living and had not deserted or abandoned child, mother had no authority to negotiate and compromise child's injury claim against third person, and judgment approving such compromise was absolutely void and could be set aside in action for child's injuries. Probate Code, § 1431.

John F. O'Sullivan, San Francisco, Millington, Dell'Egro, Weeks & Morrissey, Redwood City, for appellant.

Dion R. Holm, City Atty., City and County of San Francisco and Clayton W. Horn, Deputy City Atty., San Francisco, for respondent.

GOODELL, Justice.

This appeal was taken from a judgment for defendant in an action wherein the

plaintiff, acting by his father as guardian ad litem, sued for \$30,000 damages for personal injuries.

On August 29, 1945 the minor was injured while riding as a passenger on a Municipal Railway car when it collided with another such car at the intersection of Duboce Avenue and Fillmore Street in San Francisco.

The minor at the time was in the personal custody of his mother pursuant to a court order in the divorce action between his parents, and about ten months after the accident she initiated, without the father's participation, proceedings for the compromise of the minor's disputed claim, § 1431, Prob. Code, and received from the city \$500 for which she signed a release on the minor's behalf.

Almost two years later the present action was filed, the complaint alleging nothing respecting the settlement or release. The city's answer denied liability and pleaded as a special defense that the \$500 settlement had been made and the release given pursuant to an order "*duly given, made and entered*" by the Superior Court. The issue so raised was tried separately without a jury under the procedure of § 597, Code Civ.Proc., and the burden of proving such defense rested on the city. The court found and concluded that the order approving the compromise was valid and that appellant's attack was a collateral attack and could not be sustained.

The appellant concedes that the attack was collateral but contends, nevertheless, that the court had no jurisdiction to approve the compromise because the mother lacked the legal capacity to represent the minor in those proceedings, and that the record now under review (despite the indirect nature of the attack) shows beyond question that the court was devoid of jurisdiction to approve the compromise.

Section 1431, Prob.Code, read at the time as follows: "*When a minor has a disputed claim for damages, money or other property against a third person, his father, or if his father is dead or the parents of said minor are living separate and apart and his mother then has care or*

custody of said minor then his mother, shall have the right to compromise, or execute a covenant not to sue on, such claim, but before the compromise or covenant is valid it must be approved by the superior court of the county where the minor resides, upon the filing of a verified petition in writing. * * * The father or mother * * * upon receiving such money or other property may execute a full release and satisfaction of, or execute a covenant not to sue on the claim of the minor. * * *” (Emphasis added.)

In 1937 this court had before it a somewhat similar case, *In re Parrino*, 24 Cal. App.2d 128, 74 P.2d 549, at which time the language just emphasized was not contained in § 1431. It then provided that the mother had the right to compromise only in cases where the father was dead *or had deserted or abandoned the child*. The Parrinos had been divorced and the custody of their daughter had been awarded to the mother. The girl was injured and her mother compromised the disputed claim. Later the girl's father moved the Superior Court to set aside its order approving the compromise on the ground that the mother had no legal capacity to act in the matter, which motion was granted. In affirming the latter order this court said: “The right of either the father or mother to compromise such a claim is purely statutory and the Legislature saw fit to confer it upon the mother only in cases where the father is dead or has deserted or abandoned the child. Such is not the case here.”

The motion in the Parrino case, made before the same court that had approved the compromise, was a direct attack, hence that case differs from this in that one respect, but that difference is not material, as will hereafter appear. The principle of the Parrino case, in our opinion, is controlling herein despite the change in the statutory language, since the present question is, Whether the mother had the legal capacity under § 1431 to handle the compromise, which was precisely the question presented in the Parrino case.

[1] The Parrino case holds that compromise proceedings of a minor's claim

are “purely statutory” which means, of course, that the ordinary rules of code pleading must be observed and it must be made to appear to the court by pleading and proof that the petitioner has the legal capacity to negotiate for the minor and settle in his behalf. The record in the compromise proceeding in this case contains no such showing.

Mrs. Burge's verified petition alleged:

“The petition of Ova [sic] Burge, respectfully shows:

“1. That petitioner is the mother of Lyndle Burge, a minor, age fourteen, and that both petitioner and the minor are residents of the City and County of San Francisco.

“2. That minor has disputed claim for money against the City and County of San Francisco for injuries sustained by minor when an accident occurred on August 29, 1945, at Duboce and Fillmore Streets involving a collision of Streetcars ‘N’ and No. 22, operated by the City and County of San Francisco.

“3. That said City and County of San Francisco offered to pay in compromise of said claim the sum of Five Hundred (\$500.00) Dollars, which, in the opinion of petitioner is a reasonable compromise, and that it will be to the best interest of said minor if said compromise is accepted by this Court.

“Wherefore, petitioner prays that the Court approve said compromise and direct that said money be paid to her without the filing of any bond.

“Iva Burge,
“Petitioner.”

The only jurisdictional facts alleged, aside from the injury, were that the petitioner was the minor's mother and that he resided in San Francisco. There was no allegation (a) that his father was dead, or (b) that the parents were living separate or apart, or (c) that she had the minor's “care or custody”.

On the day the petition was filed this order was made: “Upon reading and filing the verified petition of Iva Burge for an order approving compromise of the *disputed claim for minor that Iva Burge has*

against the City and County of San Francisco, and it appearing to the Court that the compromise offer is reasonable. It is hereby ordered that said compromise be and it is hereby approved, and that the said City and County of San Francisco, is hereby directed to pay the sum of Five Hundred (\$5.00.00) [sic] Dollars to *Iva Burge, a minor*, [sic] without the filing of any bond." (Emphasis added.)

It has been noted earlier that the petition failed to allege (a) that the minor's father was dead, or (b) that his parents were living separate or apart, or (c) that the mother had his "care or custody". The order failed to recite or find any of these jurisdictional facts (a), (b), or (c). It does not even show by recital, finding, or otherwise, that the person who petitioned the court for approval of the compromise was the mother of the minor. It does not show that the claim was the minor's claim; it speaks of "the disputed claim for minor that Iva Burge has". The minor is not named in the body of the order. The concluding line of the order is a direction to the city and county to pay the sum of \$500 to "*Iva Burge, a minor*". (Emphasis added.)

It was admitted at the trial that there was no hearing on the petition; that the petition was not drawn by an attorney employed by the mother or son; that the mother did not appear or testify before any judge, nor did the son; that the order was simply laid before the judge with a half dozen other such orders, all clipped together, and he signed it. It appears that the approval of the compromise was attended by no more deliberation in the courtroom or chambers than would have attended an order extending time. The fact that there was no hearing is not emphasized by us; it is simply mentioned to give a complete picture of the compromise proceedings, such as they were.

[2-4] The defects and deficiencies in the petition and order are glaring enough, but the real reason why, in our opinion, the order was utterly void goes even further. At the time Mrs. Burge handled this compromise she had been divorced from the minor's father and the judgment in

that case contained the following order which was then in full force: "that the * * * plaintiff and defendant have joint custody and control of the * * * minor children, with personal custody in the defendant * * *" (the mother).

While the petition contains conspicuous internal evidence of having been hurriedly drawn, it may well be that the omissions therefrom were calculated and intentional. We refer particularly to the omission of the allegation which, under the ordinary rules of code pleading would make some pretense at following the provisions of § 1431, that "the parents of said minor are living separate or apart and his mother * * * has care or custody of said minor". The petition was required to be verified, and it may well be that the mother declined to go so far as to allege under oath that she had "care or custody", in the face of the order awarding to *both* parents joint legal custody and control. Had she alleged that she had care or custody (without more) such allegation would have been disingenuous, and had she come right out with the full truth by alleging that the father shared with her joint legal custody and control she would have stated herself out of court. *This is the real point in this case.* Other loose allegations may be left out of the picture for the purpose of the present discussion, but the fact remains that *the mother could not have pleaded and proved that she had care or custody* within the meaning and intent of § 1431, in the face of the joint custody order to which the "personal custody" order was but subsidiary and subordinate. It is inconceivable that the legislature intended to take from a father, who shares joint legal custody and control with the mother, the power to make a settlement for a minor simply because the mother has "physical custody".

The Supreme Court has recently said that one of the essential elements of custody is "the right to make decisions regarding [the child's] care and control, education, health and religion." *Lerner v. Superior Court*, 38 Cal.2d 676, 681, 242 P.2d 321. The same court quoted the same statement as recently as April 17, 1953, in

Guardianship of Smith, Cal.Sup., 255 P.2d 761. The right of a parent to enjoy the care and companionship of a child under a "personal custody" order is one thing; the right of a parent to have "joint custody and control" (with the other parent) is an altogether different thing.

In the instant case the mother exercised the right to make a decision in a matter of grave importance. It is now claimed that Lyndle's injuries are permanent and a judgment for \$30,000 is sought; his mother made the decision to settle the claim for \$500, and if this judgment is affirmed her settlement will have barred the present action and put the minor out of court. Courts after all, in proceedings under § 1431 are dealing not with a mother's parental right to enjoy the companionship of her child but with the minor's legal right to be adequately compensated for his injury. If "joint custody and control" means *the right to make decisions* respecting the minor's interests, then it cannot be said that the mother's settlement, based solely on her right to personal custody was a compliance with § 1431. We are satisfied that § 1431 does not contemplate that a mother having mere personal care and custody shall have the right to settle such a claim as this when the father shares joint *legal* custody with her.

Respondent argues that the phrase "care or custody" in § 1431 is in the disjunctive. Counsel says: "The words care *or* custody need no involved interpretation. A mother may have the care of a minor, when the parents have separated without a divorce decree. The mere fact that the minor was physically living with his mother and that she was taking care of him constitutes 'care' within the meaning of the statute."

The trial judge seems to have accepted this view for he said: "But I think, the mother having the care, if the mother alleged in the petition that she had the actual care and the father and mother were separated * * * I would get over that one hurdle * * *." But it is to be borne in mind that *neither the separation nor the mother's actual care was alleged in the petition, or recited or found in the order of approval.*

It is true that the statute uses "care or custody" in the disjunctive, but the two words when found in such a statute mean the same thing. One of the definitions of the noun "care" given in Webster's New International Dictionary, 2d Ed., is "Charge, oversight, or management, implying responsibility for safety. * * * Also, *custody*; temporary charge * * *." The same authority defines the noun "custody" as "A keeping or guarding; *care*, * * *. Judicial or penal safe keeping; *control of a thing or person* with such actual or constructive possession as fulfills the purpose of the law or duty requiring it * * *." (Emphasis added.) The phrase "care, custody and control", in everyday use by courts and lawyers, is accepted by everybody as expressing but one legal concept namely, "custody". In our opinion, when the legislature used the words "care or custody" it used them as synonymous. We are also mindful of the fact that the legislature spoke only of a separation, not of a divorce, and one way to interpret the statutory language is, that in cases of separation *without* divorce where the mother has the child she may act under § 1431. We have, however, the case of parents living separate and apart, but *with a divorce* wherein the judgment orders joint legal custody.

The separation, and personal custody were proved *at the trial* (not on the compromise) by the judgment roll in the divorce action, but the self-same judgment roll necessarily brought to the attention of the court *at the trial* that the legal custody was in both parents. It follows that Mrs. Burge could not have alleged or proved in the compromise proceeding that she had the "care or custody" of her son *within the meaning of § 1431.*

This case does not differ in principle from the Parrino case. The fact that there the attack was direct, while here it is collateral, makes no difference since respondent's own evidence which contains the proof of joint legal custody, makes manifest the mother's lack of legal capacity to make the compromise and the court's lack of jurisdiction to approve it.

[5] "The rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. And if the parties admit or stipulate, or fail to object to the evidence of, the facts showing a lack of jurisdiction, it is then established that the judgment is void as effectively as though shown by the record; and whenever such fact is brought to the attention of the court, it is the duty of the court to so declare as a matter of law." 15 Cal.Jur. p. 62; see also *Thompson v. Cook*, 20 Cal.2d 564, 569-573, 127 P.2d 909 and cases cited.

Rico v. Nasser Brothers Realty Co., 58 Cal.App.2d 878, 137 P.2d 861, cited by the city, is not in point. There the minor sued on the ground of mistake, to rescind the compromise of a disputed claim and offered to return the money received in settlement. The minor's father had handled the compromise as § 1431 required, hence in that case there was no question of a failure to allege and prove the jurisdictional facts. The main attack was aimed at the failure to hold a hearing on the compromise. There was no such hearing in this case either as already appears, but our conclusion is not based on that ground.

The city's contention that appellant made no offer to return the money received in settlement is without merit since appellant does not seek a rescission.

[6] The question whether in cases of joint custody both parents must join in proceedings under § 1431 is not presented herein. We simply hold that in this case, where the mother acted alone, she had no legal capacity to handle the compromise since the legal custody was joint rather than vested solely in her.

The trial court's decision that the compromise order was "conclusive upon plaintiff and may not be collaterally attacked" was erroneous.

The judgment is reversed.

DOOLING, Justice.

I concur. The problem presented is the proper construction of the 1939 amendment

to section 1431, Prob.Code, which gives to the mother the power to compromise the claim of a minor child where "the parents of said minor are living separate or apart and his mother then has care or custody of said minor". The crux of the question lies in the effect to be given the words "care or custody".

In historical perspective it appears beyond doubt that this amendment was adopted to remedy the hiatus in the section as it previously read which was disclosed in *In re Parrino*, 24 Cal.App.2d 128, 74 P.2d 549. In the *Parrino* case it was held that a mother to whom exclusive custody had been awarded in a divorce action could not compromise the minor's claim under section 1431 as it then read: i.e., "if his father * * * has deserted or abandoned him * * *." To remedy this situation the legislature substituted for the words "has deserted or abandoned him" the language first quoted hereinabove.

It is obvious that to meet the exact situation of the *Parrino* case the use of the single word "custody" in the substituted phrase would have been sufficient, but such a substitution would have left a new hiatus in the section and would not have taken care of the situation where no custody decree had been made but the father had voluntarily left the child in the sole physical control of the mother. It seems plain to me that it was to meet the latter situation that the word "care" was added to the amendment.

If the parents are separated and no formal court order determining the right to custody has been made but the father voluntarily leaves the child with the mother she has in fact the "care" of the child, although the question of "custody" in the legal sense would depend upon factual questions not readily determinable in a proceeding under section 1431. Civ.Code, § 197, gives the custody exclusively to one parent only where the other is "dead or unable or refuse(s) to take the custody or has abandoned" the family. In that situation where the mother has the actual "care" of the child but the custody is uncertain because the custodial rights of the parents have not

been formally adjudicated the legislature realizing the practicalities of the situation has given the mother the power to compromise.

The other situation, which exists where the rights to custody have been formally adjudicated by a court decree, is very different. There all uncertainty as to whether the father has lost his custodial rights or not is resolved by a formal adjudication. If by that decree the father's right to custody is established then the mother has not the "custody" of the child to the exclusion of the father. In that case it seems logical to hold that the right to compromise should be determined by the more definitive word "custody". So construing section 1431, where the custodial rights of the parents have been judicially determined the key word in section 1431 is the word "custody"; where the custodial rights of the parents have not been judicially determined the key word is "care".

The legislature in section 1431 has primarily given the right to compromise the claims of minor children to the father, traditionally the head of the family. It has taken that right from the father and given it to the mother in two instances: 1. where the father without court decree has voluntarily surrendered his parental rights to the mother, i.e., where "the parents * * are living separate or apart and his mother * * * has care * * * of said minor": and 2. where by court decree all custodial rights have been taken from the father and given to the mother, i.e., "his mother * * * has * * * custody of said minor".

I reach this conclusion the more readily because in a closely related field, the guardianship of minors, a clear distinction is made between care of the person of a minor and care of the minor's property rights, so that we may have one guardian of the person and another of the estate. Section 1440, Prob.Code. Where, as here, the

general custody of the minor has been given to the father and mother jointly with "personal" custody in the mother the same distinction seems properly applicable.

NOURSE, Presiding Justice.

I dissent.

I disagree with the construction given by my colleagues to section 1431, Probate Code, in its application to this case. The section is applicable both during marriage and after divorce. During marriage the father and mother, even if they live separate and apart, have equal *legal* custody of their minor children. Sections 197, 198, Civil Code. Therefore, when during marriage section 1431 gives the right to compromise to the mother if she has "care or custody of said minor" this can only mean if she has the *factual* care or custody, i.e., the fact that the wife actually (and lawfully) cares for and guards the child. The interlocutory decree in this case gave joint custody and control of the minor children to the parents thereby continuing the legal custody as it was during marriage under sections 197 and 198, Civil Code, but gave the "personal custody" to the mother, giving her a more permanent factual care or custody than exists when during marriage parents live separate and apart. There is then here at least as much reason to consider this *factual* care or custody of the mother as decisive of the right to compromise under section 1431, Probate Code, as when there is no divorce. The expression "personal custody" can have no special significance as excluding control of property or estate because such control is at any rate not included in parental custody, section 202, Civil Code; 13 Cal.Jur. 143.

The main opinion recites several imperfections of the approval of the compromise but the reversal is not and should not be based on them.

I am of the opinion that the judgment should be affirmed.

117 Cal.App.2d 462

PEOPLE v. LEEPER.

Cr. 2369.

District Court of Appeal,
Third District, California.

April 28, 1953.

Defendant was convicted in the Superior Court, Yolo County, Macmillan, J., of perjury and conspiracy to commit grand theft, and he appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence sustained the conviction.

Affirmed.

See also 111 Cal.App.2d 623, 245 P.2d 337.

1. Criminal Law ⚖️641(1)

In prosecution for conspiracy to commit grand theft and for perjury, evidence would not sustain contention of defendant, that he had been compelled to go through trial without assistance of a competent counsel. Pen.Code, § 686, sub. 2.

2. Criminal Law ⚖️589(2)

Record on appeal from conviction for conspiracy to commit grand theft and for perjury showed no abuse of discretion on part of trial judge in not granting defendant's request for continuance upon ground of his illness.

3. Criminal Law ⚖️511(2)

Corroboration need do no more than connect defendant with crime in such way as reasonably to satisfy fact finding bodies that accomplice is telling truth.

4. Criminal Law ⚖️511(1)

Accomplices need not be corroborated in everything to which they testify.

5. Criminal Law ⚖️511(1)

Corroboration of accomplice testimony was sufficient to sustain conviction for perjury and for conspiracy to commit grand theft from a decedent's estate by passing as true a counterfeit document. Pen.Code, § 1103a.

VAN DYKE, Presiding Justice.

The grand jury of Yolo County found an indictment against appellant and three codefendants, Louise E. Mecum, Bert Yost and Edward R. Greene. Count I of the indictment charged conspiracy to commit grand theft in that the defendants during the period between August, 1948, and October, 1950, conspired to obtain property and money of the estate of one Frank Weber by making false and fraudulent representations and making, uttering, publishing and passing as true and genuine a certain false and counterfeit document, to wit, a carbon copy of an alleged executed will. Count II charged the crime of perjury alleged to have been committed by the several defendants on varying dates in that they gave certain false testimony. All of the defendants pleaded not guilty to all charges. The case was called for trial on January 15, 1952. Defendant Greene not appearing his bail was forfeited and a bench warrant issued for his arrest. Before the voir dire examination of jurors began, John C. Harris, Esq., who had been acting as counsel for Leeper and Mecum, was, at his request, relieved of his representation of Mecum and the public defender was appointed to represent her. Thereupon, with leave of court, she withdrew her plea of not guilty to the charge of perjury and pleaded guilty thereto. The count charging conspiracy was dismissed as to her. Prior to trial defendant Yost had withdrawn his plea of not guilty and entered a plea of guilty as to a charge of perjury and as to him also the conspiracy charge had been dismissed. Both Mecum and Yost testified for the prosecution during the trial which went forward as to appellant Leeper alone. After a trial consuming ten days, the jury returned verdicts of guilty against appellant on both counts of the indictment. Motion for new trial was made and denied and the court sentenced appellant to serve consecutive terms as to each conviction. This appeal followed.

Appellant assigns the following errors: (1) That he was not accorded a fair and an impartial trial; (2) That the evidence of the accomplices Mecum and Yost was not

E. R. Vaughn, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

corroborated; (3) That the conspiracy was not established by competent evidence; and, (4) That the perjury was not proved by required evidence.

[1] In support of his assignment that his trial was unfair, appellant urges that when his case was called for trial, and throughout the trial, he was too ill to be tried; and that, though himself an attorney, he was compelled to go through the trial without the assistance of competent counsel. In factual support he shows the following: The record discloses that appellant moved the court for a continuance upon the ground of his illness, which motion was denied; that he moved for a change of venue, which was denied; that when it appeared at the beginning of the trial that defendant Greene would not be present, appellant moved for a continuance upon that ground, which motion was denied; that when Greene did not appear the court in the presence of the panel ordered his bail forfeited and that a bench warrant issue for his arrest, whereupon appellant again moved for a change of venue, which motion was denied; that on the second day of the trial appellant again renewed his motion for a continuance on the ground of his illness, which motion was denied, the court stating it found the supporting affidavit of an urologist insufficient, whereupon appellant asked that he be examined by a local physician skilled in urology, and that he be granted continuance sufficient to subpoena the affiant urologist whose affidavit the court declared insufficient. The requests were denied. On the fourth day of the trial appellant again moved for a change of venue and the motion was denied. On the eighth day of the trial and because appellant indicated he felt unable to properly conduct his defense, the court offered to appoint the public defender of Yolo County to assist. A week-end continuance was granted to enable appellant to consult with the public defender and on the following Monday the public defender asked to be relieved principally upon the ground that he objected to being required to defend a defendant who had means to employ counsel. The court granted the public defender's request and the trial proceeded. At the same time John

C. Harris, Esq., who appeared throughout as counsel for appellant, asked permission to withdraw upon the ground that he was in material disagreement with appellant as to how the case should be conducted and felt he could not conscientiously go forward. The prosecution objected and the court refused to grant Mr. Harris' request. Having set forth the foregoing, appellant contents himself as to discussion by citing the provisions of the California Constitution concerning the right to counsel; Penal Code Section 686, subdivision (2), containing a provision to the same effect; and case authority for the proposition that the right to counsel extends to every person accused of crime whether or not he is himself a lawyer. Respondent does not quarrel with these statements of the law but insists the facts shown by the record justify the actions of the court complained of. We have read the record carefully and have concluded that this assignment of error cannot be sustained.

[2] Appellant charges that his counsel was incompetent, but he points to nothing in the record that supports this charge save to say that his counsel was young and inexperienced. This may be, but our examination of the record shows that in so far as appellant allowed him to participate in the trial his counsel performed creditably and competently. He conducted the voir dire examination and the range of his questions indicated a thorough knowledge and appreciation as to what ought to be inquired into for the protection of appellant in the selection of the jury. He developed a number of grounds for challenge for cause which he made and which were allowed by the court. We can see no fault in his work in this regard. From that point on, however, he was permitted to have little share in the conduct of the trial, appellant himself taking over almost exclusively and conducting his own defense. Appellant appears to have industriously limited his counsel's participation to the voir dire examination and to the gathering of witnesses and the like, save for the examination of one or two minor witnesses. It further appears that during the months that elapsed between the pleas and the trial appellant

negotiated with at least two attorneys of his own selection who were experienced in criminal trial work, but in the end did not engage either because he deemed their demands for compensation unreasonable. It does not appear their demands could not have been met by him and in view of the probable length of the trial and the amount of time to be consumed in preparation therefor we do not think that the demands of these attorneys were so unreasonable as to justify appellant's failing to engage either when, for all the record shows, he was financially able to do so. Moreover, the record shows that appellant, an experienced attorney in his own right, did conduct his defense with competence and his argument of his cause was not only extensive but was well organized and leaves the reader with the impression that all that could have been said, the testimony considered, was said and well said. We think the verdicts were in no wise the product of a poorly-handled defense, but rather the result of most persuasive testimony on the part of the prosecution, not the least of which was the direct testimony of the accomplices as to both the conspiracy and the perjury. Appellant further complains that his trial was unfair because he was too ill to go through with it. The record shows that he was suffering from a prostatic condition which required surgery for its correction, but the most that can be said is that there was a factual issue as to whether or not his condition was acute enough to make it necessary that he undergo surgery before rather than after the trial; and as to whether the presence of his disease would interfere with his defense and with his own conduct thereof, to an extent that required his requested postponements. The record discloses a situation where the granting or denial of appellant's various requests for continuance were within the discretion of the court and no abuse of that discretion appears in the record. *People v. Nolan*, 126 Cal.App. 623, 14 P.2d 880; *People v. Fitzgerald*, 14 Cal.App.2d 180, 58 P.2d 718. While appellant cites the denial of his motions for continuance, and the denial of his various motions for change of venue, he makes no supporting argument that the

court erred and cites no authorities. Our own search of the record indicates that his motions based on these grounds were justifiably denied.

[3-5] Appellant contends that the evidence of the accomplices Mecum and Yost was not corroborated. This assignment requires a brief statement of the prosecution's testimony which follows: Frank Weber died in November, 1949. For more than 30 years appellant had been his attorney, to the exclusion of all others until May, 1949, during which month another attorney prepared and attended the execution of a will which disposed of an estate of around \$600,000 in value. Appellant was not a beneficiary under this will. Prior thereto and on August 31, 1948, appellant prepared and Weber executed a will in which likewise appellant was not a beneficiary. While that will was being prepared, however, appellant approached one Willie Beltrami, general handyman and nurse to Weber who then and thereafter up to his death needed constant attention, with a suggestion that although Beltrami was a beneficiary in a substantial amount in the will being prepared, nevertheless both he and appellant were deserving of a large share of Weber's estate when he should die; that Weber had no heirs (this was true) and that their sharing in the property that Weber would leave could be brought about by taking the last page of the will then about to be executed and thereafter drawing a false will, fitting the last and signature page of the true will thereto and probating it as the will of Weber. In the false part of the will a substantial share of the property would appear to have been bequeathed and devised to appellant and Beltrami. Beltrami refused to join this plan. After the May will, prepared by another attorney, had been executed by Weber, from which will Beltrami would substantially benefit, but from which appellant would take nothing, and just prior to July 20, 1949, a proposed Weber will was drafted in part through the efforts of appellant, Louise Mecum doing the secretarial and stenographic work. We will refer to this document as the July will. This proposed will provided for appellant bequests aggregating some \$200,000

in value. On July 20th Mecum, Yost and Greene gathered in the office of an attorney sharing a common reception room with appellant, and there and in the absence of Weber these three and the attorney purported to sign the will as witnesses. Mecum testified that when later she questioned the efficacy of this procedure, appellant replied that he would obtain Weber's signature thereafter. A copy of this proposed will, however, was filled out as though the original had been signed by Weber and by the subscribing witnesses. After Weber's death the May will was proposed for probate and appellant filed a copy of the purported July will alleging in his petition for probate that the original had been duly executed by decedent on July 20, 1949, and had been in existence after his death but had since been lost. A contest was filed to this petition for probate. During the contest Mecum, Yost and Greene testified that on July 20, 1949 they three had in the presence of Weber and at his request and in the presence of each other and of the fourth subscribing witness, subscribed a true and genuine will then bearing the signature of Weber. Appellant also, as a witness in the contest, testified that after Weber's death he had seen and had in his possession the original will of July 20th bearing the signature of Weber which he knew and of which the filed copy was a true copy in all particulars. During the trial herein there was testimony by Beltrami to the effect that he was on the 20th of July, 1949 in constant attendance upon Weber and that at no time did Weber go to the office of the attorney wherein the subscribing witnesses testified that he executed the will. Other witnesses testified to Weber's presence at different times of that day and the general effect of their testimony was to support Beltrami's testimony that Weber could not have executed the proposed will on July 20th. It was shown that one or more bequests in that will were made to persons whom Weber knew to be dead prior to its execution. There was also evidence which we need not detail tending to show that the July will was not such as Weber would have executed. The accomplices Mecum and Yost testified here-

in that Weber did not sign the will and was not present when they pretended to sign as subscribing witnesses and that their testimony to the contrary given in the contest had been false. Yost testified that both before and after the occurrences on July 20th he was assured by appellant that he, Yost, would receive a share of appellant's interest when appellant should have succeeded in obtaining distribution.

Appellant contends that the testimony of the accomplices Mecum and Yost is the only testimony in the record that establishes the corpus delicti of the conspiracy and connects Leeper therewith. The other evidence, he says, while it tends to show that Weber did not execute the July will, nevertheless fails to corroborate the accomplices' testimony as to Leeper's part in the conspiracy. This contention cannot be sustained. It is hardly necessary to labor the proposition in view of the testimony we have related. Generally, proof of conspiracy must be largely, if not entirely, circumstantial. Beltrami's testimony as to appellant's proposal to him, while not showing any conspiracy at that time, nevertheless tends to establish an existing intent on the part of appellant to wrongfully obtain a share in Weber's estate through a false will. The testimony of Beltrami and the other witnesses to the effect that Weber did not sign the July 20th will warrants the inference that when appellant proposed probate of that will as one properly executed by Weber and thereafter testified that he saw the signature of Weber upon the original his actions were in furtherance of the very conspiracy to which Yost directly testified. The proof of the conspiracy, of course, was adequate, Yost's testimony and that of Mecum being sufficient for that purpose. Since they were accomplices corroboration was necessary, but it is easily found in the related testimony. Corroboration need do no more than to connect "the defendant with the crime in such a way as reasonably to satisfy the fact-finding body that the accomplice is telling the truth." *People v. Griffin*, 98 Cal.App.2d 1, 26, 219 P.2d 519, 535.

Appellant contends that perjury was not proved by the required evidence. This as-

signment is difficult to understand in view of the facts we have related. True, under section 1103a perjury must be proved by testimony of two witnesses or one witness and corroborating circumstances, but that test is amply met by this record. The argument in support of this assignment, however, goes along this line: Even if Weber did not make a will on July 20th Leeper might have believed that he saw such a will. But Leeper knew Weber's signature and said he saw it on the will. There is no room here to argue that appellant just thought he saw such a will. Appellant says the only testimony as to the preparation of such a will was given by the accomplices and they said the attorney in whose office they gathered prepared the document and that appellant was not taking any part. But Mecum testified that appellant took part in the preparation of the purported will and Yost said that Leeper asked him to witness the will. Says appellant, they were not corroborated in these statements. But accomplices need not be corroborated in everything to which they testify. *People v. Griffin*, supra.

We find no error in the record. The judgment and the order denying new trial are therefore affirmed.

SCHOTTKY and PEEK, JJ., concur.



117 Cal.App.2d 470

HAGGERTY v. KINGS COUNTY et al.

Civ. 4380.

District Court of Appeal,
Fourth District, California.

April 28, 1953.

Action by individual for himself and in representative capacity for and on behalf of a state labor federation, its officers and members, to enjoin certain county officers from interfering with peaceful picketing, and from enforcement of certain allegedly unconstitutional ordinances, and from prose-

cution of two individuals in Justice Court for alleged violations of said ordinances. The Superior Court of Kings County, Stanley Murray, P. J., sustained demurrer to plaintiff's complaint without leave to amend, and entered judgment in favor of defendants, and plaintiff appealed. The District Court of appeal, Mussell, J., held that complaint did not state cause of action for plaintiff in his individual capacity, or for union members for damages in tort, or for the individuals who were being prosecuted, but that ordinance requiring permit from sheriff to conduct parade on public highway was unconstitutional and void.

Judgment affirmed in part; reversed in part.

1. Injunction ☞114(2)

In action to restrain county officers from enforcing ordinances relating to the use of loud speakers on automobiles and to the conducting of parades, in prevention of peaceable assemblage, peaceable picketing, and the exercise of freedom of speech by unions and members thereof, plaintiff, a union officer, who did not allege that he had applied for or was denied the permits authorized by the ordinances involved, or that he had been engaged in picketing, had no standing to maintain the action in his individual capacity.

2. Appeal and Error ☞917(1)

Allegations of complaint would have to be accepted as true where demurrer to complaint was sustained without leave to amend.

3. Labor Relations ☞927

Under allegations that plaintiff was secretary of a state labor federation and had been authorized by federation to bring action, that federation and members were engaged in peaceful picketing, that defendants were prosecuting pickets and members under ordinances, and that members constituted class similarly situated with respect to matters alleged, plaintiff was entitled to maintain a representative action to restrain enforcement of ordinances and, thus, to test their constitutionality. Code Civ.Proc. § 382.

4. Labor Relations ☞930

Where complaint in properly instituted class suit to restrain county officers from

enforcing certain allegedly unconstitutional ordinances against unions and their picketing members failed to particularize how each of members was injured, and did not state amount claimed by each as damages, such complaint failed to state cause of action for damages for tort. Code Civ.Proc. § 382.

5. Labor Relations ⇨930

Petition alleging right on part of state labor federation and its members to bring class suit to restrain enforcement of allegedly unconstitutional ordinances against picketers, failed to state cause of action as to union members who were being prosecuted for violation of ordinances but whose union was not a party plaintiff and who were not themselves party plaintiffs and who could test constitutionality of ordinances by appeal or habeas corpus after their criminal prosecution. Code Civ.Proc. § 382.

6. Constitutional Law ⇨90

Labor Relations ⇨818

The right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such, is guaranteed by the Constitution as an incident of free speech; however, the concerted activity of picketing is not free from all restraint, and injunctive relief is available where object sought to be achieved and means used to achieve it are unlawful.

7. Labor Relations ⇨283

While peaceful picketing may not be prohibited, unlawful conduct of pickets may be denounced by ordinance.

8. Highways ⇨165

As to public highways within county of Kings, outside the municipal corporations therein, the public acquires only the right of way and incidents necessary to enjoy such right subject to regulation, but county supervisors have custody and control of county highways and may enact and enforce ordinances and regulations for maintenance, protection, supervision, management, control or use of such highways. Streets and Highways Code, §§ 905, 942.

9. Highways ⇨166

Ordinance which prohibited parades, processions, or caravans on county highways unless permit were obtained from sheriff, but which prescribed no standards for exercise of sheriff's discretion and provided that he might refuse permit if in his opinion any parade, procession or caravan would unduly interfere with traffic or would tend to cause a breach of public peace, vested an arbitrary discretion in such officer, and, hence, was unconstitutional and void.

10. Constitutional Law ⇨90

Highways ⇨165, 168

It is the privilege of all persons to use the public highways, and the right of free speech thereon cannot be abridged or denied; however, use of such highways may be regulated and controlled in order to assure safety and convenience of traveling public.

11. Constitutional Law ⇨90

County board of supervisors had authority to specify, without unfair discrimination, the time, place and manner of the exercise of the right of free speech upon public highways, in relation to other proper uses of the highways.

12. Highways ⇨165

The use of vehicles equipped with loud speakers emitting loud and raucous noises and objectionably amplified sound on public highways is subject to legislative control.

13. Constitutional Law ⇨90

Ordinance prohibiting use of loud speaker on vehicle on public highways without permit from county board of supervisors, but providing that permit can be denied only upon presentation to supervisors of substantial and convincing evidence of clear and present danger that granting of permit would result in obstruction of orderly movement of traffic etc., set forth specific and enumerated standards for controlling the action of the supervisors and was not unconstitutional and void as unlawful restraint upon right of free speech.

14. Highways 165

The use on vehicles on public highway of sound amplifiers and loud speakers emitting a volume of sound sufficient to reach homes of farmers on large tracts of land may be regulated by county ordinance when such use creates an unwarranted obstruction to the orderly movement of traffic on the highways.

Todd & Todd, Clarence E. Todd and Henry C. Todd, San Francisco, for appellants.

Walter M. Gleason, San Francisco, A. Hugo Pearson, Dist. Atty. of Kings County, and Kenneth C. Nagel, Asst. Dist. Atty., Hanford, for respondents.

Francis Heisler, Carmel, for John A. Despol, Secretary, C.I.O. California Union Council, *amicus curiæ*.

MUSSELL, Justice.

Plaintiff appeals from a judgment entered against him after a demurrer to his complaint was sustained without leave to amend. The action was brought by one C. J. Haggerty individually and in a representative capacity for and on behalf of the California State Federation of Labor, an unincorporated association, its officers and members to obtain an injunction against certain officers of Kings County, restraining said officers from interfering with peaceful picketing and the enforcement of ordinances numbers 155 and 199 of the County of Kings and from prosecuting two individuals in the Justice Court for alleged violations of said ordinances.

It is alleged in the complaint, in substance, that the California State Federation of Labor (hereinafter called the "Federation") is a voluntary association of labor unions affiliated with the American Federation of Labor and that the National Farm Labor Union is also affiliated with said Federation; that plaintiff C. J. Haggerty is the secretary of said Federation and a member of one of the labor unions affiliated with the said Federation; that the members of said Federation and the N.F. L.U. constitute a class similarly situated with respect to the matters alleged; that

the subject matter of the complaint is a matter of interest to all of the members of said organization and that plaintiff has been authorized to represent all of the members of said unions and bring this suit in a representative capacity for and on behalf of himself and all other organizations similarly situated; that the said Federation and the said N.F.L.U. and its members have found it necessary to picket employers in the farming areas in Kings County; that the ordinary method of picketing in such areas would entail great and unbearable expense to said unions and would not be effective; that the said unions have employed a method of picketing and publicizing labor disputes which involves the use of a number of automobiles proceeding in concert and involving also the use of loud speakers in order to attain the necessary publicity; that said method of picketing has been carried on without violence or threat of violence and without any more interference with traffic on or across the roads and highways than would be involved by other lawful and ordinary traffic; that in order to prevent peaceable assemblage and peaceable picketing and the exercise of freedom of speech by said unions and the members thereof, the defendants have threatened to institute and are instituting prosecution of such pickets and members under the provisions of the two said ordinances and in particular are prosecuting R. E. Wadley and Timothy Parker in the court of the Justice of the Peace for violations of said ordinances and that unless restrained, the said Justice of the Peace will convict said Wadley and Parker and subject them to the penalties set out in said ordinances; that the said ordinances are unconstitutional and void; that R. E. Whatley and William Becker, members of the National Farm Labor Union, applied for permission to use a loud speaker; that permission was denied and that the board of supervisors refused to hear evidence in connection with the application. The prayer of the complaint is that the defendants be restrained from interfering with the constitutional rights of the plaintiff and the members of the unions whom he represents to free speech as expressed by peaceful picketing; from at-

tempting to enforce said ordinances and from presenting or continuing the prosecution of R. E. Wadley and Timothy Parker before the said Justice of the Peace. Damages are also asked for in the sum of \$100,000.

The ordinances involved are attached to the complaint as exhibits and insofar as are here material, provide as follows:

"Ordinance No. 199

"Ordinance Requiring Permits for the Use of Loud Speakers on Vehicles upon Highways in the Unincorporated Areas of Kings County.

"Section 2. It shall be unlawful for any person, other than law enforcement and governmental agencies to employ a speaker mounted upon a vehicle for the purpose of giving instructions, directions, making talks, addresses or lectures to any persons or assemblage upon or over any highway, without first obtaining a permit therefor as hereinafter provided.

"Section 3. The Board of Supervisors may grant any person a permit to employ a speaker mounted upon a vehicle upon or over any highway, upon proper application therefor, notwithstanding the provisions of Section 2. hereof. * * *

"Section 6. The Board of Supervisors shall grant said permit at said time, unless there is presented to the Board at the time of said consideration substantial and convincing evidence of a clear and present danger that the granting of said permit will result in the obstruction of the orderly movement of traffic or the peaceable passage or presence of persons, to, over or upon the public highways and other public places, or disorder or unlawful conduct, or unlawful injury of persons, or destruction of life or property, or tending to incite crime; or an invasion of the rights of privacy, or threatening the overthrow of the lawfully established government by force, in which case said permit may be denied.

"Section 9. Any person violating any of the provisions of this ordinance shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding Five Hundred Dollars (\$500.00), or by

imprisonment not exceeding six months or by both such fine and imprisonment."

"Ordinance No. 155

"An Ordinance Prohibiting Parades in Unincorporated Areas of the County of Kings Without a Permit, Providing for Application for and Issuance of Permits Therefor, and Providing Penalties for Violation of the Ordinance.

"Section 1. It shall be unlawful for any person to hold or conduct or to participate in any parade, procession or caravan upon any public highway in the County of Kings, State of California outside the limits of any incorporated city in said county, unless there has first been secured from the Sheriff of the County of Kings a written permit for the holding of such parade, procession or caravan.

"Section 2. To secure such written permit the person or organization sponsoring such parade, procession or caravan shall file a written application with the Sheriff of the County of Kings stating therein the name of the person or organization sponsoring the same, the route of travel of the same, the date and hour of holding the same, the approximate number of persons or vehicles expected to participate in the same, the purpose of holding the same, and such other information as shall be required by said Sheriff. Upon the filing of such application, if in his opinion the holding of such parade, procession or caravan will not unduly interfere with traffic upon the public highways and will not tend to cause a disturbance of the public peace, the Sheriff may in his discretion issue a written permit allowing the holding of such parade, procession or caravan. The Sheriff shall have power to refuse the issuance of such a permit if in his opinion the holding of such parade, procession or caravan would unduly interfere with traffic upon the public highways or would tend to cause a breach of the public peace. If the Sheriff grants such permit he may impose such restrictions and conditions as he deems necessary therein, said restrictions and conditions to be set out in full in said permit. No fee shall be charged by the Sheriff for the issuance of such permit.

"Section 4. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment."

The principal question here involved is whether plaintiff, in his individual or representative capacity, has stated a cause of action in his complaint.

[1] Plaintiff states in his opening brief that the instant action is brought by one C. J. Haggerty, representing all American Federation of Labor unions and members in California to restrain the enforcement of the said ordinances on the ground that they restrain the right of organized labor to assemble and picket and otherwise exercise the right of free speech. The complaint does not state facts showing an interference with plaintiff's individual or personal rights. It does not appear that he applied for or was denied a permit under either of the ordinances or that he was engaged in picketing. Since he has failed to plead facts showing any wrongful act which directly resulted in a violation of his legal rights, he has no standing to maintain this action in his individual capacity. *United States v. Superior Court*, 19 Cal.2d 189, 198, 120 P.2d 26.

Representative or "class" suits are authorized by the provisions of Section 382 of the Code of Civil Procedure "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

In *Parker v. Bowron*, 40 Cal.2d 344, 254 P.2d 6, the court, in discussing this statutory provision, held that there must be a well-defined "community of interest" in the questions of law and fact involved as affecting the parties to be represented. Citing *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 837, 198 P.2d 514 and *Jellen v. O'Brien*, 89 Cal. App. 505, 509, 264 P. 1115. In the *Parker*

case, as here, the plaintiff was the secretary of certain designated unions. He filed a petition for a writ of mandate for and in behalf of himself individually and as representative of affiliated unions and members thereof to compel the Los Angeles city officials to fix a salary or wages for the city employees in certain classifications. The court ruled that Parker failed to allege facts sufficient to bring him within the well-established rule regarding class suits; that he did not claim to be a member of the interested class and there was nothing to indicate that he was "similarly situated" with those whom he pretended to represent; and that there was no "common or general interest" in the subject matter of the controversy. In the *Weaver* case, supra, 198 P.2d 515, four plaintiffs "on behalf of themselves and all others similarly situated" brought an action to recover the statutory penalty imposed for the wrongful refusal of admission to a Rose Bowl game at Pasadena. The court held that the cause of action of the several plaintiffs and the other unnamed individuals were separate and distinct; that "the question, as to each individual plaintiff, is whether *he* 'as a person over the age of twenty-one years' presented himself and demanded admittance to the game, whether *he* tendered the price of the ticket, and whether, as to *him*, the refusal of admission was wrongful under section 53 of the Civil Code"; that while each claimant would be "similarly situated" in that his cause of action arose under the same statute, his recovery would rest on a distinct premise correlative with varying proof as to the facts of his particular case, and that "In such circumstances there is not the necessary 'common or general interest' in the subject-matter of the litigation appropriate to the maintenance of a representative action"; that "in general, a representative suit is proper because it is in behalf of a common or joint interest of an *ascertained class* in the subject matter of the controversy".

Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 878, 87 L.Ed. 1324, was an action brought to restrain threatened prosecution of petitioners and other Jeho-

vah's Witnesses for violation of a city ordinance. It was there said that it was not enough to justify the exercise of equity jurisdiction, in the circumstances of that case; that there were numerous members of a class threatened with prosecution for violation of the ordinance; that "Generally, the jurisdiction of equity court to avoid multiplicity of civil suits at law is restricted to those cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact, and it does not ordinarily extend to cases where there are numerous parties and issues between them and the adverse party [here the state] are not necessarily identical", and that "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." (Citing cases.)

In *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 963, 83 L.Ed. 1423, individual citizens, unincorporated labor organizations composed of such citizens and a membership corporation brought suit in the United States District Court, 25 F.Supp. 127, against the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City, New Jersey, to enjoin interference with plaintiffs' rights of freedom of speech and assembly. The Supreme Court dismissed the bill as to all save the individual plaintiffs, holding that "Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit."

However, it was held in *Rosicrucian Fellow v. Rosicrucian Etc. Ch.*, 39 Cal.2d 121, 139-140, 245 P.2d 481, 492, that

"The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and the others; and a bill may also be maintained against a portion of a numerous body of defendants representing a common interest." Citing *Baker v. Ducker*, 79 Cal. 365, 21 P. 764 and *Wheelock v. First Presb. Church*, 119 Cal. 477, 481, 51 P. 841.

In *Peterson v. Donelley*, 33 Cal.App.2d 133, 91 P.2d 123, the action was brought by one beneficiary under a trust for and on behalf of all of the beneficiaries, approximately 3,000 in number, and the court held that the necessary parties were before the court; that the allegations of the complaint and the findings were sufficient to show that the parties were numerous and that it was impracticable to bring them all before the court.

[2-4] In the present case it is alleged in the complaint that plaintiff is the secretary of the California State Federation of Labor and has been authorized to bring this action in a representative capacity; that the Federation and its members are engaged in peaceful picketing; that the defendants have threatened to institute and are instituting prosecution of such pickets and members under the provisions of the two ordinances involved and that the members of the Federation constitute a class similarly situated with respect to the matters alleged. These allegations must be accepted as true where, as here, the demurrer to the complaint was sustained without leave to amend. Under these circumstances and in view of what was said in the recent *Rosicrucian* case, *supra*, we conclude that the action may be maintained by Haggerty in a representative capacity in behalf of the Federation and its members to test the constitutionality of the ordinances here under consideration. In this connection it may be noted that the complaint fails to particularize how each of the members of the various unions was injured whereby he is entitled to damages and does not state the amount claimed by each as damages. The complaint there-

fore fails to state a cause of action for damages for tort. *Jinks v. Hodge*, D.C., 11 F.R.D. 346, 347.

[5] The record shows that R. E. Wadley and Timothy Parker are alleged to be members of the National Farm Union. This union is not a party plaintiff and Wadley and Parker, individually, are not parties plaintiff. They apparently are being prosecuted in a criminal action pending in the Justice Court. They can test the constitutionality of the involved ordinances in those proceedings. If they are unlawfully imprisoned, the remedies of habeas corpus or appeal are available to them. The complaint fails to state a cause of action in Haggerty as representing them individually.

[6] Appellant takes the position that the two ordinances involved are unconstitutional and that the enforcement thereof will restrain the right of organized labor and the Farm Labor Union to assemble, to picket and otherwise exercise the right of free speech and assembly. The right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such, is guaranteed by the Constitution as an incident of free speech. *Hughes v. Superior Court*, 32 Cal.2d 850, 854, 198 P.2d 885. As is said in *re Blaney*, 30 Cal.2d 643, 647, 184 P.2d 892, 895:

"The identification of the constitutional protection of the right of free speech, press and assembly, with the publicizing of labor disputes or problems through the medium of picketing, boycotting and otherwise has been established."

However, such identification does not free the concerted activity of picketing from all restraint and injunctive relief is available where the object sought to be achieved and the means used to achieve it are unlawful. *Seven Up Etc. Co. v. Grocery Etc. Union*, 40 Cal.2d 368, 254 P.2d 544.

In the Hague case, *supra*, it was held that streets and parks are held in trust for the use of the public and are and have been used for the purpose of assembly, communicating thoughts between citizens

and discussing public questions; that such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens; that the privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; that it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

[7, 8] While peaceful picketing may not be prohibited, unlawful conduct of pickets may be denounced by ordinance. 7 Cal.Jur. 10 Yr.Supp., Sec. 38, p. 479. And it has been held that there may be a limit placed upon the number of pickets using sidewalks on the city streets and the means of use. *Pezold v. Amalgamated Etc. Workmen*, 54 Cal.App.2d 120, 126-127, 128 P.2d 611. As to public highways within the county of Kings, outside the municipal corporations therein, the public acquires only the right of way and the incidents necessary to enjoy such right subject to regulation, Sts. & Hy. Code, Sec. 905, but the supervisors have the custody and control of county highways, *Las Posas Water Co. v. County of Ventura*, 97 Cal.App. 296, 301, 275 P. 817, and may enact and enforce ordinances and regulations for the maintenance, protection, supervision, management, control or use of such highways. Sts. & Hy. Code, Sec. 942.

The constitutionality of ordinances regulating the use of loud speakers and parading on public streets has been presented to the Supreme Court of the United States on numerous occasions. In *Cox v. State of New Hampshire*, 1941, 312 U.S. 569, 61 S.Ct. 762, 764, 85 L.Ed. 1049, five Jehovah Witnesses and sixty-three others of the same persuasion were convicted for violation of a state statute prohibiting a "parade or procession" upon a public street without a special license. The statute provided for a licensing board to which was delegated the power to investigate and decide the question of granting licenses. The court upheld the conviction and said:

"The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * *

"If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right."

In *Saia v. People of State of New York*, 334 U.S. 558, 68 S.Ct. 1148, 1149, 92 L.Ed. 1574, *Saia* was convicted of a violation of a municipal ordinance prohibiting the use of sound amplification devices except with permission of the chief of police. The ordinance provided that the use of loud speakers should not be deemed a violation of the ordinance, provided that the same was done with the permission of the chief of police. The court set aside the conviction and declared that the ordinance was unconstitutional on its face as it established a previous restraint on the right of free speech in violation of the first amendment which is protected by the Fourteenth Amendment against State action. The court said:

"To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards

prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones which we struck down in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; *Lovell v. [City of] Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; and *Hague v. C. I. O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423."

The court went on to say that noise could be regulated by regulating decibels; that the hours and place of public discussion could be controlled and that any abuses which loud speakers create could be controlled by narrowly drawn statutes, but that when the city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas.

In the *Hague* case, *supra* [307 U.S. 496, 59 S.Ct. 964], the court declared the city ordinance unconstitutional which required a license from a local official for a public assembly on the streets or highways or in public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent "riots, disturbances or disorderly assemblage". The court held that the ordinance was void on its face because it could be made "the instrument of arbitrary suppression of free expression of views on national affairs".

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 453, 93 L.Ed. 513, involved the validity of an ordinance which prohibited the use of a loud speaker or sound amplifier which emitted therefrom loud and raucous noises and was attached to and upon any vehicle operated or standing upon the streets or public places in the city of Trenton, New Jersey. *Kovacs* was convicted by a police judge of the city and on appeal to the Supreme Court, his conviction was affirmed. The court said:

"We think it is a permissible exercise of legislative discretion to bar

sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets.

* * *

"Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. * * * We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance."

In *Kunz v. People of the State of New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280, Kunz was convicted for unlawfully conducting a religious meeting without a permit from the city police commissioner. The ordinance under which he was convicted made it unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner and gave the commissioner discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. The court held that, as such, the ordinance was clearly invalid as a prior restraint on the

exercise of first amendment rights and that there were no standards prescribed for the exercise of his discretion.

The Supreme Court of this state in *In re Porterfield*, 28 Cal.2d 91, 168 P.2d 706, 718, 167 A.L.R. 675, declared that an ordinance of the City of Redding which prohibited soliciting for compensation without a license or memberships in organizations requiring the payment of dues was unconstitutional and void. The ordinance designated the city council as a licensing board for the issuance of licenses and provided that the city council should issue a license, upon payment of a license fee, if the council was satisfied that the applicant was of good moral character and did not resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation. The court stated the rule applicable as follows:

" '(A) statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business * * * in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses * * * according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform,—is unconstitutional and void.' (See, also, *State ex rel. Altop v. City of Billings*, 79 Mont. 25, 255 P. 11, 54 A.L.R. 1104; *American Baseball Club v. Philadelphia*, 312 Pa. 311, 167 A. 891, 92 A.L.R. 400.)"

The court stated that on the face of the ordinance the indefinite standards which it enunciated provided a mechanism for the deprival of constitutional rights, not only on the basis of guaranties applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity.

A provision of the Los Angeles Municipal Code which prohibited the holding of a procession or parade on any public street without a permit from the board of police commissioners, no standard being set up in the code by which the board was required to measure its decision, was held to be unconstitutional and void in *People v. Duffy*, 79 Cal.App.2d Supp. 875, 179 P.2d 876.

[9] Viewed in the light of the rules and principles announced in the foregoing cases, ordinance No. 155 here involved is, in our opinion, unconstitutional and void. To conduct or participate in any parade, procession or caravan on a public highway in the county of Kings, it is first necessary to secure a permit from the sheriff. There are no standards prescribed for the exercise of his discretion and if, in his opinion, such parade, procession or caravan would unduly interfere with traffic or would tend to cause a breach of the public peace, he may refuse to issue a permit. The ordinance vests arbitrary discretion in such officer and the determination of what constitutes a permissible parade or caravan is only limited by his opinion as to what would or would not constitute an undue interference with traffic or tend to cause a breach of the public peace. The board of supervisors of Kings county has authority to impose regulations in order to assure the safety and convenience of the public in the use of public highways and control the traffic thereon. However, such regulations should be set forth in an ordinance, properly drawn, and not left to the determination of an administrative officer.

[10-14] Ordinance No. 199, regulating the use of loud speakers, is not, in our opinion, unconstitutional and void as an unlawful restraint upon the right of free speech. It is the privilege of all persons to use the public highways and the right of free speech thereon cannot be abridged or denied. However, the use of such highways may be regulated and controlled in order to assure the safety and convenience of the traveling public. The board of supervisors of Kings county has authority to specify, without unfair discrimination, the time, place and manner of such use in re-

lation to other proper uses of the highways. The use of vehicles equipped with loud speakers emitting loud and raucous noises and objectionably amplified sound on public highways is subject to legislative control. Ordinance No. 199 does not abridge or deny the right of free speech or assembly. By its terms a permit to use a loud speaker can only be denied upon presentation to the board of supervisors of substantial and convincing evidence of a clear and present danger that the granting of a permit will result in the obstruction of the orderly movement of traffic or the peaceable passage or presence of persons to, over or upon the public highways and other public places, or disorder or unlawful conduct, or unlawful injury of persons or destruction of life or property, or tending to incite crime, or an invasion of the rights of privacy or threatening the overthrow of the lawfully established government by force. The standards controlling the action of the board of supervisors are specifically set forth and enumerated. In this connection it may be observed that plaintiff alleges in his complaint that unions have employed a method of picketing and publicizing labor disputes involving the use of a number of automobiles proceeding in concert and using loud speakers to picket employers on large tracts of land in the rural districts of Kings county; that such picketing has been carried on without violence or threat of violence and without any more interference with traffic on or across the roads and highways on which said picketing is in progress than would be involved by other and lawful traffic. Picketing in the manner alleged is not prohibited by the terms of the ordinance. The use of sound amplifiers and loud speakers emitting a volume of sound sufficient to reach the homes of farmers on such large tracts of land may be regulated by county ordinance when such use creates an unwarranted obstruction to the orderly movement of traffic on the highways.

It follows from what we have here said that the demurrer to the second cause of action involving the constitutionality of Ordinance No. 155 should not have been

sustained without leave to amend. The judgment is reversed as to the second cause of action and affirmed as to the first. Appellant to recover costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



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**ELECTRICAL PRODUCTS CORP. v.
WILLIAMS et al.**

Civ. No. 56.

Appellate Department, Superior Court,
Alameda County, California.

April 30, 1953.

Action was brought for breach of contract containing liquidated damage clause. The Municipal Court of the Oakland-Piedmont Judicial District entered judgment for plaintiff, and defendants appealed. The Superior Court, Ledwich, J., held that where contract provided that plaintiff would construct and install electrical display sign for defendants on their store, and that monthly rental should be \$98.75 for thirty-six months, and that if defendants should breach terms of contract, defendants' interest together with deduction for plaintiff's unexpended costs and possible salvage should be valued at 25 per cent of amount of rentals for unexpired term, burden was on plaintiff in action for breach of contract to introduce evidence to show that it would be impracticable or extremely difficult to fix actual damage, in order to recover under liquidated damage provision.

Judgment reversed.

1. Bailment ⇨31(3)

In action for breach of contract providing that plaintiff would construct and install special electrical display sign for defendants on their store and that defendants should pay certain monthly rental for 36 months for cost of installation and supplying parts, repairs, and maintenance, wherein defendants admitted nonpayment of monthly rentals but excused failure to pay

rentals on ground that plaintiff had not serviced and repaired sign as agreed, evidence sustained finding that plaintiff had fully performed its obligations to service and repair sign.

2. Courts ⇨190(8)

Appellate Department of Superior Court was bound by municipal court's findings as to which there was conflicting evidence.

3. Damages ⇨150, 163(3)

Generally, it is incumbent on one who relies on liquidated damage clause both to plead and prove facts sufficient to show that such clause comes within statutory provision that parties to contract may agree therein on amount which shall be presumed to be amount of damage sustained by breach thereof when, from nature of case, it would be impracticable or extremely difficult to fix actual damage. Civ.Code, § 1671.

4. Damages ⇨78(1)

Mere stipulations in contract are insufficient to sustain liquidated damage clause. Civ.Code, §§ 1670, 1671.

5. Damages ⇨150, 163(3)

Statutory rule that provision in contract which provides for amount of damages to be paid in event of breach of contract is void unless it is impracticable or extremely difficult to fix actual damage must be presumed to apply in all cases, unless party seeking to recover on agreement shows by averment and proof that it is impracticable or extremely difficult to fix actual damage. Civ.Code, §§ 1670, 1671.

6. Damages ⇨83

Whether nature of case is such that it would be impracticable or extremely difficult to fix actual damage, so as to warrant provision in contract for liquidated damages, is a question of fact. Civ.Code, §§ 1670, 1671.

7. Damages ⇨150, 163(3)

One seeking to rely on liquidated damage provision in contract, on ground that it would be impracticable or extremely difficult to fix actual damage, has burden to plead and prove facts showing impracticability. Civ.Code, §§ 1670, 1671.

8. Damages ⚡76

Validity of clause in contract for liquidated damages must be determined in accordance with facts and circumstances of each particular case. Civ.Code, §§ 1670, 1671.

9. Damages ⚡78(2)

Where parties exercise their business judgment in providing that it is impracticable and extremely difficult to fix damages which may result from failure to comply with contract, and that therefore there should be liquidated damages, is not controlling as to actual difficulty in fixing damages, though it is entitled to some weight. Civ.Code, §§ 1670, 1671.

10. Damages ⚡163(3)

Where contract provided that plaintiff would construct and install electrical display sign for defendants on their store, and that monthly rental should be \$98.75 for 36 months, and that, if defendants should breach terms of contract, defendants' interest together with deduction for plaintiff's unexpended costs and possible salvage should be valued at 25 per cent of amount of rentals for unexpired term, burden was on plaintiff in action for breach of contract to introduce evidence to show that it would be impracticable or extremely difficult to fix actual damage, in order to recover under liquidated damage provision.

11. Damages ⚡175

In action for breach of contract containing liquidated damage clause, court properly sustained objections to questions asking witness to compute rate of damages in accordance with contract as result of default by defendants and inquiring what balance was that plaintiff was asking for in damages, since questions were not appropriate to show impracticability or extreme difficulty of fixing actual damages sustained by plaintiff. Civ.Code, §§ 1670, 1671.

Minett F. Hallmark, Oakland, and Albert L. Wagner, Sacramento, for appellants.

Dannenbrink & Graves, Oakland, for respondent.

LEDWICH, Judge.

Defendants appeal from a judgment awarding plaintiff damages in the sum of \$1,826.87, interest \$165, attorney's fees \$250, and costs of suit for breach of a written

contract. Its execution is admitted by defendants. The contract provides that the plaintiff, described therein as "Owner", agrees "to construct, install and furnish" a special electrical display sign for defendants (called "User") on their store premises, according to certain specifications, and that the monthly rental shall be \$98.75 for 36 months "for the cost of installing said Display, for the agreement to supply parts, repairs and maintenance and for the right and license to use said Display". A deposit of \$395, the equivalent of four months' rent, was paid at the time of the execution of the contract, to be applied in payment of the rentals last becoming due, subject, however, to the provisions of paragraphs (h) and (j) thereof.

Paragraph (j) provides, among other things, for acceleration, without notice or demand, of all unpaid installments and for liquidated damages of 75% of the rentals for the unexpired term, and that "all rights and interest of User therein shall terminate in the event of breach of any of the terms of the agreement by defendants. The judgment includes an award of liquidated damages based on said paragraph (j), computed as therein provided. Said paragraph (j), the liquidated damage clause, is as follows:

"Breach of Agreement: It is mutually recognized that Display is not an article of general trade or utility, but is designed and is to be constructed, installed and maintained at the request and for the special distinctive uses and purposes of User, that Display is of no value to Owner except as so used, and that it is a material consideration to Owner in entering into this agreement that User shall continue to use Display as contemplated; and it is expressly agreed that if User shall breach any of the terms, provisions or agreements herein contained, or if during the term of this agreement or any extension thereof bankruptcy, debtor or insolvency proceedings are commenced by or against User, or if User makes an assignment for the benefit of creditors, or if a receiver is appointed to take possession of the business of User, or if action is taken to accomplish this end, or if User discontinues business in

the premises where Display is located, or sells or files, or there is filed on its behalf, notice of intention to sell or mortgage under Section No. 3440 of the Civil Code of California or similar statute of another State, or transfers its business or a material part thereof, voluntarily or involuntarily, or if continued use of Display is prohibited for any reason whatsoever, then and in any such event all of the unpaid rentals to the end of this agreement, or any extension thereof, shall without notice or demand be at once precipitated and accelerated and become due and payable and all rights and interest of User therein shall thereupon terminate. It is agreed that in the event of such acceleration and termination, User's interest therein together with deduction for Owner's unexpended costs and possible salvage, shall be valued at a sum equal to 25% of the amount of the rentals for said unexpired term, and that this amount shall be allowed in deduction of User's obligation herein. Provision is so made herein for a liquidated amount as liquidated damages in case of any such breach or event, for the reason that it is and ever would be impracticable or extremely difficult to ascertain the actual amount of damage. Upon such termination Owner shall have the right to apply any deposit made by User hereunder, or any unused portion thereof, to the amount that shall so become due hereunder. If Owner shall institute any suit or action for the enforcement of any of the obligations of User hereunder, including without limitation the payment of damages, User agrees to pay in addition to all sums found due from User, a reasonable Attorney's fee. All overdue payments shall bear interest at the rate of 6% per annum".

Defendants paid the first eight months' rent, through December, 1949. Plaintiff alleged and the Court found defaults in the payment of six installments of rental of \$98.75 each for January to June, inclusive, 1950, or a total of \$592.50. Defendants admitted the non-payment of these monthly

payments and gave as the reason therefor that plaintiff had not serviced and repaired the sign as agreed. The Court found that plaintiff had fully performed all of its obligations under the contract.

The contract does not provide for defendants ever becoming the owners of the sign. The "Owner" reserved title in and right to remove the sign on any termination of the contract. A letter written by defendants to plaintiff, dated four days prior to the date of the contract, states that defendants may purchase the sign "at any time during the course of the lease, or at the end of the 36-month agreement by payment of the salvage value of \$229.00 plus the sales tax". There is no evidence whether this sum is the salvage value of the sign.

Appellants present two arguments for reversal of the judgment. First, that the "credible evidence" was undisputed that the sign was not operating prior to any failure of defendants to pay rent. Defendants admit that there is "some conflict in the record" as to whether the sign failed to operate, as they claimed.

[1,2] We have carefully read the transcript of the testimony and there is the above conflict therein. The credibility of the witnesses on this issue of fact was a matter for the trial court to pass upon. We are satisfied that there is sufficient evidence to sustain the finding that the sign was operating when defendants failed to pay the rents and the further finding that plaintiff had fully performed all the conditions of the contract to be performed by it. This Court is bound by such findings under the well settled rule regarding conflicting evidence. *Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689.

The second argument is that the judgment for liquidated damages cannot be sustained because there was no evidence introduced to warrant the finding that the actual damages were "from the nature of the case * * * impracticable or extremely difficult to fix", as provided in Civil Code Section 1671.

[3] The California law is well settled that generally it is incumbent upon a party

who relies upon a liquidated damage clause to both plead and prove facts sufficient to show that such clause comes within the exception provided in Civil Code Section 1671. Plaintiff apparently recognizes this to be the rule, for the complaint affirmatively alleges "that at all times it was and is now impracticable and extremely difficult to fix the amount of damage or loss to plaintiff caused by either of said defendants or to prove the same". Paragraph (j) of the contract is to the same effect. In the absence of special demurrer, this is a sufficient pleading to permit proof that the case falls within the exception of said Section 1671, but that such proof must be made. *Sun-Maid Raisin Growers v. Paul A. Mosesian & Son*, 90 Cal.App. 1, 6, 265 P. 828.

Plaintiff contends that since the contract is in evidence, the provision in the contract for liquidated damages is itself sufficient evidence to sustain the finding of the court awarding liquidated damages. In support of this argument, certain federal court cases and decisions from other states, including the following, are cited: *Electrical Products Consol. v. Sweet*, 10 Cir., 83 F.2d 6; *Bassett v. Claude Neon*, 10 Cir., 65 F.2d 526; *Electrical Products Corp. v. Mosko*, 88 Colo. 447, 297 P. 991; *Electrical Products Corp. v. Ziegler*, 141 Or. 117, 10 P.2d 910, 15 P.2d 1078; *Hyde v. Claude Neon Federal Co.*, Tex.Civ.App., 157 S.W. 2d 952; *Lamson Co. v. Elliott-Taylor-Woodfenden Co.*, 6 Cir., 25 F.2d 4, 58 A.L.R. 295.

The test of determining the validity of the liquidated damage clause involved in the above and other cases cited may be stated as involving the following elements:

(1) Did the parties, from the language used in the contract, intend to provide for liquidated damages rather than a penalty?

(2) Did the provision in the contract represent an honest and genuine effort of the parties to estimate in advance the probable damages?

(3) Was the pre-estimate of the damages not disproportionate to any damage reasonably to be anticipated, at the time the contract was entered into? See *McCormick on Damages*, Sec. 149, pp. 606-608.

In some of the cases cited, evidence was received to determine the above questions and in some the provision in the contract was accepted as sufficient evidence. The Court had no occasion in any of the cases to consider the question of the proof required in this case, because no statute like Sections 1670 and 1671 was before the Court. The cited cases may all be distinguished for that reason alone. *Rice v. Schmid*, 18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589. This case must be decided under the California cases construing our statutory provisions as to the proof required to sustain a liquidated damage clause.

[4] No California case which has considered a similar liquidated damage provision to the one here involved on a similar factual situation has been cited. However, the California courts have repeatedly declared that "the mere stipulations in the contract are insufficient for this proof". *Sun-Maid Raisin case*, *supra*, and cases therein cited.

[5] In *McInerney v. Mack*, 34 Cal.App. 153, at page 156, and 157, 166 P. 867, at page 868 the Court states: "The rule stated in section 1670 of the Civil Code must be presumed to apply in all cases, unless the party seeking to recover upon the agreement shows by averment and proof that his case comes within the exception mentioned in section 1671. * * * This does not depend entirely upon the contract itself. * * * The mere stipulations of the contract are insufficient for that purpose".

[6] In *Rice v. Schmid*, 18 Cal.2d 382, 384, 115 P.2d 498, 499, the Court states: "It is a question of fact in each instance whether the nature of the case is such that it would be impracticable or extremely difficult to fix the actual damage". At page 387 of 18 Cal.2d, at page 500 of 115 P.2d, the opinion cites two leading U. S. Supreme Court cases, *Wise v. U. S.*, 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647, and *U. S. v. Bethlehem Steel Corp.*, 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed. 731, and then continues: "In states like California, however, which have code sections governing the matter of liquidated damages, the courts can not disregard the plain provisions of the statute".

In distinguishing a Massachusetts case, *Calvin Hosmer Stolte Co. v. Paramount Cone Co., Inc.*, 285 Mass. 278, 189 N.E. 192, the same decision says: "The decisions in that state do not require proof that the actual damages would be extremely difficult to estimate, but require only that the parties have intended to provide for damages rather than for a penalty".

The California Supreme Court recently held valid liquidated damage clauses in two cases under the peculiar and special facts of those cases, which were in no way comparable to the facts in this case. *Better Food Markets v. American Dist. Tel. Co.*, 40 Cal.2d 179, 253 P.2d 10; *Atkinson v. Pacific Fire Extinguisher Co.*, 40 Cal.2d 192, 253 P.2d 18.

[7-9] In the *Better Food* case, the Court states, 40 Cal.2d page 185, 253 P.2d at page 14, "It is settled law that the burden is on the party seeking to rely upon a liquidated damage provision in a contract to plead and prove facts showing impracticability. *Rice v. Schmid*, supra, 18 Cal.2d 382, 385, 115 P.2d 498; *Dyer Bros. Golden West Iron Works v. Central Iron Works*, supra, 182 Cal. 588, 593, 189 P. 445"; and at page 188 of 40 Cal.2d at page 16 of 253 P.2d "The validity of a liquidation clause in a contract must be determined in accordance with the facts and circumstances of each particular case". In the same case at page 184 of 40 Cal.2d, at page 13 of 253 P.2d, the opinion says, "Where the parties exercise their business judgment in providing that it is impracticable and extremely difficult to fix the damages which may result from the defendant's failure to render its service such a provision is not controlling as to the actual difficulty in fixing damages, although it is entitled to some weight". (Citing California cases.)

In the *Atkinson* case, at page 195 of 40 Cal.2d at page 20 of 253 P.2d, the Court uses the following language: "In the case of *Better Food Markets, Inc., v. American District Tel. Co.*, 40 Cal.2d 179, 253 P.2d 10, it was held that the question whether it would be impracticable or extremely difficult to fix liquidated damages is generally a question of fact and that the time for the

determination of the question is the time of making the contract. It was also held in that case that the question becomes one of law where the facts are not in dispute and admit of but one conclusion". This language is a definite recognition that the question here involved "is generally a question of fact".

In each of these cases the Supreme Court, in sustaining the liquidated damage clauses before it stressed the special facts of those cases to distinguish them from the California cases therein cited. In the *Better Foods* case the Court points out, "The possibilities of the consequences of a failure of the defendant to perform its obligation under the contract are innumerable".

In the *Atkinson* case it states: "The factors involved were too many and too variable to permit of any certainty in predicting the extent of the losses directly attributable to the failure of the detection system with reference to a particular fire".

The small compensation received by the party relying on the liquidated damage clause for the services it agreed to render compared to the large, uncertain and unforeseeable damages that might result from a breach of the contract was also a primary factor that entered into the Court's decision in these two recent cases.

There are no such complications in the instant case in the computation of actual damages as in these two recent cases. Here, the only obligation breached is one for the payment of a fixed sum of money in monthly installments, as agreed. The most damage that the plaintiff could possibly suffer is fixed and certain. It would be the full contract price, namely, 36 monthly payments of \$98.75 each, or a total of \$3,555, less the cost of maintenance and repair of the sign for the unexpired term, assuming the sign had no salvage value. If it had a salvage value, plaintiff's damages would be further reduced by the amount thereof at the time plaintiff elected to terminate the contract. There are other factors that enter into a computation of plaintiff's actual damages, such as the cost of constructing and installing the sign, plaintiff's profit if the contract were fully per-

formed, any commission paid for obtaining the contract and a proper charge for its overhead for doing business.

[10] Whether plaintiff's actual damages resulting from a failure to pay the rent as agreed in the contract was "from the nature of the case" impracticable or extremely difficult to fix could only be determined by evidence on that matter. Since the stipulations in the contract alone are not sufficient proof of the impracticability or extreme difficulty in fixing the actual damages, it is the duty of plaintiff to introduce evidence from which the Court can determine this question of fact.

[11] In plaintiff's brief it is stated, "at the time of the trial plaintiff offered to prove the damages in detail and were prevented by the specific objections of the defendant". This statement is unsupported by the record. All that the plaintiff did in this respect was to ask a witness two questions: (1) to "*compute* the rate of damages in accordance with this contract as of June as a result of defendants' default in payment", (2) "what is the balance you are *asking* for in damages"? The complaint was the answer to this question. Objections to both questions were properly sustained.

These questions were not appropriate to prove any facts showing from the nature of the case, the impracticability or extreme difficulty of fixing the actual damages sustained by plaintiff, and no offer of such proof was made by plaintiff. There is no merit in this argument.

The judgment awarded plaintiff of \$1,826.87 includes six months' accrued rent, through June 1950, amounting to \$592.50, and, to the extent of the unpaid rent, the judgment is supported by the evidence, except that it takes no account of the deposit of \$395. Insofar as the judgment awards liquidated damages, it is based solely upon the provision therefor in the contract, and is therefore, under the California cases, unsupported by any evidence. Under these circumstances, the judgment should be reversed.

If plaintiff offers evidence on the validity of the liquidated damage clause, the trial court should make its determination on that matter and then proceed to determine plaintiff's damages, dependent upon how it finds on the validity of the liquidated damage clause.

The judgment is reversed. Appellants are to recover their costs on appeal.

WAGLER, P. J., and HOYT J., concur.

40 Cal.2d 845

**FRAENKEL v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.**

S. F. 18745.

Supreme Court of California, in Bank.

May 1, 1953.

Action by plaintiff who it was stipulated was registered as professional engineer but was not licensed as contractor, for balance allegedly due under written contract for construction of grain elevator. The Superior Court, San Francisco County, sustained demurrer to complaint without leave to amend, on ground that plaintiff was not a licensed contractor and therefore was not entitled to enforce his claim, and plaintiff appealed. The Supreme Court, Spence, J., held that the demurrer to complaint was properly sustained, but that the denial of leave to amend complaint to allege that the construction was incidental to farming and that plaintiff needed no license constituted an abuse of discretion.

Judgment reversed with directions.

Prior opinion, 248 P.2d 531.

1. Licenses ⇨19(3)

Provision of contractor licensing statute to effect that statute does not apply to any construction or operation incidental to construction and repair of irrigation and drainage ditches, etc., or to farming, dairying, agriculture, etc., exempts any construction or operation incidental to farming, agriculture, etc. Business and Professions Code, §§ 7026, 7028, 7031, 7049.

2. Licenses ⇨11(5)

Contractors' licensing law was enacted for safety and protection of public against imposition by persons inexperienced in contracting work, and for prevention of fraudulent acts by contractors resulting in loss to subcontractors, material men, employees, and owners of structures. Business and Professions Code, § 7025 et seq.

3. Licenses ⇨19(3)

With respect to provision exempting from contractors' licensing statute the construction of structures incidental to farming, phrase "incidental to farming" means construction located on a farm and incidental to farmer's own farming operations. Business and Professions Code, §§ 7026, 7028, 7031, 7049.

256 P.2d—36½

4. Constitutional Law ⇨48

All presumptions favor a legislative classification, which cannot be overturned unless plainly arbitrary.

5. Constitutional Law ⇨48

Legislature's judgment on question whether particular provision should be made for any class of cases, and as to classification thereof, is not to be interfered with, except for very grave causes, and where it is clear beyond reasonable doubt that no sound reason for the legislative classification and for the different provisions regarding it exists.

6. Licenses ⇨39.44

In action by plaintiff who it was stipulated was registered as a professional engineer but was not licensed as a contractor, for balance allegedly due on written contract for construction of grain elevator, demurrer to complaint on ground that plaintiff was not licensed to perform such construction work was properly sustained, but denial of leave to amend complaint to allege that construction was incidental to farming and was, under exemption provision of contractors' license law, exempt therefrom, constituted an abuse of discretion. Business and Professions Code, §§ 6800 et seq., 7025 et seq., 7026, 7028, 7031, 7049.

Jack Flinn and Carrol F. Jacoby, San Francisco, for appellant.

John W. Hutton, King City, for respondent.

C. Ray Robinson and William B. Boone, Merced, as amici curiae on behalf of respondent.

SPENCE, Justice.

Plaintiff sought to recover the unpaid balance allegedly due for the construction of a grain elevator for Gordon F. Williamson, who was the original defendant but who died during the pendency of this appeal. Although his representative has been substituted, said Gordon F. Williamson will be referred to as defendant herein. The trial court gave judgment for defendant after sustaining a demurrer to the com-

plaint without leave to amend. There are three companion cases, *Fraenkel v. Trescony*, 256 P.2d 573; *Fraenkel v. Echenique*, 256 P.2d 573; *Fraenkel v. Ansberry Co.*, 256 P.2d 573, brought by this same plaintiff against other defendants in similar circumstances, and in which the trial court made like rulings. It has been stipulated that the decision in those cases will depend on the conclusions reached herein.

The trial court based its ruling solely on the proposition that plaintiff was not a licensed contractor and therefore was not entitled to enforce his claim. Plaintiff contends that the construction work involved may come within the farming exemption of the state licensing law; and that the complaint is capable of amendment to show the required facts. *King v. Mortimer*, 83 Cal.App.2d 153, 158, 188 P.2d 502. An analysis of the applicable statutory law and the underlying public policy thereof sustains plaintiff's position.

Plaintiff's action is predicated on a written contract for the construction of a grain elevator for defendant on the basis of "cost plus ten per cent." During the progress of construction defendant paid plaintiff \$15,286.82 on account. Upon completion plaintiff demanded a total of \$18,720.36 for the work, and following defendant's refusal to make any further payment, plaintiff commenced this action to recover the claimed balance of \$3,433.54, plus interest, attorneys' fees and costs. The complaint alleged that plaintiff performed the contract as an engineer. Defendant interposed a demurrer on the ground that the contract, pleaded as part of the complaint, shows that plaintiff did the work as a contractor, and that he failed to allege possession of a license to act in that capacity. At the hearing it was stipulated that plaintiff was registered as a professional engineer, Bus. & Prof.Code, Div. 3, Ch. 7, art. 8, but that he was not licensed as a contractor, Bus. & Prof.Code, Div. 3, Ch. 9, art. 2. Upon the basis of this stipulation and in accord with defendant's view relative to the necessity of plaintiff's compliance with the contractors' license law, the trial court sustained defendant's demur-

rer to the complaint without leave to amend.

On his appeal plaintiff does not deny that under the applicable statutory law his services were rendered as "a contractor" as that term is defined to include "any person, who undertakes to * * * construct * * * any building * * * or other structure," Bus. & Prof.Code, § 7026; that "It is unlawful for any person to * * * act in [such] capacity * * without having a license therefor, *unless* * * * *particularly exempted* * * *", Ibid, § 7028; emphasis added; and that "No person * * * acting in [such] capacity * * * may * * * maintain any action in any court of this State for the collection of compensation for the performance of any act or contract *for which a license is required* * * * without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract", Ibid, § 7031; emphasis added. However, plaintiff contends that the work he performed was within the following exemption provisions of section 7049 of said code: "This chapter does not apply to *any construction or operation incidental* to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts, or *to farming, dairying, agriculture, viticulture, horticulture, or stock or poultry raising, or clearing or other work upon land in rural districts for fire prevention purposes, except when performed by a licensee under this chapter.*" (Emphasis added.)

[1] In *Kelly v. Hill*, 104 Cal.App.2d 61, 63, 230 P.2d 864, 866, the language of section 7049 was, in our opinion, correctly analyzed and construed so as to exempt, as plaintiff here maintains, "any construction or operation incidental to * * * farming * * * agriculture * * *." A different construction of the exemption was made in *Bowline v. Gries*, 97 Cal.App. 2d 741, 745, 218 P.2d 806, 809, so as "to detach 'incidental' from farming and apply it only to certain work of irrigation and reclamation districts" rather than extend it to the succeeding clause of the provi-

sion. Such severance in the connected phraseology of the exemption does not appear to correlate with its intended scope, and it is therefore disapproved.

[2,3] However, there now arises the question of what "construction" is "incidental to farming" or "agriculture." Manifestly, the Legislature did not intend that the construction of every structure bearing a possible relation to the farming industry would be exempt from the contractors' license law as "incidental to farming." That law was enacted for the safety and protection of the public against imposition by persons inexperienced in contracting work, and for the prevention of fraudulent acts by contractors resulting in loss to subcontractors, material men, employees, and owners of structures. *Loving & Evans v. Blick*, 33 Cal.2d 603, 609, 204 P.2d 23; *Franklin v. Nat. C. Goldstone Agency*, 33 Cal.2d 628, 632, 204 P.2d 37. In exempting construction "incidental" to farming, agriculture, and allied occupations from the licensing requirements, the Legislature undoubtedly considered that such construction would include only those structures so closely appertaining to and necessary for the conduct of the designated occupations that they may reasonably be dissociated from the objects and purposes of the licensing law. Thus, the Legislature may well have had in mind prevailing conditions in many rural districts where there are few, if any, licensed contractors and where other persons in the area having the necessary training and experience are readily available for doing various construction jobs as the need may arise. Moreover, many farmers themselves develop special skill in various construction trades qualifying them for contracting among themselves for undertaking the erection of structural improvements upon neighboring farms and yet they are not regularly licensed for such occasionally performed work. But consistent with such practical considerations underlying the exemption in question, we are of the opinion that the construction must be located on a farm and must be incidental to the farmer's own farming operations in order to be "in-

cidental to farming," within the meaning of the exemption.

[4,5] All presumptions favor the legislative classification, which cannot be overturned unless plainly arbitrary. *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194, 209-210, 55 S.Ct. 187, 79 L.Ed. 281; *In re Cardinal*, 170 Cal. 519, 521, 150 P. 348, L.R.A.1915F. 850; *County of Los Angeles v. Hurlbut*, 44 Cal.App.2d 88, 93-94, 111 P.2d 963; see, also 5 Cal.Jur. sec. 193, p. 832. If the Legislature could have acted upon any conceivably reasonable ground, the courts must assume that the Legislature acted upon such basis. In short, the Legislature's judgment "on the question whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with, except for very grave causes, and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists." *Cohen v. City of Alameda*, 168 Cal. 265, 267, 142 P. 885, 886.

The premise of a "farming" exemption has been the subject of frequent comment in cases involving the application of workmen's compensation or unemployment insurance acts where "farm labor" or "agricultural labor" is excluded from the operation of such laws. Annotations in 7 A.L.R. 1296, 13 A.L.R. 955, 35 A.L.R. 208, 43 A.L.R. 954, 107 A.L.R. 977, 140 A.L.R. 399; 139 A.L.R. 1164, 146 A.L.R. 1318. "Agriculture," according to Webster's New International Dictionary, Second Edition, is "the art or science of cultivating the ground, and raising and harvesting crops * * *." The terms farming, husbandry and tillage are said to be synonymous or equivalent of the term agriculture. 3 C.J.S., Agriculture, § 1, p. 366. The purport of such legislative exemption envisages the integral association of the work in question with farming or agriculture. *California Emp. Comm. v. Kovacevich*, 27 Cal.2d 546, 560, 165 P.2d 917. Not only are the nature of the activity and its close relationship to agriculture among the elements to be considered, but an additional factor is the nature of the bus-

iness conducted by the person for whom the service is rendered. Thus, specialized services on a farm, such as the installation of irrigation and drainage systems when performed for the farmer himself and constituting an essential contributing factor to the efficient operation of his farming enterprise, are regarded as part of the general farming operation, *Irvine Co. v. California Emp. Comm.*, 27 Cal.2d 570, 574, 582-583, 165 P.2d 908, but when the same or similar services are performed for one who is not the owner or tenant of a farm and who is engaged in a commercial enterprise, the work loses its agricultural character, *Cal. Emp. Comm. v. Butte County, etc., Ass'n*, 25 Cal.2d 624, 639, 154 P.2d 892; see, also, *Machinery Engineering Co. v. Nickel*, 101 Cal.App.2d 748, 751, 226 P.2d 78. This same concept appears to have equally proper application in determining whether or not construction work is "incidental to farming."

[6] So here, if the grain elevator was built on defendant's farm and designed to function as an incidental part of his own farming operations rather than as a commercial enterprise, see *Machinery Engineering Co. v. Nickel*, supra, 101 Cal.App.2d 748, 751, 226 P.2d 78, there would be a factual basis for holding such structure to be within the terms of the exemption as a "construction or operation incidental to * * * farming". Plaintiff's complaint does not allege any particulars disclosing whether or not these essential elements are present. Such allegations are necessary to show, as a matter of pleading under the state contractors' license law, that plaintiff needed no license while performing the construction work in question, and to avoid the requirement of section 7031 that a license must be alleged. In these circumstances the demurrer to plaintiff's complaint was properly sustained; but since the complaint on its face appears susceptible of amendment to set forth the required factors, the denial of

leave to amend constituted an abuse of discretion.

The judgment is reversed with directions to give plaintiff a reasonable time within which to amend his complaint if he be so advised.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice.

I concur in the judgment of reversal but I do not agree with the limited and narrow interpretation placed by the majority upon the exemption provisions of section 7049 of the Business & Professions Code and neither do I agree with the attempt of the majority to re-affirm the holding of this Court in *California Emp. Comm. v. Kovacevich*, 27 Cal.2d 546, 165 P.2d 917 and *Cal. Emp. Comm. v. Butte County, etc., Ass'n*, 25 Cal.2d 624, 154 P.2d 892, in both of which cases I dissented and still adhere to the views expressed in my dissents.

The majority opinion states "But consistent with such practical considerations underlying the exemption in question, we are of the opinion that the construction must be located on a farm and must be incidental to the farmer's own farming operations in order to be 'incidental to farming,' within the meaning of the exemption." In my opinion this is altogether too narrow a construction to place upon the language contained in section 7049 of the Business & Professions Code quoted in the majority opinion. In my opinion many situations may arise where construction work of various types may be "incidental to farming" where the construction work is not performed on a farm, and I think it is unwise to lay down such a narrow definition in a case such as this, where it is remanded to the trial court to determine as a question of fact whether or not the construction work here involved was "incidental to farming."

SCHAUER, J., concurs.

40 Cal.2d 905

Carl M. FRAENKEL, doing business as **The Matthis Company**, plaintiff and appellant, v. **J. G. TRESCONY** and **Marie G. Trescony**, defendants and respondents.

S. F. 18746.

Supreme Court of California, in Bank.

May 1, 1953.

Appeal from Superior Court, City and County of San Francisco; Edward Mollenbuhr, Judge.

Prior opinion, 248 P.2d 533.

Jack Flinn and Carroll F. Jacoby, San Francisco, for appellant.

John W. Hutton, King City, for respondents.

PER CURIAM.

This is a companion case to *Fraenkel v. Bank of America*, 256 P.2d 569, and is controlled by the decision in that case. Accordingly, the judgment is reversed with directions to give plaintiff a reasonable time within which to amend his complaint if he be so advised.



40 Cal.2d 906

Carl M. FRAENKEL, doing business as **The Matthis Company**, plaintiff and appellant, v. **Lucio ECHENIQUE**, **Patricia Echenique**, **Ricardo Echenique**, **Francis D. Echenique** and **Luis Echenique**, individually and doing business as **Echenique Co.**, defendants and respondents.

S. F. 18747.

Supreme Court of California, in Bank.

May 1, 1953.

Appeal from Superior Court, City and County of San Francisco; Edward Mollenbuhr, Judge.

Prior opinion, 248 P.2d 533.

Jack Flinn and Carroll F. Jacoby, San Francisco, for appellant.

John W. Hutton, King City, for respondents.

PER CURIAM.

This is a companion case to *Fraenkel v. Bank of America*, 256 P.2d 569, and is controlled by the decision in that case. Accordingly, the judgment is reversed with directions to give plaintiff a reasonable time within which to amend his complaint if he be so advised.



40 Cal.2d 906

Carl M. FRAENKEL, doing business as **The Matthis Company**, plaintiff and appellant, v. **ANSBERRY CO.**, a corporation, and **Adrian Ansberry**, defendants and respondents.

S. F. 18748.

Supreme Court of California, in Bank.

May 1, 1953.

Appeal from Superior Court, City and County of San Francisco; Edward Mollenbuhr, Judge.

Prior opinion, 248 P.2d 533.

Jack Flinn and Carroll F. Jacoby, San Francisco, for appellant.

John W. Hutton, King City, for respondent.

PER CURIAM.

This is a companion case to *Fraenkel v. Bank of America*, 256 P.2d 569 and is controlled by the decision in that case. Accordingly, the judgment is reversed with directions to give plaintiff a reasonable time within which to amend his complaint if he be so advised.

117 Cal.App.2d 712

GILBERT v. ROGERS et al.

Civ. 8213.

District Court of Appeal, Third District,
California.

May 11, 1953.

Hearing Denied July 9, 1953.

Action for damages to plaintiff's truck when he swerved to avoid oncoming truck which had crossed over center lane. The Superior Court, Sacramento County, Glenn, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that a radial highway common carrier which has sublet a portion of a contract for hauling freight on the highways to an independent contractor who is a highway common carrier, is not liable to the public for damages caused by the negligence of the independent contractor.

Judgment affirmed in so far as recovery was denied against radial highway common carrier.

1. Master and Servant ⇨317

Generally an individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm to such others by the negligence of a contractor employed to do work in carrying on the activity.

2. Automobiles ⇨197(1)

A radial highway common carrier, which also possessed a contract hauling permit, having sublet a portion of a contract for hauling freight on the highways to an independent contractor, who was a highway common carrier, was not, in the course of its business performing activities giving rise to a non-delegable duty, and was not responsible for the tortious conduct of its independent contractor resulting in damage to plaintiff's truck, notwithstanding rule which would have resulted in liability on part of a highway common carrier, licensed and regulated by public utilities commission, in the same circumstances.

3. Automobiles ⇨197(1)

Where a radial highway common carrier, which was also licensed as a contract

carrier, sublet portion of contract for hauling freight to independent contractor who was highway common carrier, fact that independent contractor, without knowledge of radial carrier, had failed to keep in force security for payment of claims arising by negligent conduct, and that his license had been revoked an hour or two before happening of accident in question, did not compel conclusion that radial carrier was to be held responsible for tortious conduct of its independent contractor.

4. Automobiles ⇨197(1)

Radial common carrier, which also had license as highway contract carrier, was under no duty, at time of subletting a portion of a contract for hauling freight on highways to an independent contractor who was a highway common carrier, to ascertain more than that independent contractor was a licensed highway common carrier.

Stanley J. Gale, Sacramento, for appellant.

Gerald M. Desmond, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

On August 23, 1950, at 1:30 a. m. Ernest A. Boyd, as the employee of Richard V. Rogers, was driving a truck, with trailer attached thereto, northerly on Highway 99. Negligently he drove his rig across the center line into the opposing traffic lane, thereby compelling plaintiff's truck and trailer, going southerly, to swerve in such way as to overturn and spill its load. At that time defendant and respondent, Constructors Transport Company, a corporation, was a licensed *radial highway common carrier* as defined by Section 3516 of the Public Utilities Code. It was also a licensed *highway contract carrier* as defined by Section 3517 of said code. Up to midnight of August 22d Rogers, the negligence of whose driver caused the accident, was a licensed *highway common carrier*, but because he had violated certain provisions of law applying to such carriers his license had been revoked effective at midnight of said day. When the accident occurred Rogers was without a license. Prior to the time

of the accident, respondent Constructors Transport Company had contracted with an agency of the United States Government to haul a quantity of cargo for said agency and on August 22d had contracted with Rogers to subhaul a portion thereof. Rogers contracted to furnish for the work his own truck and driver and to haul at a rate fixed and allowed by the Public Utilities Commission. His rig finished its run and Rogers was paid for the haul. Plaintiff-appellant sued for his damages, joining Rogers and respondent Constructors Transport Co. The trial court in effect found that the relationship between Constructors Transport Company and Rogers, according to their contract, was that of employer and independent contractor, and that the contract between them was conformable to the authority and permits issued the carriers by the Public Utilities Commission. The trial court fixed the damages at \$10,520.90, and gave judgment in favor of plaintiff and against Boyd and Rogers; but held that plaintiff was entitled to nothing as against Constructors Transport Company. Plaintiff has appealed from that part of the judgment which denied him recovery against Constructors Transport Company.

This appeal presents primarily the question of whether or not a *radial highway common carrier* which has sublet a portion of a contract for hauling freight on the highways to an independent contractor, a *highway common carrier*, is liable to the public for damages caused by the negligence of the independent contractor.

[1] At the time the cause was decided in the trial court this Court had rendered its decision in *Gaskill v. Calaveras Cement Company*, 102 Cal.App.2d 120, 226 P.2d 633, and the Supreme Court had denied a hearing. While this case has been pending on appeal the Supreme Court rendered its decision in *Eli v. Murphy*, 39 Cal.2d 598, 248 P.2d 756, 757. Therein it held that a highway common carrier, licensed and regulated by the Public Utilities Commission under the Public Utilities Act, came within the rule enunciated in Section 428 of the Restatement of Torts. That rule is there stated as follows:

"An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

The Supreme Court said this common law principle had frequently been applied to impose liability on franchised common carriers who had engaged independent contractors to transport goods over the public highways and that it was applicable to the highway common carrier involved so that it was liable for injuries caused by the tort of its independent contractor, the subhauler. The court stated the highway common carrier was engaged in a business attended with a very considerable risk; that the legislature had subjected it and similar carriers to the full regulatory power of the commission to protect the safety of the general public, the effectiveness of which regulation would be impaired if the carrier conducted its business through independent contractors over whom it had no control; that to permit it through that device to escape liability for negligence of the subcontractors would reduce the incentive for careful supervision of its business and deprive injured members of the public of the financial responsibility of the licensee. Said the court: "Accordingly, both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier's duties as non delegable."

It seems to us that the reasoning in *Eli v. Murphy* is equally applicable to radial highway common carriers and also to highway contract carriers, both of which classes are licensed to transport freight upon the public highways by the Public Utilities Commission under the provisions of the Highway Carriers' Act. Secs. 3501-3809. These carriers are individuals or corporations carrying on an activity which can be lawfully carried on only under a franchise granted by public authority. To carry on

this activity involves a very considerable risk to the public and, indeed, involves the same risk as that arising from the operations of the highway common carriers who receive their licenses from the same commission, but under the provisions of the Public Utilities Act. The rigs used by the radial carriers and the contract carriers to carry out these activities are comparable to those used by the highway common carriers. The truck and trailer involved in this accident was 64 feet in overall length, carried a cargo of 44,000 pounds, and rig and cargo grossed 62,000 pounds in weight. At the time of the accident it was traveling 45 to 50 miles per hour. As indicating the similarity of the activities carried on by the three classes of carriers they all are licensed in like language to engage in the business of transporting freight over the public highways. Division 1 of the Public Utilities Code is entitled "Regulation of Public Utilities". Division 2 of the same code is entitled "Regulation of Related Businesses by the Public Utilities Commission." Highway common carriers are licensed and regulated under the first division. Radial highway common carriers and highway contract carriers are regulated under the second division. That the regulation of those engaged in the business of carrying on the activities for which all three classifications are licensed is a material concern of the legislature is indicated by the foregoing, and by the fact that the regulation of all are placed under the same regulatory power. Although the Public Utilities Commission may not, as yet, have issued regulatory orders to the radial carriers and the contract carriers, having the full scope of those issued to the highway common carriers, it has the power to do so. The regulation of all three classes includes the fixing of the rates they are permitted to charge and safety rules they must obey. All three classes are required to furnish security for the payment of damages to members of the public arising from their activities. There seems to be good reason why, if the duties of one class are nondelegable, those of the other two classes are equally so.

However, the Supreme Court in *Eli v. Murphy*, supra, did not disapprove the holding of this Court in *Gaskill v. Calaveras Cement Company*, supra. It distinguished the two decisions. Although applying the rule of nondelegable duty to highway common carriers, it declared the rule not applicable to the employing carrier involved in the *Gaskill* case. It said: "In that case, however, both the defendant and the independent contractor stood on an equal footing as contract carriers operating under permits from the Public Utilities Commission. Such carriers are not required to secure certificates of public convenience and necessity and they are not subject to the safety regulations the commission may establish for highway common carriers. They are entitled to permits as a matter of right on complying with the statutory provisions. Public Utilities Code, § 3572. Thus the carriers in that case [the *Gaskill* case] were engaged in a business open to all, and accordingly, the principle enunciated in section 428 of the Restatement of Torts was inapplicable." To us the distinction is not convincing. No one can engage in the transportation of freight over the public highways except by license from the Public Utilities Commission. This grant of authority any one must have if he desires to carry on those activities. We think the factor of control by the commission is important, notwithstanding both radial highway common carriers and highway contract carriers are entitled to their permits as a matter of right upon making the statutory showing to the commission by petition therefor. They may obtain their permits as a matter of right upon meeting the statutory conditions, but they can retain them only by obeying the regulations of the commission. Nor does it seem to us that it can be said such carriers are engaged in a business open to all. It may be true, as stated by the Supreme Court, that the legislature has exhibited special concern over highway common carriers and has classified them apart from other highway carriers, but certainly it has exhibited no lack of concern with respect to the safety of the operations of the latter.

[2] If the question were open to us, therefore, we would for the reasons given and in view of the Supreme Court's holding as to highway common carriers, hold that all three classes of carriers performed nondelegable duties and that none of them could insulate themselves from liability for negligence occurring in the course of their business by engaging independent contractors to transport freight for them. But as we read *Eli v. Murphy*, supra, the question is not open. While the respondent carrier, held by the trial court in this case to have successfully insulated itself through the medium of an independent contractor, possessed both a radial and a contract hauling permit at the time it engaged Rogers to haul freight over the highway, and while the carrier involved in the Gaskill case was a contract carrier we are not able to perceive any distinction between these two classes of carriers. Both receive their permits and both are regulated under the provisions of the Highway Carriers' Act. Both are common carriers as that term is generically understood. By Section 3571 of the code it is provided that neither shall engage in business without first obtaining from the commission a permit authorizing it to do so and the section which governs the securing of such permit, that is 3572, applies to both without distinction. Upon the mere filing of the petition either class must be given the required permit. Throughout, the provisions contained in the Highway Carriers' Act, addressed to the subject of regulating these two classes of carriers, make no distinction between them; and, as we have seen, both types of permit are sometimes granted to a single carrier. In this case respondent carrier had both types of permit. As we read *Eli v. Murphy*, we are thereby bound to hold that the respondent carrier, a radial highway common carrier, was not, in the course of its business performing activities giving rise to nondelegable duties, and therefore we must uphold the decision of the trial court that it was not responsible for the tortious conduct of its independent contractor, the subhauler.

[3,4] Appellant urges that the fact that the subhauler, a licensed highway common

carrier, had failed for the requisite length of time to keep in force security for the payment of claims arising by negligent conduct, coupled with the fact that an hour or two before the accident happened the license had been revoked compels a holding that respondent carrier was liable. We think this contention cannot be sustained. The record shows that respondent carrier had no information as to the defaults of its contractor when it made the contract. It is also stated in the record that when it made the contract it made no inquiry concerning such matters. We do not think that it was required to do so. Its contractor was at that time a licensed highway common carrier, and we think that it was under no duty to ascertain more than that, in order to validly contract, and having thus validly contracted it cannot be held liable for the torts of its independent contractor.

That part of the judgment appealed from, which denies recovery against the respondent carrier, Constructors Transport Company, a corporation, is affirmed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; CARTER, J., dissenting.



117 Cal.App.2d 649

PEOPLE v. SIERRA.

Cr. 2852.

District Court of Appeal, First District,
Division 2, California.

May 6, 1953.

Defendant was convicted of grand theft. The Superior Court, Santa Clara County, Elmer D. Jensen, J., entered judgment, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that the evidence sustained the conviction.

Affirmed.

I. Larceny $\S$ 65

Conviction for grand theft was sustained by evidence.

2. Witnesses ⇨297

Witness, who had previously been convicted on same charges on his plea of guilty in another court but who was not a defendant on charges then being heard could not properly refuse to testify on ground of self incrimination.

3. Criminal Law ⇨1168(2)

Reversal could not be predicated upon error in excusing witness on ground that his testimony might tend to incriminate him where no showing was made as to what defendant sought to prove by witness.

4. Criminal Law ⇨1044

Defendant who had pleaded to amended information and had not moved in court below to set it aside could not for first time on appeal urge that second count had been added to information without hearing before committing magistrate. Pen.Code, § 996.

5. Constitutional Law ⇨43(1)

A constitutional right may be waived either directly or by inaction. Pen.Code, § 996.

Hugh S. Koford, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Charles E. McClung, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was tried on two counts of an information charging grand theft of electric cable. Counsel was appointed to defend him and by stipulation a jury trial was waived and a trial was conducted by an attorney at law duly appointed as judge pro tem. with the consent of the parties. Defendant was convicted on both counts and sentenced to the State penitentiary. He appeals from the judgment and is here represented by other counsel assigned at his request by this court. Said counsel advanced two grounds for a reversal of the judgment—insufficiency of the evidence, and error in the exclusion of the witness called by defendant. Both grounds are ably discussed in the briefs but neither requires extensive treatment. At the time

of the oral argument he moved for an augmentation of the record to show the preliminary examination and commitment.

On the two occasions charged in the information a quantity of lead covered copper cable was taken from a substation of the Pacific Gas & Electric Company in San Jose. In the early morning following the night of the second theft, six men, including defendant, were discovered by a rancher in the act of chipping the lead off the cables. He telephoned the sheriff's office and restrained the parties until a deputy appeared and placed them under arrest. A quantity of the broken down cables were found in each of the two cars the parties were occupying.

On the trial, witnesses testified as to the ownership and the theft of the material, the observation of the parties engaged in breaking down that taken in the second theft, and the sale of the material taken in the first theft to a junk dealer. Witnesses definitely identified this appellant as one of those who had made the earlier sales and as one of those observed on the ranch in possession of the material taken in the second theft. The most convincing evidence of appellant's participation in the crime came from the witness Rodrigues who was an accomplice in both offenses. Respondent cites as corroboration of this witness the active cooperation of appellant with the witness in the sale of the material, his use of an assumed name in making the sale and his active participation with the witness in cashing the checks and distributing the proceeds. To these may have been added the undisputed and unexplained presence of appellant at an early hour of the morning following the second theft. There, in the presence of the ranch owner, the appellant was seen with the witness Rodrigues in possession of the stolen property. *People v. Trujillo*, 32 Cal.2d 105, 110, 194 P.2d 681; *People v. Bargala*, 81 Cal.App. 381, 253 P. 938.

[1] However, the evidence disclosed a general pattern or plan to take the cables, break them down and sell the parts to the same junk dealer and all such evidence, taken with appellant's unexplained possession of the cut up cables taken on

the second occasion, was pertinent to the corroboration of Rodrigues and it was sufficient to support the judgment.

[2] A more serious question is the propriety of the trial court in excusing the witness Garcia on the assumed ground that any testimony might tend to incriminate him. The witness had been previously convicted on the same charges on his plea of guilty in another court. He was not a defendant on the charges then being heard. However the court, mistakenly assuming that he was a defendant, stopped the proceedings and appointed special counsel for the witness to advise him as to his right to refuse to testify. Such counsel erroneously advised him that he could refuse to testify and the defendant was thereupon deprived of his only witness. The witness might have given testimony favorable to the defendant which testimony could not have conceivably tended to incriminate the witness in any crime. For instance, since the identity of the participants was at issue, this witness may have testified that he was present but that the defendant was not. Such testimony would not have incriminated the witness since he had theretofore confessed and pleaded guilty to his own participation in the offense.

[3] However no question was asked the witness except as to whether he wished to testify. No showing was made as to what the defendant sought to prove by the witnesses. Hence, no prejudice in the ruling appears. It is like those cases where no objection was made and no request for a ruling was made at the time. It is not a question which can be made for the first time on appeal because the reviewing court cannot say that prejudice appears from the record.

[4] At the oral argument on appeal it was suggested that the second count had

been added to the information without a hearing before a committing magistrate and it was orally requested that the transcript be augmented with the material relating thereto. However as it is conceded that appellant pleaded to the amended information and did not move in the court below to set it aside, he cannot urge this matter for the first time on appeal. § 996, Penal Code; *People v. Reimringer*, 116 Cal.App.2d 332, 253 P.2d 756 and cases there cited. Appellant relies wholly on *Parks v. Superior Court*, 38 Cal.2d. 609, 241 P.2d 521 and questions our ruling in *People v. Reimringer*, supra, distinguishing the *Parks* case on the ground that failure to move in the trial court to set aside the information was not considered in the *Parks* case. There the defendant did move to set aside the information under section 995 of the Penal Code and that motion was denied. Failure to so move was the ground of the ruling in the *Reimringer* case and this was based on *People v. Ahern*, 113 Cal.App.2d 746, 750, 249 P.2d 63, where the rule is supported by other authorities. We conclude that this ground is not now available to appellant.

[5] Appellant further argues that, since the right to a preliminary hearing is a right granted by the Constitution, it cannot be deemed waived and cannot be denied under sections 995 and 996 of the Penal Code. A constitutional right may be waived either directly or by inaction. 5 Cal.Jur. p. 626; 22 C.J.S., Criminal Law, § 333, p. 487; 14 Am.Jur. p. 936; 56 Am.Jur. pp. 110, 111. See *Chesney v. Byram*, 15 Cal.2d 460, 469, 101 P.2d 1106.

The application for an augmentation of the record is denied.

The judgment and the order denying a new trial are affirmed.

GOODELL and DOOLING, JJ., concur.

117 Cal.App.2d 588

**POST et al. v. ALAMEDA AMUSEMENT
CO. et al.
Civ. 15417.**

District Court of Appeal, First District,
Division 1, California.

May 4, 1953.

Action for injuries allegedly sustained from a defective portable electric automobile heater in a drive-in-theater. The Superior Court, County of Alameda, Donald K. Quayle, J., entered a judgment on a verdict in favor of defendant owner of drive-in-theater and in favor of plaintiffs against defendant manufacturer of heater, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that defendant theater owner was not chargeable as matter of law with failure to exercise reasonable care in installation, inspection and maintenance of heaters.

Judgment affirmed.

1. Electricity ⌋16(1)

Theaters and Shows ⌋6(10)

An owner of a drive-in-theater, which bought portable electric automobile heaters from a manufacturer for use of theater patrons, had duty to patrons to use reasonable care in installation, inspection and maintenance of heaters, and manufacturer had duty to use reasonable care in manufacture of heaters and in assembling their component parts and in inspecting and testing heaters before they left manufacturer's plant.

2. Theaters and Shows ⌋6(29)

In action for injuries to patron of drive-in-theater received when using portable electric automobile heater furnished by theater owner who bought heaters from defendant manufacturer, which injuries allegedly resulted from defective switch, causing heater to turn into a burning ball when switch was flicked and to burn plaintiff, defendant theater owner was not chargeable under record as matter of law with failure to exercise reasonable care in installation, inspection and maintenance of heaters.

1. Hereafter referred to as "Theater."

3. New Trial ⌋144

In action for injuries to patron of drive-in-theater, received when using portable electric automobile heater furnished by theater owner who bought heaters from defendant manufacturer, which injuries allegedly resulted from defective switch, causing heater to turn into a burning ball when switch was flicked and to burn plaintiff, wherein plaintiff claimed \$1,275 special damages, evidence did not establish that \$600 award in favor of plaintiff against heater manufacturer was compromise verdict.

4. Appeal and Error ⌋1060(1)

In action against drive-in-theater owner and manufacturer of portable electric automobile heaters, for injuries plaintiff patron of theater received when using heater furnished by theater owner and heater turned into a burning ball when plaintiff flicked heater switch, burning plaintiff, plaintiff was not under record entitled to reversal of judgment in favor of theater owner on ground that counsel for theater owner deliberately and without factual support attempted to injure plaintiff in eyes of jury by attacking plaintiff's sanity and family relationships, and attempting to show that plaintiff had been sterilized.

Wagener & Brailsford and Augustin Donovan, Oakland, for appellants.

Brown, Rosson & Berry, Oakland, for respondent National Heaters, Inc.

Appelbaum & Mitchell, Oakland, for respondent Alameda Amusement Co.

BRAY, Justice.

In an action for damages for personal injuries claimed to have been sustained from a defective heater in a drive-in-theater, the jury returned a verdict in favor of defendant Alameda Amusement Company, a corporation,¹ and in favor of plaintiffs and against defendant National Heaters, Inc.,² in the sum of \$600. From the judgment entered thereon, plaintiffs appeal.

2. Hereafter referred to as "National."

Questions Presented.

1. Were the verdicts inconsistent?
2. Were the verdicts compromise ones?
3. Alleged misconduct of Theater counsel.

Evidence.

There was practically no conflict in the evidence, except as to the extent of plaintiff Mary's injury. Theater owns the Alameda Drive-In-Theater. It purchased portable electric car heaters from National, who manufactured them. Theater advertised the fact that it had car heaters for the use of its patrons. The heaters were equipped with switches manufactured by various firms and were assembled into the heater units by National. National tested each heater and then packaged and shipped them to Theater. Each switch bore the seal of approval of the Underwriters' Laboratories, Inc., which means that it had been passed, checked and approved by the National Board of Fire Underwriters. Theater employed an electrical engineer named Burchett to prepare plans for installation of the electrical set-up and the heaters. His plans were based on, and identical with, the instructions received from National. An electrical contractor named Jarvis installed the heaters. Both Burchett and Jarvis testified it is standard practice to rely on the Underwriters' label and not to make an inspection of the heater switches. They did not take the heaters apart to inspect the switches. There was evidence that National might have used defective switches in assembling their heaters. Burchett testified that the accident was due to a "bad" switch in the heaters. The heaters had been in operation at the Drive-In Theater only five or six days when the accident happened. The one used by plaintiff Mary was the first one to cause trouble, although within five months thereafter, 17 out of the 500 installed were found to have faulty switches. On May 24, 1950, Mary, her husband and her family attended the Drive-In. Feeling chilly, she reached out of the car window and brought through the window the portable car heater. Holding it in one hand, she flicked the switch with the other. "[T]he minute I flicked the switch I got a tremendous

electric shock and the whole thing went into millions of sparks and it went into one burning ball, and at that time I dropped it into my lap and at the time I was wearing a wool skirt and I saw wool burning and I looked and saw I was on fire and I knocked the heater on the floor by my other hand and started in to put the fire out. * * *

She then threw the heater out of the car and leaped out. She testified that she "was screaming and hysterical" and "shocked to death." Her husband led her to the theater's Snack Bar where a woman employee rubbed ointment on the flash burns on her hands. She had flash burns on her legs also. The extent of her alleged injuries will be discussed later.

1. Alleged Inconsistency of Verdicts.

[1,2] Plaintiffs contend they were inconsistent, stating, in effect, that if the manufacturer were liable the Theater must necessarily be liable too. To reach this conclusion they have evolved a rather ingenious theory. It is that as the providing of electric heaters to patrons of drive-in theaters is a novel procedure, and as electrical equipment not properly constructed and maintained is dangerous, the duty of a theater owner towards a patron should be more than that of ordinary care, at least that of the highest degree of care, if not that of an insurer. Plaintiffs frankly admit they have no authority so holding. They rely, however, by analogy on *Nelson v. Duquesne Light Co.*, 338 Pa. 37, 12 A.2d 299, 128 A.L.R. 1257, and *McCordic v. Crawford*, 23 Cal.2d 1, 142 P.2d 7. The *Nelson* case, *supra*, does not support plaintiffs' contention as to the degree of care required, as it was held that the duty of a municipality is to use reasonable care to keep their streets in a reasonably safe condition for public travel. There an electric light pole was erected by the light company in the traversable portion of a city street. The light company's duty was to erect its poles so that the public should not be inconvenienced in the proper use of the street. The pole was erected with permission of the city. A guest passenger in an automobile which crashed into this pole sued both the city and the light company for damages for

injuries received. The jury gave a verdict in favor of the light company and against the city. The court held that the city's duty in respect to a pole that unreasonably obstructs the traffic in a street is secondary to that of the company which erected and maintained the pole, and that therefore the verdicts which released the defendant with the primary liability but held the one with the secondary liability were inconsistent. Obviously, in our case we have no situation of primary and secondary liability. As will hereafter appear, a different and separate duty was owed plaintiffs by each defendant. They both could have violated their respective duties, but not necessarily so, or either could have violated its duty, in the absence of a violation by the other of its own duty. Again, in *McCordic v. Crawford*, supra, 23 Cal.2d 1, 142 P.2d 7, the only duty required of the defendants was that of seeing that their premises were in a reasonably safe condition. There a patron of an amusement device, who was injured due to the stitching in the shoulder straps on the device coming apart, obtained a verdict against the lessee of the premises on which the device was situated and the concessionaire who operated the device. The verdict was upheld on the ground that both had violated their respective duties. In our case there was evidence which might have upheld a verdict against both defendants, had the jury so found. But the evidence did not compel such a verdict. In our case, both defendants were required to use ordinary care, but what constituted due care as to each differed. The duty of National, the manufacturer and distributor of the heater, was to use reasonable care in the manufacture of the heater and in assembling its component parts and in inspecting and testing it prior to its leaving the plant. See *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345. Theater's duty was to use reasonable care in the installation, inspection and maintenance of the heater. See *Prosser on Torts*, sec. 82, p. 668. As National is not appealing from the judgment against it, we are concerned only with the question of whether the evidence discloses that

as a matter of law Theater did not use reasonable care in installing, inspecting and maintaining the heater. The evidence does not so disclose. There is evidence that the defective condition of the switch could not be discovered except by opening the heater. This required a special type of key or screwdriver which only the manufacturer had. As said in *O'Rourke v. Day & Night W. H. Co.*, 31 Cal.App.2d 364, at page 370, 88 P.2d 191, at page 194, the heater "came to the respondent as a sealed unit. Its very nature precluded an internal inspection * * *." Liability is imposed if the defective condition of the part could have been discovered by reasonable inspection and tests. "The reasonableness of the inspection and tests used must depend upon the circumstances of the particular case." 31 Cal.App.2d at page 369, 88 P.2d at page 193. We cannot say as a matter of law that defendant, having employed an apparently able electrical engineer and an apparently efficient electrical contractor to install the heater, having installed it in accordance with the specifications of the manufacturer, it having the underwriters' seal on it, and having given it such inspection as was possible without taking the heater apart, did not exercise reasonable care.

In *Sheward v. Virtue*, supra, 20 Cal.2d 410, 126 P.2d 345, defendants Virtue Brothers manufactured and assembled a chair which it sold to Bullock's Inc. The latter used it in its beauty parlor. Due to an old discolored crack in a leg of the chair, it collapsed while plaintiff wife, a patron of the parlor, was sitting in it, injuring her. The jury returned a verdict in plaintiffs' favor against both Virtue Brothers and Bullock's. The trial court granted a new trial as to Bullock's. Plaintiffs appealed from that order. Virtue Brothers appealed from the judgment against them. The Supreme Court, after pointing out the duty of the manufacturer, stated that the plaintiffs had not seriously pursued their appeal from the order granting Bullock's a new trial, and that they were not contending that in granting the new trial the court abused its discretion. The court would have stated dif-

ferently had there been anything inconsistent in the judgment imposing liability on the manufacturer, while exonerating the party who, as in our case, supplied the article to the patron. That there is a difference in the duty owed by the manufacturer and that owed by the party supplying the article to the public is set forth in *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 140 P.2d 369, and *Tremeroli v. Austin Trailer Equip. Co.*, 102 Cal.App.2d 464, 227 P.2d 923.

Whether the facts that the supplying of heaters in drive-in theaters was a new procedure, and that the heater was electrically operated, required a greater *quantum* of care on the part of Theater, were questions for the jury to consider in determining whether Theater exercised the due care required of it. Such facts would not change the *degree* of care required.

2. Compromise Verdicts.

[3] Plaintiffs in their briefs content themselves with merely referring to the items of special damages and do not refer to any medical testimony on either side, to sustain their contention that the \$600 award was not adequate and therefore proves that the verdicts were compromise ones. Although under the ruling in *Kruc-kow v. Lesser*, 111 Cal.App.2d 198, 200, 244 P.2d 19, we are not required to do so, we have reviewed the evidence.

The special damages testified to were around \$1,275. The jury allowed a total verdict of but \$600. Dr. Stryble testified that his bill was "about \$600." Plaintiffs contend that they were either entitled to nothing or to the full amount of their special damages as well as general damages, and that because the verdict was approximately the amount of Dr. Stryble's bill, the verdict must have been a compromise one. This contention overlooks the most strongly contested element in the case, namely, did Mary receive more than slight injury in the accident, and were the services of the doctors, hospitals, etc., required because of any injury or because of a pathological condition completely unas-sociated with the injury? The evidence well supports the latter conclusion. Of

course, plaintiffs "may recover only for the necessary and reasonable expenditures attributable to the injury. It was a question of fact for the [jury] to determine how much of the medical expenses were necessitated by the accident." *Harris v. Los Angeles Transit Lines*, 111 Cal.App.2d 593, 598, 245 P.2d 35, 37. "The extent of plaintiff's disablement, its originating causes, and the degree to which defendant's negligence was responsible for producing it were the subject of dispute between the parties. There is much diversity of opinion on the matter in the medical testimony. * * * Upon the good faith, experience and sound discretion of the trier of the facts must rest the delicate task of separating fact from fancy and divesting the kernel of truthful description from the shell of exaggeration in determining the actual extent of plaintiff's injury and suffering. * * * Where there is conflict in the evidence as to the cause or extent of plaintiff's maladies, it is for the trial court to decide how much of the pain and suffering stemmed from the accident. See *Lee v. Nanny*, 38 Cal.App.2d 90, 100 P.2d 832. * * * When viewing the evidence in the light most favorable to supporting the judgment, it is patent the court was not convinced plaintiff had sustained her burden of proving that the ills she described were all caused by defendant's negligence." 111 Cal.App.2d at pages 598, 599, 245 P.2d at page 38.

It would serve no purpose to set forth the medical evidence in detail. The testimony of both plaintiffs, her mother, and plaintiffs' doctors would support a finding that her condition, and the subtotal thyroidectomy performed less than three months after the accident, were caused by and resulted from the accident. Dr. Stryble admitted that because he could find no medical literature justifying his conclusions, he had some doubt whether the goiter and the breast condition were the result of shock, although it was his opinion that they were. He also testified that in his experience he had never had a case in which breast changes resulted from a shock. On the other hand, the testimony, some of it from her own doctor, showed

that from her early 'teens Mary had had a slight enlargement of her thyroid, because of iodine deficiency. (Her mother had had an operation for goiter.) For a considerable period before the accident she ran a constant fever. Her difficulty was due to a goiter of the diffused colloid type, which two medical men, one a goiter specialist who had operated approximately 1000 goiter cases, testified could not possibly be caused by shock, emotion or emotional upsets. It was this type of goiter which was removed. Nor could the condition in her breasts of which Mary complained have been so caused. As the jury obviously believed defendants' medical witnesses, they found against plaintiffs' contention and the testimony of their witnesses that her operation and condition were due to psychosomatic or emotional disturbances caused by the accident. Therefore the jury could very well have found that most of the expenses incurred were not proximately caused by the accident, and hence it cannot be assumed that in limiting plaintiffs' recovery to \$600 the jury were doing so on a compromise basis, or that the \$600 awarded was the "about \$600" of Dr. Stryble's bill.

Cases like *Donnatin v. Union Hardware & Metal Co.*, 38 Cal.App. 8, 175 P. 26, 177 P. 845, *Bencich v. Market Street Ry. Co.*, 20 Cal.App.2d 518, 67 P.2d 398, *Wallace v. Miller*, 26 Cal.App.2d 55, 78 P.2d 745, and *Hughes v. Schwartz*, 51 Cal.App.2d 362, 124 P.2d 886, cited by plaintiffs, are not in point, for the reason that in those cases there was no issue, as here, as to whether the injuries were caused by the particular accident or due to a pre-existing cause.

The question of whether the damages awarded were adequate was undoubtedly presented to the trial court on the motion for new trial. " * * * the question of the award of damages and their amount is primarily one for the jury; * * * on a motion for new trial the trial judge sits as a thirteenth juror; * * * it becomes his duty to again weigh the evidence and its sufficiency and measure the credibility of the witnesses; * * * in so doing it is also his duty to consider the adequacy or inadequacy of the amount of damages

awarded; * * *". *Sassano v. Roulard*, 27 Cal.App.2d 372, 373-374, 81 P.2d 213, 214; see also *Gersick v. Shilling*, 97 Cal.App.2d 641, 218 P.2d 583.

In *Ortzman v. Van Der Waal*, 114 Cal. App.2d 167, 249 P.2d 846, the circumstances were somewhat similar to those here. There the plaintiff claimed that the pain in her breasts and the masses formed there which had to be removed by surgery were caused by the accident in question. Her medical experts testified that in their opinion they were so caused. Defendant produced no medical testimony. The plaintiff had an extensive medical history, more so than plaintiff in our case. The jury awarded plaintiff only \$100. Plaintiff appealed primarily on the ground of the inadequacy of the damages. In upholding the verdict the court referred to rules which are applicable to our case, that even though medical experts concur in their opinion (they did not concur here), the jury are not bound by those opinions but are required to decide the issue upon their own judgment assisted by the statements of the experts. The jury were entitled to take into consideration the reason given for the opinions, the previous medical history of the plaintiff, and the interest of the plaintiff in the case when relating her subjective symptoms, both to the medical men and to the jury. The court then stated that "In the light of their verdict it is but reasonable to conclude that the jury disbelieved the appellant's testimony and determined that she suffered no injury to her breast as a result of the accident * * *. Moreover the trial judge who had the opportunity of seeing and hearing the witnesses, in denying appellant's motion for a new trial, thereby expressed his approval of this implied finding, and hence this court is powerless to disturb the same." 114 Cal.App.2d 171, 249 P.2d 849.

3. Alleged Misconduct.

[4] Generally the charge is that counsel for Theater deliberately and without factual support attempted to injure Mary in the eyes of the jury by attacking her sanity and family relationships, and attempting to show she had been sterilized.

As to her sterilization, no objection was raised to questions of Dr. Stryble concerning that fact. The cross-examiner asked the doctor if he had examined the 1947 hospital records when she had a hysterectomy. He replied that he had not. He was then asked, "You don't know whether her family history at that time was bad and whether she was a mental case—". Plaintiffs interrupted, assigning the question as misconduct. The court immediately admonished the jury to disregard the question. Shortly thereafter the doctor testified that Mary told him she had been sterilized. He was then asked if she had told him that she had had a hysterectomy. He said that she had not, that she said she had a "suspension." He was then asked if he did not know as a fact that she had had a hysterectomy. The doctor replied that he did not believe she had. Theater's counsel then stated, "I am going to bring someone here from the hospital if necessary to prove these other records." Plaintiffs assigned this statement as misconduct. The witness said, before the court could rule, "I believe the word is hysterotomy." The court then said, "Just a minute, Doctor. The record you are looking at is not in evidence and I will sustain the objection." Theater's counsel then asked, "Doctor, did she tell you at that time she had been having a lot of trouble with her family?" Plaintiffs objected and assigned the question as misconduct. The court sustained the objection. Even though counsel did not later prove the hospital records which he said he would, a reading of the record fails to show deliberate misconduct on the part of Theater's counsel. The questions were obviously designed to show that Mary's emotional disturbance existed and was caused prior to the accident. While, once the doctor had answered he had not seen the hospital records, he should not have asked concerning their contents, the record fails to disclose that counsel was actuated by ulterior motives rather than by a certain overzealousness in the heat of contest. See *Lafargue v. United Railroads*, 183 Cal. 720, 726, 192 P. 538. The same is true of a remark made by him

when a certain line of questioning had been successfully objected to, to the effect that he did not give up easily, he would keep trying. Incidentally no objection or assignment was made to this remark. Mary's antecedent medical history as testified to by her mother, herself and the medical men, shows that Theater's counsel's theory as carried into his questions was not made out of whole cloth. While the court should have admonished the jury instead of in most instances merely sustaining the objection, counsel's actions were not prejudicial. The court denied a motion for new trial. We do not know if these matters were called to the attention of the trial court at that time. They should have been. *Harrison v. Harter*, 129 Cal. App. 22, 32, 18 P.2d 436. Presumably they were. "The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct * * *." *Lafargue v. United Railroads*, supra, 183 Cal. 720, 724, 192 P. 538, 540. Obviously the situation here was entirely different than in the four cases cited by plaintiffs: *State v. Patton*, 102 Mont. 51, 55 P.2d 1290, 104 A.L.R. 76, where in a bastardy proceeding questions were asked prosecutrix such as with reference to a man whom she had not seen for at least a year prior to the time of conception of her child, which could only be for the purpose of discrediting prosecutrix and besmirching her character; *Ingram v. United States*, 9 Cir., 106 F.2d 683, where in a prosecution of defendant for possessing morphine, his wife who was his principal witness was cross-examined, not on any subject brought out on direct examination, but concerning her private life; *McDonald v. Price*, 80 Cal. App.2d 150, 181 P.2d 115, where, in an action for damages for the wrongful death of her husband, the wife was asked if she knew that the husband had pleaded guilty to a certain felony and three certain misdemeanor charges, no evidence of which was produced or offered to be produced (it was pointed out in that case that not only did the examiner state positively in his questions facts which he made no effort

to support but that the evidence which was attempted to be elicited was immaterial); and in *Mangino v. Bonslett*, 109 Cal.App. 205, 292 P. 1006, where the trial court granted a new trial in an action for personal injuries because of the repeated statements of defense counsel that the real plaintiff was an insurance company.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



117 Cal.App.2d 698

PEOPLE v. SMITH.

Cr. 2435.

District Court of Appeal,
Third District, California.

May 8, 1953.

Defendant was convicted of committing the infamous crime against nature, with an animal. The Superior Court, Calaveras County, J. A. Smith, J., rendered judgment, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that the infamous crime against nature, with an animal, is complete whether penetration is vaginal or anal.

Affirmed.

1. Sodomy ☞1

"Sodomy" is a carnal copulation by human beings with each other against nature, or with a beast. Pen.Code, § 286.

See publication Words and Phrases, for other judicial constructions and definitions of "Sodomy".

2. Sodomy ☞1

Offense of sodomy committed between man and animal is complete whether penetration is vaginal or anal. Pen.Code, § 286.

3. Criminal Law ☞27

The infamous crime against nature, with an animal, was a felony at common law. Pen.Code, § 286.

4. Criminal Law ☞13

Statute prohibiting infamous crime against nature, with an animal, carried common-law meaning and was not unconstitutional for indefiniteness. Pen.Code, § 286; U.S.C.A.Const.Amends. 5, 14.

5. Criminal Law ☞11

Language of statutes pertaining to common-law crimes must be interpreted in light of the common law.

Orrin K. Airola, San Andreas, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Defendant-appellant was accused of the crime of violating Section 286 of the Penal Code in that he did commit the infamous crime against nature, with an animal. He was tried to the court sitting without a jury and was found guilty. From the judgment and from the order denying his motion for new trial he appeals.

[1, 2] Appellant did not take the stand at his trial and the lone witness for the prosecution, while testifying to copulation, stated that he could not say whether the penetration was vaginal or anal. Appellant contends that in this state of the evidence he is entitled to reversal because the offense is only committed, even though an animal be involved, if the penetration be anal. He argues it has been held in this State that the infamous crime against nature is synonymous with that of sodomy and that sodomy between persons is confined to copulation per anum; that this construction of the statute is the same whether the charge be that the crime was committed between persons or by man with beast; that to construe the code section to mean, with beasts, all forms of copulation, but to limit the crime to anal copulation between persons would render the section unconstitutional as being in violation of the due process clauses of the Fifth and the Fourteenth Amendments. We think these contentions cannot be sustained. In *People*

v. Battilana, 52 Cal.App.2d 685, 126 P.2d 923, People v. Williams, 59 Cal. 397, and in People v. Carroll, 1 Cal.App. 2, 81 P. 680, and in other cases the appellate courts of this State have held that, though the code does not specifically define the offense of infamous crime against nature, yet it is commonly known to be that of sodomy. But sodomy has always included copulation between man and beast. Ballentine's Law Dictionary defines sodomy as being "A common-law crime * * * consisting of unnatural sexual relations as between persons of the same sex, or with beasts, or between persons of different sex, but in an unnatural manner." 2 Bouv., Rawle's Third Revision, p. 3088, defines sodomy as: "A carnal copulation by human beings with each other against nature, or with a beast." However, when the act is between man and beast any form of copulation is included. This distinction is pointed out in many authorities. Russell on Crimes, page 937, defines sodomy as being a "carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman *in any manner* with beast." The same definition in effect appears in Archbold, Criminal Practice and Pleading, 8th Ed., Vol. 1, page 1015; in 25 American & English Encyclopedia of Law, 2d Ed., page 1144; and in Clark and Marshall's Law of Crimes, Section 461. See also State v. Tarrant, 83 Ohio App., 199, 80 N.E.2d 509; Hudspeth v. State, 194 Ark. 576, 108 S.W. 2d 1085. There are authorities to the contrary which sustain appellant's position, but we think the better reasoning is in accordance with the authorities we have cited, and therefore hold that when the offense is committed between man and animal it is

complete whether the penetration be vaginal or anal.

[3-5] Appellant contends that the foregoing construction of Section 286 would, if adopted, result in the section being unconstitutional for indefiniteness and he relies upon the rule stated in Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, as follows: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." It is stated in People v. Boljat, 36 Cal.App.2d 644, 646, 98 P.2d 513, 514, 1025: "The objection that a penal statute is void because it fails to define the offense with sufficient clearness, presupposes that, because of the lack of definition, a party might commit the offense not knowing that his act was one included in the statute." The authorities cited above establish that the crime declared by Section 286 of the Penal Code was a felony at common law. Our statute did not relate to anything newly made a crime. On the contrary, it used language taken from the common law. It cannot be attacked as being indefinite, for it carries the common law meaning. True, the statute does not describe the various acts which constitute the crime, yet the statutory language, being taken from the common law, must be interpreted in the light thereof and when the act is charged as having been committed between man and beast that law has never limited the prohibited acts to anal copulation. See Burdick, The Law of Crimes, Vol. 3, sec. 876.

The judgment and the order appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.

117 Cal.App.2d 618

**THURSTON v. LOS ANGELES
COUNTY et al.**
Civ. 19506.

District Court of Appeal, Second District,
Division 2, California.
May 5, 1953.

Proceeding to obtain pension. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment for petitioner, and defendants appealed. The District Court of Appeal, Fox, J., held that, under revised pension statute providing that all existing members of pension system established pursuant to County Fire Service Retirement Law who, on or before December 31, 1951, elect by written notice filed with retirement board to become safety members, shall become safety members on January 1, 1952, and under ordinance abolishing prior pension system, which ordinance was effective October 5, 1951, but, by its terms, did not become operative until January 1, 1952, petitioner, who, on October 26, 1951, and while in active county service, filed notice with board, tendered amount necessary for membership if he was eligible, and then was involuntarily retired on December 1, 1951, because of age, was entitled to pension under revised pension statute.

Judgment affirmed.

1. Counties ⇐69(3)

Under revised pension statute providing that all existing members of pension system who, on or before December 31, 1951, filed written notice of election with retirement board shall become safety members on January 1, 1952, and under ordinance abolishing prior pension system, which ordinance was effective October 5, 1951, but, by its terms, was not to become operative until January 1, 1952, petitioner, who, on October 26, 1951, and while in active county service, filed notice, tendered amount necessary for membership, and then was involuntarily retired on December 1, 1951, because of age, was entitled to pension under revised pension statute. Government Code, §§ 31450 et seq., 31900 et seq., 32200 et seq.

2. Pensions ⇐2

Pension rights may not be denied by a strained judicial construction.

3. Pensions ⇐1

All pension laws are to be liberally construed to carry out their beneficent policy.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, for appellants.

S. V. O. Prichard, Beverly Hills, for respondent.

FOX, Justice.

Petitioner was an employee of Los Angeles County from January 10, 1921, to December 1, 1951. He was in the Department of the Forester and Firewarden, and was a member of the Foresters, Firewardens and Firemen's Retirement System. Gov't Code, Title 3, Div. 4, Pt. 3, Chap. 5, sec. 32200 et seq., known as the County Fire Service Retirement Law. Petitioner's 60th birthday occurred on November 1, 1951 and, pursuant to section 32350 of the Government Code, he was involuntarily retired on December 1, 1951. He made all contributions which were required of him by that system so that he became entitled to a pension thereunder. His terminal salary, which was the average salary earned during the last three years of his service, was \$543.72 a month. His pension was fifty percent of this amount or \$271.86 per month.

Prior to 1952 there were, in addition to the County Fire Service Retirement Law, two other separate retirement systems for county and certain other public employees. One was the County Employees Retirement Law of 1937, Gov't Code, sec. 31450 et seq., which covered county employees in general. The other was the County Peace Officers' Retirement Law, Gov't Code, Tit. 3, Div. 4, Pt. 3, Chap. 4, sec. 31900 et seq., which governed the system for deputy sheriffs, deputy marshals and other employees in the police classification. Separate systems were maintained in the police and fire classifications so that greater benefits could be provided employees in these hazardous occupations than for those in sedentary work.

In order to obtain the practical administrative advantages of one retirement

system instead of three, and at the same time recognize the differences between the hazards of police and fire work and ordinary sedentary employment the County Employees Retirement Law of 1937 was amended by the Statutes of 1951, Chapter 1098, p. 2843, to create a separate class of members known as "Safety Members" covering those in police and fire services. This statute went into effect on September 22, 1951. The new law authorized the Board of Supervisors to abolish the retirement system for those in the police and fire departments effective January 1, 1952. An ordinance for that purpose was adopted by the board on September 4, 1951. It went into effect on October 5, 1951, but by its terms it did not "become operative" until January 1, 1952.

To take care of those employees who were members of either of the abolished systems, Chapter 1098, supra, added section 31558 to the Government Code. It provides in part that "[a]ll existing members of a pension system established pursuant to * * * Chapter 5 [County Fire Service Retirement Law] * * * who, on or before December 31, 1951, elect by written notice filed with the board to become safety members, shall become safety members on January 1, 1952, * * *."

On October 26, 1951, while still in the active service of the county, petitioner filed with the Retirement Board his election in writing to become a safety member of the Los Angeles County Employees Retirement System on January 1, 1952. With his written notice of election, petitioner tendered the Board of Retirement the sum of \$1,642.44, which represented the amount he would be required to deposit under section 31664.3 of the Government Code in the event he was eligible for such membership. That money is still on deposit with the Treasurer of the Retirement System pending the final outcome of this case.

The trial court found, on stipulated facts, that petitioner "became a safety member" of such retirement system and "is entitled

to receive a pension of \$353.42 per month commencing" on January 1, 1952. Defendants appeal from the ensuing judgment.

[1] The requisite steps for transfer from the old retirement systems to the new or consolidated system are enumerated in section 31558 of the Government Code. The first requisite is that the person be an "existing" member of a pension system established pursuant to Chapter 4 or Chapter 5. Petitioner met this requirement because he was a member of the retirement system under the latter chapter. The second requirement is that such "existing" member "on or before December 31, 1951, elects by written notice filed with the board, to become a safety" member.¹ Petitioner meticulously followed this procedure. The section then says that those who meet these requirements "shall become safety members on January 1, 1952". Having thus met all of the specified requirements, petitioner, by the express language of the section, was a safety member on January 1, 1952. This, however, was simply the date upon which the consolidated system became operative. On this point *Ross v. Board of Retirement*, 92 Cal.App.2d 188, 206 P.2d 903, is pertinent. In that case it appears that Alameda County adopted a retirement system so that the ordinance was effective on November 20, 1947, but not operative until January 1, 1948. In holding that the earlier date was the crucial one and petitioner therefore entitled to certain retirement benefits, the court pointed out that "the operative date is merely a date of convenience to the officers in charge of the retirement system * * *. Otherwise the operative date is a false factor * * *." 92 Cal.App.2d at page 193, 206 P.2d at page 907. That is true in this case. Petitioner's rights as a safety member in the new system became vested upon his compliance with the requirements of the new law, though benefits therefrom were deferred until the operative date of the new system. To facilitate the taking over of the old system and fitting it into the new January 1, 1952,

1. "Safety member" means any person who is either: "(a) A member of a pension system established pursuant to either Chapter 4 or Chapter 5, who, on or before

December 31, 1951, elects by written notice filed with the board, to become a safety member, * * *." Gov't Code, sec. 31469.3.

was chosen as a logical and convenient operative date.

Defendants insist that the designation "existing members" appearing in Government Code section 31558 "means those who are members on January 1, 1952" and "those still employed" on that date. The answer to these contentions is that the statute does not so state.

[2] On the question of membership the section makes it unmistakably clear that it is membership in "a pension system established pursuant to either Chapter 4 or Chapter 5" that is crucial. It so states in simple language. Furthermore, such member, on or before December 31, 1951, must *elect* by filing written notice with the board to become a safety member on January 1, 1952. It is thus plain that in order to make the transition from the old to the new retirement system the members of the former must take action while it is still alive, for it expired with the end of the year. This is emphasized not alone by the fact that December 31, 1951, is the latest date on which necessary action to transfer can be taken by a member but also by the present tense of the verb "elect." To follow defendants' argument would mean that the life of the old system, which by the terms of the county ordinance expired with the end of the year, would somehow be carried over into the beginning of the next year. It would also mean that the present tense of the verb "elect" would be changed to past tense. The section would then say that all existing members who, on or before December 31, 1951, *have elected* shall become safety members on January 1, 1952. Such a construction would be an obvious distortion of the plain language of the section. Pension rights "may not be denied by a strained judicial construction." *Holt v. Board of Police, etc.*, Com'rs, 86 Cal.App.2d 714, 716, 196 P.2d 94, 96; *Larson v. Board of Police & Fire Com'rs*, 71 Cal.App.2d 60, 63, 162 P.2d 33.

To accept defendants' argument that to be eligible for benefits under the new law the member must still have been employed on January 1, 1952, is to add a condition for such eligibility that is not set forth in the act. If such condition or limitation had been intended it would have been a very simple matter for the Legislature to so state. The absence of such a statement is indeed significant.

[3] The practical effect of both of defendants' arguments is to place additional limitations on the eligibility of a member of the old retirement system to receive safety member benefits under the consolidated setup. This is counter to "the well-recognized rule that all pension laws are liberally construed to carry out their beneficent policy." *England v. City of Long Beach*, 27 Cal.2d 343, 346-347, 163 P.2d 865, 867; *Knight v. Board, etc. Employees' Retirement*, 32 Cal.2d 400, 402, 196 P.2d 547, 5 A.L.R.2d 410, and emphatically militates against defendants' contentions.

Defendants seek to fortify their theory of the case by raising certain hypothetical situations and by reference to a number of other sections of Chapter 1098 which they claim point in the direction of their ultimate conclusion. In view, however, of the vulnerability of their basic position it is not necessary, nor would it be profitable, to analyze these theoretical and collateral arguments. Suffice it to say that if the extreme hypothetical situations postulated by defendants were actually to arise the courts would no doubt be able to dispose of them on their intrinsic merits in conformity with the mandate of the statute and settle legal principles without necessarily producing the incongruous results which defendants fear.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

MacDONALD v. JACKSON et al.

Civ. 19309.

District Court of Appeal, Second District,
Division 1, California.

May 4, 1953.

Rehearing Denied May 25, 1953.

Hearing Denied July 2, 1953.

Action by executor on notes executed by defendants and delivered to decedent and to recover money allegedly advanced under agreement whereby decedent was to receive 10 per cent of net income of certain toy shop enterprise, which agreement was allegedly void because no permit for issuance of document had been granted by commissioner of corporation. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment of nonsuit, and the executor appealed. The District Court of Appeal, White, P. J., held that evidence, as a matter of law, would have been insufficient to support judgment for executor.

Judgment affirmed. See also 108 Cal.App. 2d 217, 238 P.2d 168.

1. Appeal and Error ⇨927(3)

On appeal from judgment of nonsuit, court must view evidence in light most favorable to appellant, must disregard all inconsistencies and draw only those inferences from evidence which can reasonably be drawn which are favorable to appellant.

2. Bills and Notes ⇨537(1)

In action by executor on notes executed by defendants and delivered to decedent, evidence on behalf of executor, who had failed to produce the notes relied upon, was insufficient to show loss or destruction or whereabouts of such notes, and nonsuit was proper.

3. Joint Ventures ⇨1.15**Licenses** ⇨39.24

In action by executor to recover money allegedly advanced under agreement whereby decedent was to receive 10 per cent of net income of certain toy shop enterprise, which agreement was allegedly void because no permit for issuance of such document had been granted by commissioner of corporations, evidence showed at most that decedent was a joint venturer, without a showing of any interest in business being offered to public, or that the instrument in

question was a security, and nonsuit on such cause of action was proper.

4. Licenses ⇨18½(27)

Where a person invests money, and contracts in connection therewith to render personal services and to receive a profit from his own services or other active participation in the business venture, such a contract and investment cannot be considered a security.

Harry J. Miller, Los Angeles, for appellant.

Elbert E. Hensley, Allan M. Carson, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal from a judgment of nonsuit in an action brought by the executor of the will of Elizabeth H. Ussher, deceased, and tried before the court without a jury.

By the first cause of action it is alleged, upon information and belief, that the defendants executed and delivered to the decedent a promissory note for \$5,000 dated August 20, 1945, and due three years from date. The second cause of action was upon a note for \$7,880, dated October 7, 1947, and due three years from date. By the third cause of action recovery of \$10,000 was sought under an agreement whereby the decedent was to receive 10% of the net income of Tru-Craft Models, it being asserted that no permit for the issuance of such document had been granted by the Commissioner of Corporations and that the same was therefore void.

Each of the three causes of action also contained the following allegation:

"That at all times herein mentioned, plaintiff's testate was a devout Christian woman, devoted to doing good and helping others, and imposed great trust and confidence in defendants; that at all such times, defendants represented themselves to be of similar character and doing others good; that defendant Cecil M. Jackson at all such times represented himself to be a reverend Minister, and thereby gained the trust and confidence of plaintiff's testate and at all

times herein mentioned and for more than ten years prior to the filing of this action, there existed a highly confidential relationship between plaintiff's testate and defendants."

Defendants' answer consisted of denials, including a denial of the existence of a confidential relation. As affirmative defenses it was alleged that on or about April 14, 1950, the decedent executed a release and discharge of all obligations, including the obligation to repay the \$10,000 referred to in the third cause of action. Further it was alleged that the testatrix and defendants had entered into a joint venture. And, with respect to the third cause of action, defendants invoked the bar of the statute of limitations, Code Civ.Proc. § 339, subd. 1.

[1] The rule upon an appeal from a nonsuit is well stated in *Golceff v. Sugarman*, 36 Cal.2d 152, 153, 222 P.2d 665, 666, as follows:

"And as to our duty, 'The uniform rule which an appellate court should follow in disposing of an appeal from a judgment of nonsuit is, that the court must view the evidence in the light most favorable to appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant.'" In *Seaford v. Smith*, 86 Cal.App.2d 339, 194 P.2d 792, 794, it is stated: "The rule with respect to a motion for nonsuit at the close of plaintiffs' case gives to them the benefit of full credit for all favorable evidence, together with the reasonable inferences to be drawn therefrom. Upon such motion the court may not weigh the evidence nor discredit the witnesses. If the evidence of a witness is conflicting, his statements most favorable to the plaintiff must be accepted as true."

Turning to an examination of the evidence, we find the following undisputed facts: The decedent, Miss Ussher, died on June 19, 1950, at the age of 72 years, and for some time prior to her death was ill with cancer and generalized arteriosclerosis. Her executor, the appellant herein, found in her safe deposit box a promissory note for \$12,880. It appears that this note had been given to the testatrix in lieu of

the note for \$7,880. Whether it had also been given in lieu of the \$5,000 note sued upon in the second cause of action was a matter of dispute. The defendants contended that there had never been a \$5,000 note, but that the difference of \$5,000 represented a \$2,000 note surrendered by the testatrix and a "gift" by them to the testatrix of \$3,000. The defendants produced at the trial the note for \$7,880 and a note for \$2,000. The note for \$12,880 bore an indorsement by the testatrix as follows: "In the event of my death, this note is cancelled. Elizabeth Ussher." Below this indorsement was a second indorsement in the writing of the testatrix, as follows: "I hereby revoke above provision which was signed by me under duress, April 24, 1950."

Appellant's first ground for reversal is that there existed a confidential relationship between defendants and decedent; that the defendants gained an unfair advantage over decedent while she was without independent advice and was infirm and sick; and that consequently there arose a presumption of undue influence and fraud.

The defendants were missionaries and Miss Ussher was interested in their missionary work. Defendant Cecil Jackson, called as a witness under the provisions of section 2055 Code of Civil Procedure, testified that he met Miss Ussher in 1940 and saw her on frequent occasions thereafter except during periods when he was absent in the Orient. He testified that the note for \$12,880, dated in 1947, "was executed in 1950 to make a package note at her request of the two thousand and the seven eight eighty notes, which represented all the funds that she had previously given me; and this was executed April 14th, 1950, at her request, stating that because of opposition by her brothers to helping the missionary work, she would like to have this for the record and because of what she had done in the missionary field, Mrs. Jackson and I had made this \$3,000 contribution, which makes up the total amount of the note."

Further defendant Reverend Cecil Jackson testified: "On March 11th, 1950, Miss Ussher called me by phone. She said that, 'My brothers are sending me to the hospital

today.' She said, 'I have the two notes with me and I am taking them to the hospital in order to protect you from my brothers making any claim, and I want you to come to the hospital and get these notes.' That on March 12, 1950, the witness visited decedent at the hospital and she had on her person the note for \$7,880 and a note for \$2,000, both of which she gave to the witness, stating, "Now these represent all the money that I have given you. My brothers have opposed our mutual missionary interest for a long time. I want to give these notes back to you that you may have them, so in case something should happen to me there would be no trouble."

With respect to the execution of the \$12,880 note Reverend Cecil Jackson testified: "After Miss Ussher had returned from the hospital April 13th, 1950, she called me on the phone and said that her brothers, Charlie and Clarence, were giving her considerable opposition regarding what she had done for the missionary work, and she thought it would be well that we leave some record so that there couldn't be any complaint on that score. * * * She said, 'I think we had better, for the record's sake, make a note to cover the seven eight eighty and the two thousand and date it back to 1946; make one package of it so that we have all these transactions in one package.' During this conversation we (the two defendants Jackson) told her that we appreciated what she had done, and not knowing her true financial circumstances, Mrs. Jackson and I made her a gift of \$3,000.00 in the way of adding that amount to the seven eight eighty and the two thousand, and that is what comprises this note of \$12,880."

In answer to questions propounded to him under section 2055 of the Code of Civil Procedure, Reverend Jackson testified, when asked, "What was the relationship between you with reference to confidence or mutual trust in each other?" replied, "We were co-Christian workers * * * We had a friendly relationship * * * I met her in 1940, and it gradually grew into a friendly relationship. * * * Q. (By the Court) Did you have confidence in

each other? Did you trust each other? A. Yes, your Honor."

Further testifying under section 2055 of the Code of Civil Procedure, Reverend Jackson stated that he had been operating the toy shop, in which the decedent had an interest as set forth in the third cause of action, for about eight years; that the decedent took an active part in the management of the business up until the year 1949; that her activities, however, were confined to the factory where girls worked on painting and sewing; that she did not work in the retail shop at the Farmers' Market.

Defendant Reverend Jackson testified further that from 1940 until her death, the decedent advanced money "in the way of donations to help out in the mission work or in any way that was needed at the time." He further testified: "Q. It is your testimony that prior to the execution of these promissory notes in 1946 that all the advances that she made to you were in the form of gifts? Is that true or not true? A. They were given to me as contributions and gifts, and I gave her in return these notes."

With respect to evidence consisting of two deeds to property from decedent to the Jacksons in 1945, defendant Cecil Jackson testified: "The two properties were given to me to be used to carry out our missionary work together and to find a place where we could manufacture these miniatures. I had already been manufacturing them, and we needed a place. * * * These two properties were traded in on another property which was used in the manufacture of our models."

Evidence was produced as to a third piece of property deeded to the "Far East Missionary Society" in 1946.

Other evidence presented as purporting to show a "confidential relationship" was a letter written by defendant Cecil M. Jackson in 1940, requesting a loan of \$5,000 from decedent and indicating that there had been previous transactions. The testimony was that the letter was not answered and no loan obtained.

Under examination by defense counsel, defendant Cecil Jackson testified to a situa-

tion wherein it appears that decedent had destroyed the agreement providing for her interest in the toy shop "inadvertently". From the letter written by the decedent reporting the inadvertent destruction of said agreement no particular inference can be drawn. Jackson testified that decedent told him that she had not burned the agreement, but that one of her brothers, she felt, had taken it from her. Reverend Jackson further testified that the operation of the toy shop was a "phase" or "part" of "our missionary work." It appeared from his testimony that he and his wife conducted a mission in Singapore under the name of "The Far East Missionary Society" and in recognition of the contributions of Miss Ussher, a plaque in bronze was erected in her honor in the church at Singapore.

It further appeared that in February, 1947, Reverend Jackson and his wife paid the decedent \$997.50, "re True-Craft Investment." Reverend Jackson testified that this was not a dividend, and that reference to "investment" was, in mission work, reference to any donations or contributions in missionary work. In connection with this agreement, Reverend Jackson testified that the decedent desired to cancel it by putting an indorsement on the carbon copy held by Jackson. He further testified, with reference to the two parcels of property obtained from Miss Ussher, that these two parcels were traded for another parcel on which to operate the toy factory, and that subsequently the latter parcel was sold for \$14,000 and \$10,000 of the proceeds paid to Miss Ussher.

Finlay J. MacDonald, executor of the decedent's will, testified that he had seen the alleged note for \$5,000 in January, 1950, prior to decedent's death, which occurred June 19, 1950. He testified that he was called to her home after she returned from the hospital and she told him that Mr. Jackson had obtained from her the two notes for \$7,880 and \$5,000. At a subsequent conversation decedent told the witness that she accepted the \$12,880 note against her will and had subsequently written the second endorsement stating that the first endorsement, that the note should be cancelled in event of her death, had been procured by

duress. He testified in the existence of the alleged \$5,000 note prior to the death of decedent. He testified that his failure to list either of the notes sued upon in the inventory of decedent's estate was upon the advice of the inheritance tax appraiser.

Reverend J. William Bostrom testified for the plaintiff that the only note he "saw" was that for \$12,880 but that he had "heard" about other notes; that the decedent told him about them; that decedent told him she was "compelled" to put the indorsement on the \$12,880 note providing for its cancellation in event of her death before Reverend Jackson would give it to her, and that at the witness' suggestion, she used the word "duress" when she wrote on the back of the note that she revoked the previous indorsement that it should be cancelled in event of her death.

[2] Bearing in mind that in determining whether the evidence produced by plaintiff entitles him to have the case proceed to trial and decision on the merits we must be guided by the rules hereinbefore set forth concerning the propriety of granting a nonsuit, we are persuaded that the judgment of nonsuit in the instant case was not erroneous. This we say because we are convinced that there is in this record no evidence of sufficient substantiality to support a judgment for plaintiff if such judgment were given.

As was said by the trial judge in his summation when ruling on the motion for nonsuit, "Now the pleadings that are before me now do not mention a \$12,880.00 note, the only one that the decedent had in her possession when she died, but does describe a \$7,880.00 note and a \$5,000.00 note, and produces through the defendant himself in open court the \$7,880.00 note and a \$2,000.00 note, and a statement that at the same time he gave her a \$3,000.00 present, a gift. * * * I will have to dismiss the first cause of action. There is no proof whatever here to support a judgment for \$5,000.00 with interest upon an alleged promissory note which is not here produced and the loss or destruction or whereabouts of which are not satisfactorily shown at all.

"I will have to grant the motion on the second cause of action because the plaintiff

failed to produce from the possession of the Estate the note in question. It was surrendered some time before the death of the decedent to the defendants, and the only evidence that I have here that would construe most favorably for the plaintiff is that the \$7,880.00 note was handed back to the defendant, discharged, paid, by the delivery and acceptance of a new \$12,880.00 note, which also included something else."

[3,4] As to the third cause of action, the only evidence with reference to the instrument giving decedent an interest in the toy business was that of respondent Reverend Cecil Jackson, and from his testimony the only reasonable inference to be drawn was that he, his wife and the decedent were joint venturers in the project and that the decedent actually participated in the business. No evidence was offered to show that any interest in the business was offered to the public or that the instrument in question was a security. Where a person invests money and contracts in connection therewith to render personal services and to receive a profit from his own services or other active participation in the business venture, such a contract and investment, under the authority of *People v. Syde*, 37 Cal.2d 765, 768, 235 P.2d 601, and *People v. Gould*, 37 Cal.2d 885, 235 P.2d 604, cannot be considered a security.

The evidence that there existed a "confidential relationship" showed only that the decedent and the defendants were friends and were jointly interested in missionary work. Aside from the innuendoes contained in appellant's brief, there is no evidence that respondents were not bona fide missionaries or that the interest of decedent, Miss Ussher, in their work was not that of a "co-Christian worker", as she was described in the testimony.

The rules applicable to motions for nonsuit do not require courts to put themselves in incongruous positions in order to hold a case in court. The courts will not give a strained or unnatural construction to language or conduct, or distort the orderly laws of sequence or the logic of a given situation to force an unnatural result. Looking at the case as presented, and giving effect to the evidence which in reason

it should receive, we are in accord with the conclusion reached by the trial court. The evidence, as a matter of law, is insufficient to support a judgment for appellants.

The judgment appealed from is affirmed.

DORAN, J., concurs.

Hearing denied; CARTER, J., dissenting.



117 Cal.App.2d 556

TAYLOR v. MARINE COOKS & STEWARDS ASS'N OF PACIFIC COAST et al.

FERNANDEZ v. MARINE COOKS & STEWARDS ASS'N OF PACIFIC COAST et al.

ALMEIDA et al. v. MARINE COOKS & STEWARDS ASS'N OF PACIFIC COAST et al.

HESSE v. MARINE COOKS & STEWARDS ASS'N OF PACIFIC COAST et al.

Civ. 15314, 15315, 15369, 15370.

District Court of Appeal, First District,
Division 2, California.

April 30, 1953.

Hearing Denied June 18, 1953.

Actions against labor union for declaratory relief as to rights of plaintiff-members to engage in activities which had been made basis of disciplinary charges, and for damages for wrongful expulsion from union. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., entered judgments from which the union appealed. The District Court of Appeal, Dooling, J., held that when expulsion of plaintiff-members had occurred subsequent to filing of complaints for declaratory relief, it was not error to permit the filing of supplemental complaints alleging the facts surrounding wrongful expulsion, since the facts were material to the case stated in the original complaint.

Judgments affirmed.

I. Labor Relations 109

Where members of labor union who had a contract right to be tried in disciplinary proceedings by a committee elected by the membership were subjected to disciplinary action as result of hearings be-

fore committees improperly selected, there was clear violation of contract right to be tried by committee elected by the membership.

2. Declaratory Judgment ⇨324

Where members of union filed complaint for declaratory relief as to their right to engage in activities which had been made basis of charges against them by union, and such members were, before trial on complaint, expelled from union pursuant to trial before union committees improperly constituted, it was not error to permit such union members to file supplemental complaint alleging their expulsion, its illegality and right to damages for loss of employment, since facts so alleged were material to case stated in original complaint. Code Civ.Proc. § 464.

3. Labor Relations ⇨109

Fact that members of union had appeared before improperly constituted trial committees, on charges against such members, without objection, and that other members had failed to appear, did not amount to a waiver of the right of such members to object that the trial committees were selected in a manner not authorized by the union constitution.

4. Labor Relations ⇨109

Although unincorporated associations, such as labor unions, are not bound to proceed with formality of courts of law, the formation of a trial body in accordance with contract rights of accused member is not a mere matter of form or procedure, but is a substantive right of which the member should not be lightly deprived.

5. Limitation of Actions ⇨43

The statute of limitations for coercive relief only commences to run from date of completed wrong, and fact that declaratory relief may have been sought before there has been a completed breach of the obligation does not commence the statute running against the later completed wrong.

6. Limitation of Actions ⇨55(1)

Where union members who had brought action against union for declaratory relief, thereafter filed supplemental complaint for damages and restoration to

union because of their expulsion from union as result of proceedings before improperly constituted trial committee, causes of action for damages and restoration to union were not barred by limitations, when supplemental complaint was filed less than one year after expulsions.

7. Limitation of Actions ⇨127(2)

Subsequent amendments which do not introduce a new cause of action are not subject to the statute of limitations, the effective pleading being the first in which the particular cause of action is set out or even attempted to be stated.

8. Appeal and Error ⇨991

The question of laches is one primarily for the trial court.

9. Labor Relations ⇨116, 117

Union members who filed their first supplemental complaints seeking reinstatement and damages because of wrongful expulsion, within approximately eleven months after expulsion, were not guilty of laches as a matter of law.

10. Limitation of Actions ⇨127(3)

Supplemental complaint of members of labor union for reinstatement and damages because of wrongful expulsion, partook of nature of both tort and contract, and amendments alleging facts showing that members suffered shame and humiliation as result of their expulsion and seeking additional damages therefor, added no new cause of action which must have been filed within one year limitation period for tort actions.

11. Limitation of Actions ⇨127(18)

A change of theory as to basis of recovery or as to measure of damages is not a change of cause of action or the substitution of a new and different action for the original.

12. Labor Relations ⇨117

Where union members sought damages for wrongful expulsion from union resulting in loss of earnings and shame and humiliation, it was for trial court to weigh the various factors entering into damages to be awarded in each case, and to assess damages suffered as fairly as possible, and

difficulty of assessing such damages with anything like mathematical accuracy could not defeat an award reasonably supported by the evidence.

13. Labor Relations ⇨117

Award of \$7,500 to members of union who were wrongfully expelled, as damages for loss of earnings and shame and humiliation, without segregation of the items of damage, was sustained by record which would have supported full awards for loss of earnings alone.

14. Appeal and Error ⇨1073(7)

Where union members were each awarded \$7,500 as damages for loss of earnings and shame and humiliation, as result of wrongful expulsion from union, fact that items of damage were not segregated was not prejudicial to union, when record would have supported the full amount of the awards for loss of earnings only.

15. Labor Relations ⇨117

Fact that awards of damages to several members of labor union for loss of earnings, shame and humiliation, as result of wrongful expulsion, were in the same amount, did not compel conclusion that they were arbitrary, when each award was sufficiently supported by the evidence.

16. Labor Relations ⇨114, 116, 117, 505

The National Labor Relations Board is given no jurisdiction or authority by the National Labor Relations Act to review legality of any disciplinary action taken by union against one of its members, or to order a member's reinstatement in the union, or to award damages resulting from his wrongful expulsion, but such powers remain in the courts of law. National Labor Relations Act, § 8(b) (2), as amended, 29 U.S.C.A. § 158(b) (2).

17. Labor Relations ⇨108, 116

Where members of labor union were expelled therefrom as result of disciplinary proceedings before illegally constituted committee, such members were entitled to restoration to their rights in union, and not merely to an order returning the matter to the union for further proceedings on charges against such members, but union

was not thereby precluded from further proceeding against such members in accordance with its constitution, after they had been restored to membership.

Gladstein, Andersen & Leonard and George R. Andersen, San Francisco, for appellants.

Edward E. Pencevich, San Francisco, for respondents Taylor and Fernandez.

Ropers & Majeski, Redwood City, Robert J. Barbieri, San Francisco, for respondents Almeida and Hesse.

DOOLING, Justice.

[1] Four appeals presenting common basic questions are here consolidated. They are taken from judgments ordering respondents restored to their rights in appellant union and awarding them damages. The plaintiffs and respondents, five in number, were all members of appellant union and were all subjected to disciplinary action as a result of hearings before committees chosen in the same manner as were the committees held to have been improperly selected in *Harris v. National Union, etc., Cooks & Stewards*, 98 Cal.App.2d 733, 221 P.2d 136. It results that under the rule of law established in the *Harris* case the respondents' "contract right to be tried by a committee *elected by the membership*", *Harris v. National Union, etc., Cooks & Stewards*, supra, 98 Cal.App.2d page 737, 221 P.2d at page 139, was clearly violated. Faced by this fundamental violation of respondents' established legal rights appellants are reduced to a rear-guard action in which they seek by a variety of secondary arguments to avoid the legal consequences of what was indisputably primary wrongful conduct. We note because some mention is made in the briefs of the new constitution that the trials were all held while the original constitution construed in the *Harris* case was still in effect. The attempted adoption of a so-called new constitution in November, 1945 was judicially nullified by a judgment of the superior court affirmed in *Weber v. Marine Cooks' & Stewards' Ass'n*, 93 Cal.App.2d 327, 208 P.2d 1009. It was not until December 11,

1947 that another constitution was adopted and the latest order disciplining any of the respondents was that disrating Fernandez in September, 1947.

The first complaint in any of the actions was filed by Almeida and Griffey on October 17, 1945. At that time charges were pending against these two for their participation with others in the publication of a newspaper critical of the actions of some of the union's officials and of the proposed new constitution. They sought in one count an injunction to prevent the trial of these charges and in a second count declaratory relief as to their right as members of the union to engage in the questioned activities which had been made the basis of the charges. A demurrer was sustained without leave to amend to the first count only and the appellants filed an answer to the count seeking declaratory relief. Thereafter orders of expulsion, after trial before improperly constituted committees as above noted, were made—in the case of Almeida on November 2, 1945 and of Griffey on November 8, 1945. On October 7, 1946 Almeida and Griffey filed a supplemental complaint alleging their expulsion, its illegality and damages for loss of employment. (This pleading is not in the record but appellants in their opening brief stipulate that it was filed.) On March 15, 1948 a second supplemental complaint was filed containing similar allegations and asking for like relief.

[2] Appellants conceive that it was error to permit the filing of these supplemental complaints. We cannot agree. Code Civ.Proc. § 464 permits the filing of a supplemental complaint "alleging facts material to the cases occurring after the former complaint". The only question is whether the expulsion of Almeida and Griffey and the consequent damage to them are facts material to the case stated in their original complaint. Although a demurrer had been sustained to their first cause of action the count which remained sought declaratory relief as to their right under the constitution to engage in the very activities which were the basis of the charges then pending against them. When the trial of these charges resulted in their expulsion

those were "facts material to the cases occurring after the former complaint."

In *Jacob v. Lorenz*, 98 Cal. 332, 33 P. 119, plaintiff originally commenced an action to enjoin defendants from destroying a ditch. Defendants in their answer alleged that since the commencement of the action they had destroyed a portion of the ditch. Plaintiff then by leave of court filed a supplemental complaint alleging the destruction of this portion of the ditch and asking damages therefor. The court said, 98 Cal. at page 338, 33 P. at page 121: "The defendants, by their own act, made different or additional relief necessary. The subject of the action was plaintiff's property, and his right to convey water in his ditch across defendants' mine. That *right* was not destroyed, and was still the subject of litigation. * * * It is no objection to a supplemental complaint that different or additional relief is asked for. (Citation.) Indeed, the object of the supplemental complaint is to obtain additional or different relief without resort to a new action. Not only did the court not err in refusing to strike out the supplemental complaint, but appellants should not be heard to complain that their efforts to defeat plaintiff's action, by making the relief he sought inadequate, had not proved successful."

[3,4] By the appearance of some of respondents before the trial committees without objection and the failure of others to appear at all it is argued that respondents have waived their right to object that the committees were selected in a manner not authorized by the constitution. Appellants cite no cases which support the view that the right to have a trial by a tribunal whose members are selected in the manner required by the constitution is waived by mere inaction or failure to make express objection. Such a purported tribunal is in fact no tribunal at all and while unincorporated associations are not bound to proceed with the formality of courts of law, *McConville v. Milk Wagon Drivers' Union*, 106 Cal.App. 696, 701, 289 P. 852, the formation of the trial body in accordance with the contract rights of the accused member is not a mere matter of form or procedure but is a substantial substantive right of

which he should not be lightly deprived. *Hopson v. National Union, etc., Cooks, and Stewards*, 116 Cal.App.2d 320, 253 P.2d 733. At first blush *People ex rel. Schults v. Love*, 199 App.Div. 815, 192 N.Y.S. 354, may appear to announce the rule that failure to object to an improperly selected tribunal will amount to a waiver. A reading of the entire opinion shows however that the trial there was before the union as a whole in open meeting and the only objection was that the officers of the union had not been properly elected. The court said, 192 N.Y.S. at page 356: "but the officers were de facto officers, and he interposed no objection at the time, and therefore, *even if such objection would have been of any avail*, he cannot now complain." (Emphasis ours.) In a later New York case where the trial was before an illegally constituted committee, as here, the court said: "There was no trial before a legally constituted committee, and the so-called judgment was wholly void." *Jose v. Savage*, 123 Misc. 283, 205 N.Y.S. 6, 7.

[5-7] The claim that the statute of limitations had run against the cause of action for restoration to the union and damages set up in the supplemental complaints is not tenable. The first supplemental complaint of Almeida and Griffey was filed less than one year after their expulsions. The statute of limitations for "coercive" relief only commences to run from the date of the completed wrong and the fact that declaratory relief may have been sought before there has been a completed breach of the obligation does not commence the statute running against the later completed wrong. *Martin v. Henderson*, 40 Cal.2d 583, 255 P.2d 416. Subsequent amendments which do not introduce a new cause of action are not subject to the statute of limitations, the effective pleading being the first in which the particular cause of action is set out or even attempted to be stated. 16 Cal.Jur., Limitation of Actions, secs. 144, 145, p. 549.

[8,9] The question of laches is primarily one for the trial court. *Hopson v. National Union, etc., Cooks and Stewards*, supra, 116 Cal.App.2d 320, 253 P.2d 733; 10 Cal.Jur., Equity, sec. 64, p. 527. Al-

meida and Griffey filed their first supplemental complaint seeking reinstatement and damages approximately eleven months after their expulsion. Their assertion of these rights by court action within that relatively short period of time cannot support the claim that they were guilty of laches as a matter of law. In *Griffin v. International Longshoremen's and Warehousemen's Union*, 109 Cal.App.2d 823, 241 P.2d 552, most strongly relied upon by appellants, the original action was not filed until two years and seven months after the wrongful act complained of.

After the trial but before decision the opinion of the District Court of Appeal in *Cason v. Glass Bottle Blowers Ass'n*, 220 P.2d 34, was filed by the District Court of Appeal. In that opinion the court stated 220 P.2d at page 40: "Damages may also be awarded to one who has been illegally expelled from a duly organized association for wages lost on account of having been deprived of the opportunity to work or to obtain employment, including compensation for the mental suffering and humiliation caused thereby, and which flows proximately from the wrongful suspension or expulsion". After this opinion was filed the trial court on motion set the submission aside and permitted the filing of an amendment to the supplemental complaint alleging facts showing that plaintiffs suffered shame and humiliation as a result of their expulsion and asking additional damages therefor. Evidence was introduced of such shame and humiliation and the court included in the damages allowed an unstated amount for this element of damage.

[10,11] It is argued that these amendments introduced a new cause of action sounding in tort which was barred by the statute of limitations. The supreme court granted a hearing in the *Cason* case and in its opinion used the following language: "The record shows that there was a closed shop contract between the national union and plaintiff's employer, and plaintiff was entitled to sue in tort if the union wrongfully expelled him and at the same time refused to let him work because he was not a union member. (Citations.) Plaintiff likewise had contract rights by reason of his

membership in the union, and he was entitled to bring an action for breach of that contract if he was wrongfully expelled. (Citations.) Thus the trial court correctly determined that the action partook of the nature of both tort and contract." *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal.2d 134, 142, 231 P.2d 6, 10, 21 A.L.R.2d 1387. An examination of the briefs in the *Cason* case shows that there was in fact in that case an award for mental stress, nervous shock and humiliation. Conceding, without deciding, that this is a case in which damages for mental suffering could not be allowed on the breach of contract theory, see *Chelini v. Nieri*, 32 Cal.2d 480, 196 P.2d 915, delimiting the cases in which such damages may be allowed for breach of contract, the original supplemental complaint, in the language of the supreme court in the *Cason* case, "partook of the nature of both tort and contract", because here as there the damages for loss of employment arose from the fact that appellant union had exclusive contracts with the shipping companies by which their members were employed. Thus the amendments added no new cause of action but only alleged additional damages for the same cause of action which had been filed within the one year period of limitation for tort actions. "A change of theory as to the basis of recovery or as to the measure of damages is not a change of cause of action or the substitution of a new and different action for the original." *Wells v. Lloyd*, 6 Cal.2d 70, 88, 56 P.2d 517, 526.

Hesse was expelled on November 23, 1945 and he commenced his action on October 24, 1946. Taylor was expelled on April 4, 1946 and commenced his action on October 23, 1946. Each complaint was later amended to plead and seek additional damages for shame and humiliation after the cases were reopened for that purpose. Fernandez was not expelled from the union but disrated from the classification of chief steward on September 11, 1947 and commenced his action on March 24, 1948. He also later amended to ask for damages for shame and humiliation. What has been said in the previous discussion of the case of Almeida and Griffey sufficiently disposes

of the same questions of law as they apply to the cases of the other respondents.

[12, 13] The court awarded in each case \$7500 as damages for loss of earnings and shame and humiliation, without segregation. The basic earnings of the positions held by the respondents before they were disciplined were proved and their inability to secure positions on ships under contract with the appellant union. The question of good faith attempts to mitigate damages by each respondent was the subject of testimony as well as the availability of employment opportunities. It was for the trial court to weigh these various factors in each case and to assess the damages suffered in loss of earnings as fairly as possible. The difficulties of assessing these damages with anything like mathematical accuracy should not be allowed to defeat an award reasonably supported by the evidence. *Harris v. National Union, etc., Cooks & Stewards*, supra, 98 Cal.App.2d 733, 738, 221 P.2d 136; *Hopson v. National Union, etc., Cooks, and Stewards*, supra, 116 Cal.App.2d 320, 253 P.2d 733; *Harris v. National Union, etc., Cooks & Stewards*, 116 Cal.App.2d 759, 254 P.2d 673. The earnings of all of the respondents except Fernandez if continuously employed during the period covered by the awards would have been greatly in excess of the amounts allowed them and we must assume that the trial court took into account the questions of uncertainty of continuous employment and mitigation of damages in fixing the damages. Fernandez testified that although only disrated as chief steward: "I went to put my application in for chief cook, they kick me out only as chief steward. I want to go to work you know; I want to make a living. Well, I was refused any kind of job in my union that I belonged to for 45 years." While appellants point to other testimony in the record the weighing of conflicting evidence is the trial court's function not ours.

[14] On the element of mental distress there is evidence that after they were disciplined respondents were shunned and reviled by their former friends and associates in the union. It would have been better for the trial court to have segre-

gated the items of damages, but on the whole record which would have well supported the full awards for loss of earnings alone we find no prejudice in the failure to segregate.

[15] Each award is sufficiently supported by the evidence and the fact that they were all for the same amount does not compel us to conclude that they were arbitrary. *Harris v. National Union, etc., Cooks & Stewards, supra*, 116 Cal.App.2d 759, 254 P.2d 673.

In the case of Fernandez appellants make the additional argument that his disrating was affirmed by the union after the adoption of the new constitution, but he was illegally disrated under the old constitution and no new proceedings were taken against him thereafter.

[16] Appellants argue that these disputes are solely cognizable by the National Labor Relations Board under the Taft-Hartley Act. 29 U.S.C.A. § 158(b) 2. The damages suffered by respondents were an incident of the wrongful act of appellant union in taking disciplinary action against them in a manner which was violative of their rights under the constitution of the union. Nowhere in the Taft-Hartley Act is the N. L. R. B. given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order a member's reinstatement in the union or to award damages resulting from his wrongful expulsion. These powers are left in the courts of law where they have always resided. We find nothing in the Taft-Hartley Act to deprive a court of the power to do complete justice between a wrongfully disciplined member and his union by allowing such damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived.

[17] Appellants finally urge that instead of restoring respondents to their rights in the union the court should have simply ordered the matter back to the union for further proceedings on the charges. *Cason v. Glass Bottle Blowers Ass'n, supra*, 37 Cal.2d 134, 147, 231 P.2d 6. The

respondents were not suspended before trial and they are entitled to restoration of the rights taken from them as a result of their being tried in an illegal manner. If the union desires to proceed further against them in accordance with its constitution after it has restored them to membership it is free to do so. *Hopson v. National Union, etc., Cooks and Stewards, supra*, 116 Cal.App.2d 320, 253 P.2d 733.

The judgments are affirmed.

NOURSE, P. J., and GOODELL, J., concur.



117 Cal.App.2d 686

PEOPLE v. HALLER.

Cr. 4914.

District Court of Appeal, Second District,
Division 1, California.

May 7, 1953.

Defendant was convicted of the unlawful possession of marijuana. The Superior Court, Los Angeles, County, H. J. Borde, J., entered judgment and defendant appealed. The District Court of Appeal, Doran, J., held that the evidence sustained the conviction.

Affirmed.

1. Poisons ☞9

Evidence sustained conviction for unlawful possession of marijuana. Health and Safety Code, § 11500.

2. Poisons ☞9

In prosecution for unlawful possession of marijuana, court fully instructed jury on valid issues. Health and Safety Code, § 11500.

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendant was adjudged guilty by a jury of violating section 11500 of the Health and Safety Code; unlawful possession of marijuana. It is contended on appeal that the evidence is insufficient to support the verdict and that the court erred in refusing to give a certain requested instruction.

The respondent's brief, referring to the evidence, recites the following:

"Patrick C. Gomez, Police Officer for the City of Santa Monica, had occasion to go to Marine and Main Streets in that City, Friday night, March 14, 1952. Prior to going to this location he received a telephone call from a person he believed to be one Francisco. Officer Gomez went to the aforesaid location at about 9:50 p. m. He observed an automobile, a two-tone Pontiac, crossing Main Street and driving into a gas station, from his location across the street. He noted more than one person in the automobile, which stopped in the parking area in the back of the service station. A building interfered with Officer Gomez's view. He walked across the street and as he came around the building he met defendant. The officer recognized the automobile as being of a similar type as that owned by defendant. When the officer first observed defendant the latter was about ten feet from the automobile and was walking toward the sidewalk. The officer stopped defendant, 'grabbed his wrists and looked at his hands and asked him to keep his hands out of his pockets, and I searched his back pocket, at which time he put both of his hands in his front pants pockets'. Officer Gomez asked defendant to remove his hands from his pockets. Defendant raised them up 'and he had them clenched as if in a fist, and I (the officer) immediately grabbed hold of his wrists again, and upon opening his hands, I found 14 brown wrapped ciga-

rettes in his left hand'. Officer Gomez asked defendant what he was doing with the cigarettes and defendant, whose statements were made freely and voluntarily, stated that he was holding them for a friend."

[1] The foregoing was corroborated by other witnesses. That the evidence was sufficient to support the verdict there can be no question.

With regard to the court's failure to give a certain instruction appellant argues, quoting from the brief,

"The Court gave the following instruction concerning possession:

"Within the meaning of the law, a person is in possession of a narcotic when it is under his dominion and control, and, to his knowledge either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible and exclusive to him."

"By the foregoing instruction appellant's defense that although he had in his possession the contraband, it did not belong to him, was precluded from consideration by the jury. In a close case such as the instant one, the only means by which appellant's defense could have been placed before the jury was by the requested CAL-JIC instruction 72-C concerning specific intent."

[2] The requested instruction referred to does not appear in the record or appellant's brief. Inasmuch as appellant ignored the rules on appeal the above quoted argument could also be ignored but, inasmuch as respondent's brief supplies the necessary information, it may be noted that the court fully instructed the jury on all valid issues.

No prejudicial errors appear in the record. The judgment is affirmed.

WHITE, P. J., concurs.

MILLER v. SOUTHERN PAC. CO.

CIV. 15391.

District Court of Appeal, First District,
Division 1, California.

April 30, 1953.

As Amended on Denial of Rehearing
May 29, 1953.

Hearing Denied June 18, 1953.

Action under the Federal Employers' Liability Act against railroad by administratrix of estate of a decedent for death of plaintiff's decedent resulting from injuries suffered by decedent while employed as a brakeman by defendant. The Superior Court, City and County of San Francisco, Theresa Meikle, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence supported implied finding that defendant was negligent and that such negligence was sole cause of injuries.

Affirmed.

1. Master and Servant ⚬276(3), 278(7, 18)

In action against railroad for death of brakeman, wherein plaintiff claimed evidence supported implied finding that defendant negligently failed to furnish reasonably safe place of employment, negligently operated passenger train which passed standing freight train for which decedent was brakeman, and that brakeman was hit by or sucked into side of passenger train or was thrown down by suction created by it, evidence supported implied finding that defendant was negligent and that such negligence was sole cause of injuries causing death. Federal Employers' Liability Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.

2. Death ⚬86(2)

The care, attention, instruction, training, advice and guidance which father of minor children could reasonably be expected to give his children had he lived were proper elements of pecuniary loss to such children and were recoverable as such in action against railroad under Federal Employers' Liability Act for death of father of such children. Federal Employers' Liability Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.

3. Death ⚬99(4)

\$80,032.50 awarded for death of 37 year old railroad brakeman who had life

expectancy of 30.35 years and was earning \$4,200 a year, and who left surviving a widow and four children ranging in age from six to twelve years, was not so disproportionate under evidence as to indicate that award was result of passion, prejudice, or corruption on part of triers of facts. Federal Employers' Liability Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.

Arthur B. Dunne, John W. Martin and Dunne, Dunne & Phelps, San Francisco, for appellant.

James A. Myers, Hildebrand, Bills & McLeod and D. W. Brobst, Oakland, for respondent.

FRED B. WOOD, Justice.

This is an action against the Southern Pacific Company brought by the administratrix of the estate of Fred A. Miller, deceased, for the benefit of the widow and four minor children of the deceased for damages for his death which occurred as the result of injuries suffered by him while employed by the defendant in interstate commerce.

The action was brought under the Federal Employers' Liability Act which declares that every common carrier by railroad while engaging in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C.A. § 51.

In any such action the "employee shall not be held to have assumed to risks of his employment in any case [where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such car-

rier; and no employee shall be held to have assumed the risks of his employment in any case]¹ where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C.A. § 54. In any such action "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C.A. § 53.

At the time of the injury the decedent was working as a brakeman in defendant's yard at Gerber, California, engaged in making up a freight train which was soon to leave for the north. That train was on a side track, parallel to the main line, headed north. Decedent was last seen, prior to the accident, standing on the

ground near the head of the freight train and between that train and the main line. Shortly thereafter a southbound passenger train passed that point. The gist of the first count of the complaint is that decedent was standing at the head end of the freight train engaged in attempting to receive a signal from another employee who was at the rear end of the train; that defendant, in disregard of its duty of exercising ordinary care to provide decedent with a reasonably safe place to work, carelessly and negligently constructed and maintained a certain signal box with arms located between these two tracks in such a position as to obstruct the view of the decedent in attempting to receive the signal from the brakeman at the rear of the train; that in order to see the signal it was necessary for decedent to, and he did, stand alongside of the main line, and as a result of defendant's said carelessness and negligence decedent was struck by the southbound train, as a proximate result of which he received the injuries. In the second count of the complaint, plaintiff additionally alleged that at the time and place mentioned defendant, by and through its em-

1. The words within these brackets were inserted by amendment of the section in 1939. Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404.

In *Tiller v. Atlantic Coast Line R. Co.*, 1943, 318 U.S. 54, 63 S.Ct. 444, 87 L. Ed. 610, the Supreme Court held that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'." 318 U.S. at page 58, 63 S.Ct. at page 446.

The court in the *Tiller* case traced the origin and history of the assumption of risk doctrine, 318 U.S. at pages 58-64, 63 S.Ct. at pages 446-450, and concluded that the "result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed." 318 U.S. at page 64, 63 S.Ct. at page 450.

The court in that case further concluded that "the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure

to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.' Of course in any case the standard of care must be commensurate to the dangers of the business." 318 U.S. at page 67, 63 S.Ct. at page 451.

Justice Frankfurter, concurring, made this comment: "The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee 'assumed the risk' of its negligence. But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care." 318 U.S. at page 72, 63 S.Ct. at page 453.

ployees other than decedent, carelessly and negligently operated the passenger train on the main line in a southerly direction and that by reason thereof and defendant's careless and negligent construction and maintenance of the signal and as a direct and proximate result thereof, the passenger train struck decedent and injured him.

The jury awarded plaintiffs a verdict for \$80,032.50 and judgment was entered thereon. Defendant moved for a new trial and for judgment notwithstanding the verdict. Upon denial of those motions defendant appealed from the judgment and from the order denying its motion for judgment notwithstanding the verdict. Upon this appeal defendant presents two questions: (1) Is the evidence sufficient to sustain the verdict, and (2) Is the amount of damages awarded excessive?

(1) *The issue as to the sufficiency of the evidence to sustain the verdict* poses these questions: Is the evidence sufficient to support implied findings that defendant negligently failed to provide a reasonably safe place of employment or negligently operated the passenger train, and if so, in either case, was such negligence a proximate cause of the injury suffered by decedent Miller? There is involved no violation by defendant of any statute enacted for the safety of employees. A fairly detailed statement of the pertinent facts is desirable.

Miller, the decedent, had worked for the defendant, as a brakeman on the Shasta Division, since 1943. He had worked in and out of Gerber. He was familiar with the physical set up of the yard and with the operations being conducted. For the last 30 days he had been operating between Dunsmuir and Gerber as a member of the same crew as on this occasion. He and his fellow crew mem-

bers reported for duty at sometime prior to 5 o'clock on the morning of October 2, 1950. The crew consisted of the conductor, engineer, fireman, and three brakemen. Miller was one of the brakemen.

Their train, the second section of No. 620 (Second 620), consisting of 95 freight cars and a diesel locomotive of 4 units, stood on the side track immediately west of and parallel to the main line track with its caboose about 300 or 400 feet north of the Gerber depot and its head end approximately 4800 feet to the north of the caboose. The distance between the two tracks, measured from center to center between the rails, was 17 feet 11 inches, with a clearance of about 7 feet 2 inches between trains when both tracks are occupied.

The first section of No. 620 (First 620) was on a side track parallel to and west of the side track first mentioned. Neither section could leave until it had been readied by its crew nor until a fast passenger train (First 11, The Cascade Limited) arrived from the north. Second 620 could not leave until First 620 had pulled out. First 11 was due at Gerber at 4:55 a. m. It was a few minutes late. Its head end passed the head end of Second 620 at 5:07 a.m.

Miller and Lyman G. Newton, head brakeman, met at the caboose of Second 620 and proceeded to walk the length of the train from the rear to the head end, Miller on the left side and Newton on the right, inspecting the train and connecting air hoses where necessary. They were still on opposite sides of the train when they arrived at the rear end of the locomotive. Newton then connected the air hose of the locomotive to that of the first car. (That was the last time he saw Miller until after the accident.) The engineer then commenced pumping up the train,²

2. The brakes of a freight train are operated by compressed air. The air is furnished by compressors on the diesel units of the locomotive. It is transmitted the length of the train, to each car on the train, by pipes built onto the cars. The pipes of the cars are connected by air hoses which are coupled at the point of coupling of the cars. The first thing to

be done after the air hoses are coupled is for the engineer to pump up his train.

To make sure this work is properly done and that the brakes are working, a test must be made before the train can leave. The method of making this test, and the method followed on this occasion, was to pump up until a gauge in the caboose registered 65 pounds. When this

a process which continued until after First 11 had passed by. Newton retraced his steps part way for a distance of about 20 cars to see that the air was coming through, then turned and proceeded forward again until he reached a point three or four cars back of the locomotive. He remained there until First 11 passed. He said he was more or less looking back toward the rear of his train when First 11 went by and he first saw it about as it passed by. He stepped back between two cars of his train, as a safety matter, there being suction from a train going by there, from a streamliner, when it goes by at a high rate of speed.

Meanwhile, the conductor, S. H. Birdwell, reported at defendant's Gerber office, obtained his bills and the line up (a statement of what trains were moving, with respect to which he would have to govern the operation of his own train), went to the caboose, left his bills there and then walked to the head end of the train, leaving the rear brakeman, Nelson, at the caboose. On the way he passed Newton, gave him the line up and then went on and met and spoke with Miller who was then standing between the freight train and the main line about opposite the middle of the first diesel unit; that Miller was then where he, the conductor, instructed Miller to be. First 11 was then in sight, coming through Rawson, 4.1 miles away. Its headlights could be seen. (Between Gerber and Rawson the main line track is straight.) Conductor Birdwell further testified: "When I arrived at where Mr. Miller was standing I gave him the line up of what we were doing, when we were going to leave, and trains approaching us." "When I spoke to Mr. Miller I told him that was First 11, and that we were stuck there for an opposing extra train. * * * He said 'O.K.'" Birdwell also said he had given instructions to his crew not to give the brake test signal when a train was approaching on the main line track. He was then asked "You never did tell Mr. Miller

that, though, did you—the swing brakeman?" He responded: "Mr. Miller was not working on the rear of the train." Continuing, Birdwell testified that he was the only man of his crew who knew that First 11 was late, he having received that information from the telegraph office. He added that in railroad practice if one does not have information that a particular train has arrived, "it is late." Upon leaving Miller, Birdwell got in the cab of the locomotive of Second 620, gave the orders to the engineer and the fireman and was there when First 11 passed the head end of Second 620.

Concerning the speed of First 11, the defendant's applicable regulations were as follows: A speed board is placed $\frac{3}{4}$ of a mile in advance of the point where the restriction is effective, to give a train time to reduce its speed. At speeds in excess of 51 miles an hour, when a train is making a change in speed, a tolerance of five miles per hour is allowed. Near Proberta, 1 mile north of Kiska,³ there was a speed board indicating 60 miles per hour. Just north of Kiska there was a speed board indicating 35 miles per hour, effective at a point 3696 feet south of Kiska. The head end of Second 620 was 878 feet south of Kiska. Hence the authorized speed limit for First 11 at the head of the freight train and at the spot where Miller was found, was 60 to 65 miles per hour. The engineer of First 11 testified that he was making 79 miles per hour up to the 60 miles per hour speed board north of the Proberta road crossing; that he then started to slow down; that he shut off his engines and used the dynamic brake; that the speed was reducing as he was getting into Kiska and as he passed the head end of Second 620. He testified that as he passed Kiska he would judge that his speed was between 70 and 65 miles an hour, a point 878 feet north of the head end of Second 620. First 11's speed tape showed no violation of speed restrictions. It showed that the speed was 70 miles per hour at Kiska

pressure in the caboose has been reached, the rear brakeman gives a light signal to the head end of the train. The brakeman at the head of the train, on receiving

this signal, passes it to the engineer, and the engineer then makes his brake test.

3. Kiska is one mile north of Gerber.

and that then a rapid deceleration began, and that there was still a rapid deceleration as the head end of the streamliner passed the head end of Second 620; that from the point where speed started dropping off from 70 miles per hour, it dropped off to 60 miles per hour in slightly over $\frac{1}{8}$ of a mile, in approximately 700 feet. That indicates a probable reduction of speed to 60 miles per hour (possibly between 60 and 65 miles per hour) before First 11 reached the head end of Second 620.

First 11 was equipped with a headlight that could be dimmed, a Mars light (one which swings in a figure eight), classification lights, a bell which rings automatically after being turned on, and an air horn. The Mars light is turned off and the headlight dimmed upon approaching another train, to facilitate identification by rendering the identification lights more readily observable. First 11 was required to signal Second 620 by whistle, and Second 620 to respond by whistle. Each train complied with this requirement. The engineer of First 11 testified that about 20 to 25 car lengths north of Kiska he shut off the Mars light, dimmed his headlight and then gave the whistle signal; that before this he had started the automatic bell ringing, about 1,000 feet north of the crossing at Proberta, and that the bell continued to ring until the stop at Gerber. The engineer of Second 620 testified that he first saw First 11 when it was north of Proberta; that the Mars light was then operating and the headlight was on bright; that he did not notice it again until it whistled, and at that time the Mars light was off and the headlight dimmed; that it started to whistle when it was 200 feet or more away and that its bell was then ringing. The fireman of Second 620 said the Mars light was on and the headlight was on bright when he first saw First 11; that he could not say when the Mars light was shut off; that the fixed headlight was dimmed at 10 to 15 car lengths before First 11 passed the head end of Second 620; that the whistle signal was given about when the headlight was dimmed and that this was at about a certain point which was 878 feet north of the head end of Second 620.

Newton, the head brakeman of Second 620, was unable to say when the Mars light was turned off or the headlight dimmed, but testified that First 11 sounded its whistle beginning about 200 feet before it reached the engine of Second 620 and it continued to blow.

During the approach and passing of First 11, the freight train's diesel engines were operating, pumping air into the brake system, making considerable noise. All four diesel units were running. In spite of this noise, the engineer, fireman, conductor and head brakeman of Second 620 heard the whistle of First 11 as it approached.

Richard H. Williams, a freight conductor who had worked on defendant's Shasta Division for 28 years, testified that when a train travels at 65 to 79 miles an hour it creates a suction which has a tendency to cause a person to lose his balance and be drawn down and around and off his feet if he is close enough to the train. The witness said "in that particular spot [where Second 620 was being made up and First 11 was passing] there is room for you to get clear back away from the train a good distance." George R. Beatty, a brakeman in the employ of defendant on its Sacramento Division, who had worked on the Gerber yard for three months in 1950, said that lots of suction is created by high speed trains.

Defendant had in force certain safety regulations governing the conduct of trainmen, including Miller, in the situation described. Among them were these: "* * * safety is one of the first importance in the discharge of duty. Obedience to the rules is essential to safety and is required." (General Notice.) Each employee is required to have a copy of the rules and a time table when on duty (Rules A and 841). (Every member of the crew of Second 620 had a time table.) "Employees must keep sufficient distance from passing trains to avoid possibility of being struck by anything projecting or that may fall or be thrown therefrom. On double track, they should keep outside of and clear of both tracks while train is passing. They must not depend on others to notify

them of approaching trains, engines, or cars." (Rule 817.) "Look in both directions before crossing any track and be especially careful when coming out of or from behind an engine, car, building, or other structure." (Rule 2001.) "Never cross tracks closely in front of moving trains, cars, and engines." (Rule 2002.) "Always keep safe distance from passing cars, engines, and trains, to avoid being struck by falling or projecting objects." (Rule 2111.)

After First 11 had passed and was in the station at Gerber, Nelson, the rear brakeman, gave the light signal for the brake test. Newton picked it up and undertook to relay it to the head end. He got no response. So, he walked toward the head end and found Miller unconscious, lying between the side track and the main line at about the rear of the first unit of the diesel locomotive. Miller's lantern was upright on the ground midway between the side track and the main line, about 8 to 10 feet north of him and toward the head end of Second 620. His comb and pencil were found about 10 feet south of him. The signs of injury observed were fractures of the right leg and right wrist and bruises on the back and rib area to the right. Newton said that the place where Miller was found was a part of his proper position in the performance of his duties. When Miller was working for conductor Birdwell, that is where the witness would expect Miller to be. One of Miller's duties was that of looking for the signal from the rear man.

Between the spot where Miller was found and the rear end of the freight train, there were a water column, an oil column and a semaphore block signal, situate between the main line and the side track. Several hundred feet south of Gerber there is a lighted three-phase approach signal. This signal shines to the north so that if one were standing north of Gerber and looking to the south he would be looking into those signal lights. At the time of this accident, the Gerber station was lighted and in addition to the signal lights south of the station there was a flood light at Gerber. The practice, in the Gerber

yard, in the circumstances that existed at the time of this accident, of giving the signal at the rear end of the train, was by use of a fusee. A fusee is an object similar in form to a candle which can be lighted at one end. It burns with a red light. The method of giving this signal by the rear brakeman is to wave this red light horizontally across the track. Because of the oil and water columns, the block signal and the lights mentioned, it is difficult for a man at the head end to get this signal from the man at the rear of the train if both stand between the side track and the main line and close to the train on the side track. Accordingly, either the rear man goes out toward or across the main line or the man at the head end does so.

Wilson R. Callick, a brakeman in the employ of the defendant on its Shasta Division since 1937, testified that in making up a 95 car train having a 4-unit diesel and a caboose, on this side track, the caboose is south of these obstructions (the oil and water columns and the block signal). Newton said that in making the brake test signal, the man giving it or the man receiving it has to move over to the main line "especially if the caboose is where it was that particular morning. It is behind * * * that water column and the oil column, and up above that a ways there is a signal in line, and it is easier to see if you step over." Beatty testified that with a train the length of Second 620 the caboose would be about 100 feet south of the oil column. Williams said the oil and water columns were practically together, within a few feet of each other. The block signal, it would appear, was a short distance north of these columns. The exact distance in feet or yards, apparently, was not given. Asked if it was necessary to move over to the main line to get the brake test signal, Birdwell said: "I don't know what the factor is that entered into it exactly, unless it is the length of the train, but sometimes you have got to separate that light from other objects back there—I mean that light from your caboose."

No one saw Miller at the time of the accident. The circumstances warrant the

inference that he was injured during the passage of First 11, by coming in contact with it. Precisely how that contact occurred we have no direct information.

Plaintiffs claim (1) that the narrow working space (7 feet 2 inches of clearance when both tracks are occupied) and the obstructions to the view of the brakeman (block signal, water column, and oil column) would support an implied finding that the defendant negligently failed to furnish Miller a reasonably safe place of employment; (2) that the operation of the passenger train, First 11, at an excessive rate of speed, turning off its Mars light, dimming its fixed headlight, and free-wheeling (thereby making less noise than with the diesels operating) would support an implied finding that defendant was negligently operating First 11, charged as defendant was with knowledge that men were at work in the Gerber yard making Second 620 ready; and (3) that the jury could reasonably infer that Miller, in the performance of his duty to watch for and relay the rear brakeman's signal, not aware of the approach of First 11 and having no way of determining its speed, drew near to the main line track to watch for and observe the rear brakeman's signal, and was hit by First 11 or stepped into or was sucked into the side of First 11 or was thrown down by the suction created by it.

Defendant criticises the plaintiffs' analysis of the facts in evidence. It claims that the nearness of the tracks and the presence of the block signal, water column and oil column did not furnish evidence of a negligent failure to provide a reasonably safe place of employment because there was no evidence that higher standards could reasonably be required; i. e., these tracks were further apart than is usual (indicated by the testimony of one witness and by regulations of the federal government and of this and other states), and the obstructions mentioned were necessary facilities which would not be useful if placed elsewhere. That may be so when considered in the abstract; not necessarily so when viewed in the light of the work

in hand, the readying of Second 620 for its northbound trip.

Defendant further claims that there was nothing about the operation of the southbound passenger train, First 11, that indicates negligence. That operation was completely regular, in full conformity with all applicable regulations of the defendant company. That is a factor which merits serious consideration. Yet the jury may quite properly have weighed in the balance the possible need and feasibility of the defendant imposing upon First 11 a much slower speed than 60 to 65 miles as it passed the head end of Miller's train, charged as defendant was with knowledge of the work Miller and his fellow crew members were doing.

Defendant also contends that the evidence shows that Miller was charged with knowledge that First 11 was soon to arrive, and that he was expressly notified of its approach when the conductor spoke to him and gave him his line up, at which time First 11 was but 4 miles away with headlights visible. Of this we may observe that merely handing Miller his "line up," while he was standing there in the dark, did not of itself give him actual knowledge of the immediacy of the advent of First 11. Nor did the conductor's telling Miller "that was First 11" and Miller's responding "O.K." compel the jury to conclude that Miller heard and comprehended all that was said. The noise which the diesel of his train was making may have obscured much of that, and there is a basis for an inference that he was looking toward the rear, not toward the on-coming passenger train. Having crossed from the left to the right side of his train after completing his work of inspection, he placed himself where his conductor instructed him to be, in a position that would enable him to perform his duty of watching for the brake test signal and of relaying it to the engineer. These facts would warrant the inference that he was actually engaged in the performance of that duty, unaware of the imminence of the approach of First 11.

"To this evidence must be added the presumption that the deceased was actually

engaged in the performance of those duties and exercised due care for his own safety at the time of his death." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 34, 64 S.Ct. 409, 412, 88 L.Ed. 520.⁴

These are not all of the factors which the jury may have considered and weighed. There are two aspects of the problem: (1) The possible adjustment of defendant's yard lay-out and its streamliner schedule to the local operation of making up a freight train, and (2) the possible adaptation of this local operation to the yard lay-out and the main line schedule. We have considered the former; i. e., whether the tracks should be spaced further apart, the oil and water columns and block signal relocated, and the speed of the streamliners reduced as they enter Gerber yard. Under the circumstances of this case we do not perceive, nor do we infer that the jury impliedly found, a duty resting upon defendant to adjust its yard lay-out and its streamliner schedule to the operation of making up this freight train, Second 620, upon this occasion. How about the other aspect? Might it be feasible to so change the method and manner of making up the freight train and of giving the brake test signal as to avoid or reduce the hazards to which Miller was subjected?

Miller's conductor indicated it was the length of this freight train which put the caboose so far back. The jury may have considered that this particular side track was too short for the making up of so long a train, that the omission of a few freight cars would have placed the caboose north of the block signal and the oil and water columns, eliminating the obstructions to vision and making it unnecessary for either of the brakemen to step near or onto the main line track. Or, the jury may have considered it unreasonable to require that the brake test signal be given on the right instead of the left side of Second 620, in the situation which obtained on this occa-

sion. We infer from some of the evidence that it is customary to give such a signal on the right side of the train because the engineer is on that side. But on this occasion the signal had to be relayed to him through two brakemen. If given on the left side of the train, it would be relayed to him through two brakemen and the fireman. Such a procedure in this case would have avoided the obstructions to vision afforded by the block signal and the columns, and the exposure of Miller to the hazards of a fast moving streamliner. The track to the left of Miller's train was occupied by the first section of 620. The latter would not leave until after First 11 had passed by. If First 620 should start to move before the giving of the Second 620 brake test signal, it would not attain any considerable speed before it had cleared the head end of Miller's train.

These are factors quite within the competency and province of the jury to consider and weigh in ascertaining and determining whether defendant was negligent and, if negligent, whether Miller's injury and death proximately resulted therefrom, and the further question whether Miller's injury resulted in part from his negligence, if any.

[1] We conclude that the evidence supports the implied finding that defendant was negligent and that such negligence was the sole cause of Miller's injury.

This analysis finds precedent and support, if any be needed, in *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444. Bailey was injured during the unloading of a hopper car filled with cinders. The car was pulled onto a bridge over a cattle pass so that the cinders could be dumped through the ties in the bridge floor onto the roadway 18 feet below. The only footing at the side of the car was about 12 inches wide, 8 or 9 inches of which were taken up by a raised stringer. There was no guard rail. The doors in the

4. Under the circumstances of this case it is not necessary to consider whether the jury was instructed concerning this presumption. It is a part of the law applicable to the case, like the provisions of the Federal Employer's Liability Act itself, *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U.S. 42, 48, 34 S.Ct. 581, 58 L. Ed. 838; see note in *Ann.Cas.1914C*, 171, and administrative regulations is-

sued under sanction of the Federal Boiler Inspection Act, *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 488-489, 63 S.Ct. 347, 352, 87 L.Ed. 411.

"Especially when, as here" said the court in the Lilly case, "the rule only fortifies a result which we think the jury could probably have reached even in the absence of such a rule"; a statement equally apt in the instant case.

floor of the car are opened from the side by a man turning a nut on the end of a shaft by means of a wrench while another man disengages from a ratchet a dog which holds the shaft. When the doors start to open the shaft spins and the operator of the wrench must let go of it lest he be thrown off balance or knocked down. Upon this occasion Bailey operated the wrench, the shaft spun, and he was thrown onto the roadway below.

The hopper car could have been opened before it was moved onto the bridge. Any cinders which spilled on the roadbed could have been shovelled onto the roadway beneath the bridge or a railroad tie could have been used to push the cinders from the roadbed to the ground below the bridge.

A motion by the defendant for a directed verdict was denied. Upon appeal the judgment was reversed by the state Supreme Court upon the ground that negligence was not shown.

The Supreme Court of the United States took a different view. "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller v. Atlantic Coast Line R. Co.*, supra) as well as issues involving controverted evidence. *Jones v. East Tennessee, V. & G. R. Co.*, 128 U.S.

443, 445, 9 S.Ct. 118, 32 L.Ed. 478; *Washington & Georgetown R. Co. v. McDade*, 135 U.S. 554, 572, 10 S.Ct. 1044, 1049, 34 L.Ed. 235. To withdraw such a question from the jury is to usurp its functions.⁵

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacob v. New York City*, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." At pages 353-354 of 319 U.S., at page 1064 of 63 S.Ct.

The Bailey decision furnishes the answer to defendant's contention, based upon earlier cases, that a jury is not competent, without the aid of expert testimony, to consider and determine whether or not a railway company has been negligent in the planning, construction or use of its facilities; at least, in so far as those factors are involved in the instant case.

Defendant invokes a number of the earlier cases which enunciate a rule or principle that a jury must not speculate when drawing inferences from probative facts, cases which made a severely restrictive application of that principle. The answer, in our case, is furnished by the following clear and cogent statement of the

5. See also *Ellis v. Union Pacific R. Co.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572, in which the petitioner with other members of his crew was engaged in backing an engine around a curve on a spur track where visibility was obstructed by a

building located on the inside and near the middle of the curve. He was standing on the ground on the same side as the building and to the right of the engine, and was controlling operations by hand signals to the engineer.

Supreme Court in the recent case of *Lavender v. Kurn*, 1946, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." At page 744 of 66 S.Ct. That principle, as thus defined, applies here.

(2) *In ascertaining whether or not the amount of damages awarded was excessive*, there are two principal elements to consider: (a) damages "for the benefit of the surviving widow * * * and children" of the employee, 45 U.S.C.A. § 51, and (b) damages accorded by "Any right of action" given the injured employee by this statute, a right of action which survives "for the benefit of the surviving widow * * * and children" of such employee. 45 U.S.C.A. § 59.

We do not know how much the jury awarded for either of these two types of damages. Their award was in a lump sum, \$80,032.50. Defendant divides this into two amounts: \$60,032.50 to the widow and children for loss of support and \$20,000 for conscious pain and suffering of the deceased. Before we consider the propriety of such a division of the award, let us take a look at the facts which bear significantly upon the issue of damages and the several elements of compensable injury in this case.

Miller died at the age of 37, with a life expectancy of 30.35 years. He was earn-

ing \$4,200 a year. He had expenses of \$900 to \$1,000 a year applicable only to himself, while away on the road. He left surviving him his widow and four children (three sons and one daughter) of the ages of 12, 9, 7 and 6, respectively.

The defendant took \$250 per month as Miller's contribution to the widow and children. Its expert computed the present value of this amount, upon a 3% basis, at \$60,032.50.

There was no proof of special circumstances indicating that any of the children would be a dependent after attaining his majority. Defendant would pare this item of \$60,032.50 down to \$39,755 upon the theory that an aliquot part of the \$3,000 per year should be credited to Miller and that his share would increase proportionately as each child in turn attained 21 years. Upon this basis, the widow and children would be credited with $\frac{5}{6}$ th of \$3,000 each year for the first 9 years, $\frac{4}{5}$ th during the next three years, $\frac{3}{4}$ th for the next two, $\frac{2}{3}$ ths during the year following. Thereafter, during the remainder of Miller's life expectancy, none of the children would benefit and the widow would be credited with but half of the \$3,000 per year.

[2] Defendant does not treat of the evidence which bears upon the care, attention, instruction, training, advice, and guidance which Miller could reasonably be expected to give his children had he lived. These are proper elements of pecuniary loss to them and are recoverable as such. Evidence of his ability and interest in training and guiding his children is proper and significant to show the value of that loss. *Mobile & O. R. Co. v. Williams*, 1933, 226 Ala. 541, 147 So. 819, certiorari denied 290 U.S. 655, 54 S.Ct. 71, 78 L.Ed. 568. See also 74 A.L.R. 11, at 93-116, including 96 and 101-102. Miller was greatly interested in his job as a railroad man. In addition he had done some writing and some of his writings had been published. He was a devoted father to his children and took an interest in their school work and in their training. He was interested in their athletic progress, helped a good deal with their work at

school and in addition instructed them in outdoor living, fishing and camping. He was a committee man with the Boy Scouts and helped out at meetings whenever he could. We do not know how much the jury awarded for the children's loss of their father's care, attention, instruction, training, advice, and guidance. It well may have been a very substantial sum.

Concerning Miller's conscious pain and suffering, the jury had before it the testimony of Newton that Miller was unconscious when found, but regained consciousness and when he left in the ambulance he had been conscious, groaning, and in great pain for about twenty minutes. There is no evidence concerning his condition thereafter, except that he died at 7:45 A. M. of that day. Because of such lack, defendant argues that the jury had before it evidence of but 20 minutes of conscious pain and suffering; hence, under the rule of no recovery when injury and death are substantially simultaneous, defendant says there can be no recovery. It is not that simple. A person in great pain and suffering can live a veritable lifetime in but a brief interval. A twenty-minute period of great pain and suffering is not to be shrugged off as infinitesimal, too minute for the law to count or to care. Moreover, the jury was entitled to infer, quite reasonably we believe, that Miller continued to suffer for an appreciable period, perhaps until he arrived at the hospital, perhaps until the very moment of death. We could not undertake to substitute our judgment for that of the jury and the trial court that \$20,000 was not excessive compensation for Miller's conscious pain and suffering even if we were to assume, as does the defendant, that the jury awarded that amount for that purpose.

By the process of reasoning described,⁶ defendant would account for \$60,000 of the lump sum award of \$80,000. The difference, \$20,000, readily could be accounted

for as the award to Miller's children for the loss of their father's care, attention, instruction, training, advice and guidance; not an excessive amount for four children ranging from 6 to 12 years, bereft of a father who loved them, took a tender interest in them, and possessed the personal qualifications this father exhibited, to lead and guide them throughout the years of their development into the full flower of manhood and womanhood.

[3] We conclude that the damages fixed herein by the jury and approved by the trial court, when it denied a new trial, are not disproportionate to any reasonable limit of compensation, certainly not so disproportionate as to indicate that the award was the result of passion, prejudice, or corruption on the part of the triers of the facts. Peculiarly apt are the words of the Supreme Court of this state in the recent case of *Ericksen v. Southern Pacific Co.*, 39 Cal.2d 374, at page 382, 246 P.2d 642, at page 647: "The claim that the verdict was excessive was passed upon and rejected by the trial court on the motion for a new trial. The amount of damages fixed by the jury and thereafter approved by the trial court will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice, or corruption on the part of the triers of the facts." See also *Sherman v. Southern Pac. Co.*, 34 Cal.App.2d 490, 499-500, 93 P.2d 812, hearing by state Supreme Court denied, certiorari denied, 309 U.S. 669, 60 S.Ct. 610, 84 L.Ed. 1015; *Fritz v. Pennsylvania R. Co.*, 7 Cir., 185 F.2d 31, 36-37, \$70,000 award, deceased railway yard conductor aged 32, life expectancy 36 years, widow aged 29, two children of 9 and 6 years respectively; and *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 101, 70 S.Ct. 509, 511, 94 L.Ed. 683, judgment of \$80,000 for yard worker's loss of a leg

6. Our use of defendant's breakdown and analysis of the lump sum award is no indication that we deem it legally proper to make the various assumptions involved; e.g., the assumption that the jury awarded \$20,000 for Miller's pain

and suffering and \$60,032.50 for the support of his widow and children. We have used that method and those figures merely by way of illustration and as a convenient vehicle of discussion supplied by the defendant.

deemed "not monstrous in the circumstances of this case."

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



117 Cal.App.2d 731

PEOPLE v. BLETON.

Cr. 4934.

District Court of Appeal, Second District,
Division 1, California.
May 13, 1953.

Rehearing Denied May 25, 1953.

Hearing Denied June 11, 1953.

Defendant was convicted of attempted burglary. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ☞1159(2)

An appellate court will not attempt to determine weight of evidence, but will decide only whether, on face of evidence, it can be held that sufficient facts could not have been found by jury to warrant inference of guilt.

2. Criminal Law ☞1159(2)

If circumstances reasonably justify verdict, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

3. Criminal Law ☞1144(13)

Reviewing court must assume, in favor of verdict, existence of every fact which jury could have reasonably deduced from evidence.

4. Burglary ☞41(10)

Evidence was sufficient to sustain conviction for attempted burglary.

5. Criminal Law ☞784(1)

Failure to give instruction on circumstantial evidence is not necessarily fatal.

6. Criminal Law ☞1173(2)

Where direct evidence in prosecution for attempted burglary placed defendant in such an incriminating situation at almost every moment that window of apartment was broken, that there was no reason to believe that a different verdict than guilty verdict would have been returned had requested instruction on circumstantial evidence been given, and corroborating circumstances including attempted escape and alleged attempted bribery offered necessary reinforcement of such conclusion, failure to give instruction on circumstantial evidence was not prejudicial error.

7. Criminal Law ☞824(1)

Where defendant in prosecution for attempted burglary did not request instruction with reference to wilful trespass, and merely requested an instruction relating to included offenses without mentioning any specific crime, alleged error in failing to give instruction on wilful trespass was harmless. Pen.Code, § 602.

8. Criminal Law ☞1173(2)

Where jury was instructed on such matters as weight of evidence, impeachment, and reasonable doubt, and inconsistencies in testimony of police officers did not concern any vital element of offense charged, refusal of trial court to give cautionary instruction concerning testimony of police officers was not prejudicial error.

Eleanor V. Jackson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was convicted of attempted burglary of an apartment occupied by Mr. and Mrs. Roy W. Elliott, and admitted prior convictions of grand larceny in 1934, of indecent liberties and assault with intent to commit robbery in 1937, and of burglary in 1945. The building in question was a two-story house located at Hobart Boulevard and 30th Street in Los Angeles, the first floor being occupied by Mr. and

Mrs. Elliott. The second floor contained three apartments, one of which was occupied by a Mrs. Hyde. At the rear of the house was a window which opened into the Elliott apartment, and below the window was a wood box five feet six inches high. A stairway extended down beside the wood box from the second story.

On the night in question, July 2, 1952, Mr. and Mrs. Elliott had retired. Both were hard of hearing and knew nothing about the attempted burglary until the next morning. The window was previously unbroken and so stuck with paint that it would not open. Mrs. Hyde arrived at the second-floor apartment about 11:30 p. m. and shortly thereafter heard the doorbell ring twice. This was followed by a crash of glass whereupon Mrs. Hyde called the police. Another crash of glass was heard just about the time the police arrived. George Harris, walking along the other side of 30th Street, noticed a person standing on a platform between a stairway and a window at the rear of a house across the street; the sound of breaking glass was heard, and a squad car containing police officers arrived.

Officers Fuller and Chinnis arrived on the scene about 11:30 to 11:50 p. m. in response to a call, and upon reaching the intersection, heard the breaking of glass. Chinnis saw a man on top of the wood box facing the window and ordered the defendant to come down. Defendant said, "Give me a break", but was handcuffed and put in the police car from which an escape was attempted, defendant falling down across the street and being then returned to the car. There is testimony that Bletson stated, "If you guys will let me go I will give you a thousand dollars"; that "I have done a lot of time in the pen. I am going to get out of this if I have to lie out"; and that "if I had had my gun with me I would have killed both of you guys as you came up".

The defendant, who resided in a house diagonally across the intersection from the Elliott home, denied being on the Elliott property, and claimed to be going to a store when arrested. There were no weapons or burglary tools found in defendant's possession, defendant's hands were not cut, and

it was not known what instrument was used in breaking the window.

It is appellant's contention that "The evidence adduced at the trial was insufficient to support the verdict", in that "The evidence was weak and conflicting with regard to the commission of any offense by the appellant and should be held, therefore, to be insubstantial". In this connection appellant calls attention to certain conflicts and alleged inconsistencies in the arresting officers' testimony; that appellant possessed no burglary tools nor were his hands cut; that no one saw defendant break the window, and that there was no evidence showing that a felonious intent existed.

[1-3] The rule is well settled, as stated in *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 779, that an appellate court "will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt". If the circumstances reasonably justify the verdict, "the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury". The reviewing court "must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence".

[4] Applying the above stated rules to the present situation, it cannot be doubted that the evidence reflected by the record affords a substantial basis for the conviction. The crash of window glass accompanied by appellant's observed presence on a box at the broken window, coupled with the attempted escape and appellant's various statements to the arresting officers furnished substantial material from which a jury could return a verdict of conviction. Moreover, it is difficult to see what innocent intention could be reasonably inferred under such circumstances. The attempted escape and the offering of a bribe to be released are facts from which a consciousness of guilt may well be inferred.

[5, 6] Reversible error is predicated upon the trial court's failure to give the jury instructions on circumstantial evidence. Various cases are cited in which a failure to give such instructions has been deemed prejudicial error, particularly where there was but slight circumstantial evidence of guilt. However, as pointed out in respondent's brief, such is not the situation in the instant case. A failure to give such an instruction is not necessarily fatal. Direct evidence placed the appellant in such an incriminating situation at almost the very moment that the window was broken, that there is no reason to believe that a different verdict would have been returned had the requested instruction been given. Corroborating circumstances including the attempted escape and bribery offers necessarily reinforce this conclusion. Whatever may be the situation in other cases, in the present prosecution the failure to give the instruction in question cannot be deemed prejudicial.

[7] The same may be said in respect to appellant's assignment that there was reversible error in the court's failure "to give instructions on lesser and necessarily included offenses". Appellant insists that an instruction should have been given in respect to Penal Code, section 602, relating to wilful trespass. Appellant admits that the trial court's attention was not directly called to this matter but contends that the court was put on notice by a request to give, by number only, a CALJIC instruction relating to included offenses but mentioning no specific crime. If error there was in this connection, it must be deemed harmless in the present case.

[8] Finally, it is contended that the trial court erred in refusing to give a cautionary instruction concerning testimony of the police officers, "where the testimony of such officers was in conflict with each other as well as in conflict with physical facts". Appellant's brief then points out certain discrepancies in the officers' statements as to the exact time and place when the police call was received, the time and place where the crash of glass was heard, and the view which the officers had of the defendant standing in front of the broken

window. As respondent's brief points out, the jury was instructed on such matters as weight of evidence, impeachment, and reasonable doubt, and the inconsistencies mentioned did not concern any vital element of the crime. No miscarriage of justice is apparent.

The judgment is affirmed.

WHITE, P. J., concurs.



117 Cal.App.2d 709

CLETRO v. VALLEY STORES, Inc. et al.

Civ. 19302.

District Court of Appeal, Second District,
Division 3, California.

May 11, 1953.

In action for injuries sustained by patron of beverage department in public retail market when beverage bottle exploded after falling to floor when three year old child started to climb stack of bottle cartons, the Superior Court, Los Angeles County, Robert H. Scott, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence sustained the trial court's finding that the owner-operator of the public market had not been guilty of negligence.

Affirmed.

1. Negligence $\S$ 142

In action for injuries sustained by patron of beverage department in public retail market when beverage bottle exploded after falling to floor when three year old child started to climb stack of bottle cartons, finding that allegations of complaint paragraph, in which plaintiff alleged that beverage department owner was negligent, were untrue was a sufficient finding of want of negligence.

2. Appeal and Error $\S$ 931(1)

In absence of attack on finding, appellate court must assume that finding was supported by substantial evidence.

3. Negligence $\S$ 134(5)

In action for injuries sustained by patron of beverage department in public

retail market when beverage bottle exploded after falling to floor when three year old child started to climb stack of bottled cartons, evidence sustained trial court's finding that owner-operator of public market had not been guilty of negligence.

4. Negligence ⇨44

Owner-operator of public market owes duty of exercising ordinary care and prudence to keep aisles and passageways, in and through which, by reason of their location and arrangement, a customer in making purchases is induced to go, in a reasonably safe condition so as not to unnecessarily expose customers to danger.

5. Negligence ⇨136(9)

Even when there is no conflicting evidence, if different conclusions on subject can rationally be drawn from evidence, question of negligence is one of fact.

Richard A. Kleinrock, Los Angeles, for appellant.

Robert A. Cushman, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants in an action for damages for personal injuries, tried by the court without a jury.

On September 4, 1950, defendant, Valley Stores, owned and operated a public retail market. Defendant, Berg, owned and operated the beverage department in the market. The beverage department consisted of an open space adjoining and to the left, as one entered the market, of the entrance and aisle which were common to the entire market. A counter for the beverage department was located from two to three feet to the left of the aisle running parallel to it. The counter was about ten feet in length and three feet high. A beverage cooler was located at right angles to the counter at its end nearest to the market entrance. The cooler was about three feet high and extended lengthwise from behind the counter up to the en-

trance of the market. Patrons entering or leaving the market through the main entrance walked past the cooler.

In the corner formed by the cooler and the counter nearest the aisle, Berg had placed a stack of cardboard cartons containing Coca-Cola. The cartons were in two layers; each layer consisted of three cartons of twelve bottles each and three cartons of six bottles each. The top of the two layers was about fourteen to fifteen inches off the floor. The cartons were stacked so that the bottom layer extended farther away from the counter and toward the aisle about one bottle more than the top layer.

On September 4, 1950, plaintiff entered the market and purchased some soft drinks and cigarettes from Berg at the beverage counter. As she walked out of the market and was from three to five feet from the stack of Coca-Cola cartons, a three year old child started to climb onto the cartons and at least one carton fell to the floor. One of the bottles of Coca-Cola exploded and projected a piece of glass into plaintiff's foot.

There was evidence that it is customary in public markets to stack cartons of Coca-Cola in the fashion they were stacked in Berg's department on the day of the accident. Berg testified that this was the first time he had known of any carton being knocked over by a child in the store, and that none of the cartons had been knocked over on any previous occasion.

The court found that neither one of the defendants was negligent; that the "occurrence and any injury which may have resulted to plaintiff as a result thereof, was not proximately caused or contributed to by any carelessness or negligence on the part of" any of the defendants; and that "plaintiff has not sustained any injury, loss or damage as the direct or proximate result of any negligence on the part of" any defendants. Judgment was for defendants from which plaintiff appeals.

Plaintiff contends that "the negligence of the defendant Berg was a proximate cause of the injuries sustained by plain-

tiff," and that the findings that "any negligence on the part of the defendant Berg was not a proximate cause of the accident and any resultant injury to plaintiff, are unsupported by any substantial evidence."

[1,2] Plaintiff's contention is predicated on the erroneous assumption that the court found Berg was negligent. The court found that Berg was not negligent. The complaint alleged Berg was negligent in paragraph VI. The court found the allegations of paragraph VI were untrue. This was a sufficient finding of want of negligence. *Susumu Igaue v. Howard*, 114 Cal.App.2d 122, 249 P.2d 558. The finding that Berg was not negligent is not attacked. Since the court found that Berg was not negligent, in the absence of attack we must assume that that finding is supported by substantial evidence. The findings with respect to proximate cause are surplusage.

[3-5] The court also found that Valley Stores was not negligent. Plaintiff claims this finding is not supported by any substantial evidence. The point has no merit. It is true, of course, as plaintiff argues, that the law imposes on the owner-operator of a public market the duty of exercising ordinary care and prudence to keep the aisles and passageways, in and through which by their location and arrangement a customer in making purchases is induced to go, in a reasonably safe condition so as not to unnecessarily expose him to danger. *Neel v. Mannings, Inc.*, 19 Cal.2d 647, 652, 122 P.2d 576. But whether Valley Stores met this standard is a question of fact and not of law. Even when there is no conflict in the evidence, if different conclusions on the subject can rationally be drawn from the evidence the question of negligence is one of fact. *Thompson v. B. F. Goodrich Co.*, 48 Cal.App.2d 723, 727, 120 P.2d 693. It is apparent from the foregoing recital of the evidence that the trial judge was justified in finding there was no negligence on the part of Valley Stores, Inc.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

117 Cal.App.2d 634

MASELLI v. E. H. APPLEBY & CO., Inc.
Civ. No. 8199.

District Court of Appeal. Third District.
California.

May 5, 1953.

In action arising out of plaintiff's processing of olives for defendant, the Superior Court, Glenn County, Belieu, J., denied defendant's motion to change the place of trial, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that issues of fact were raised by verified complaint and affidavits as to where contract between parties was made, as to where obligation thereunder arose, as to where it was to be performed and as to where breach occurred, and held that the record amply sustained the order denying motion for change of venue, which was based on claim that action should have been brought in county of defendant's residence.

Affirmed.

1. Action ⇨38(2)

Where common counts follow count wherein all facts on which plaintiff's demand is based are specifically pleaded and common counts upon their face make it clear that they are based upon same set of facts, common counts are to be considered not as different causes of action, but as alternative methods of pleading plaintiff's right to recover money judgment he seeks.

2. Venue ⇨46

Where it was obvious from allegations of all three counts contained in complaint arising out of plaintiff's processing of olives for defendant that common counts following first count were not based on separate contracts and that there was in fact only one transaction out of which suit arose, defendant was not entitled to change of venue because of inclusion of such separate causes, even though only as to first count was any issue made concerning where contract was made, where obligation arose, and the like.

3. Venue ⇨70

In action arising out of plaintiff's processing of olives for defendant, issues of fact were raised by verified complaint and affidavits as to where contract between par-

ties was made, as to where obligation thereunder arose, as to where it was to be performed and as to where breach occurred, and record amply sustained order denying motion for change of venue based on claim that action should have been brought in county of defendant's residence. Const. art. 12, § 16.

4. Appeal and Error ⇨912

Where motion for change of venue was made and determined upon allegations of verified complaint and affidavits of respective parties, all conflicts would have to be resolved in favor of prevailing party and all reasonable inferences drawn would have to be in support of trial court's order.

5. Contracts ⇨208

In suit upon contract of corporation, where no place of performance is expressly stipulated, it ought to be held performable in place where circumstances, viewed in light of pertinent code provision, indicate that parties expected or intended it to be performed. Const. art. 12, § 16.

6. Appeal and Error ⇨931(1), 1010(1)

Contracts ⇨176(1)

Question of where contract was to be performed is one of fact, and determination by trial court of that question will not be disturbed if there is any substantial evidence in record to support it, all conflicts being resolved in favor of prevailing party.

7. Appeal and Error ⇨965

Venue ⇨52(1)

Granting or denial of motion either to change or retain place of trial for convenience of witnesses is addressed to sound discretion of trial judge, and order will not be disturbed on appeal except for abuse of discretion.

8. Venue ⇨52(1)

Mere numerical majority of affected witnesses on one side or other does not necessarily determine merits of motion to change or retain place of trial for convenience of witnesses.

9. Venue ⇨52(1)

In proceedings on defendant's motion to change place of trial of action arising out of plaintiff's processing of olives for

defendant, trial judge did not abuse his discretion, on showing made, in denying change of venue on ground of convenience of witnesses.

Samuel L. Fendel, San Francisco, for appellant.

Duard F. Geis and Bruce H. Thomas, Willows, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order denying a motion to change the place of trial. Appellant is a California corporation. Respondent, Maselli, filed an action against appellant in the Superior Court of Glenn County. By Count One respondent sought a money judgment in the sum of \$2,990.10. He alleged that he and the appellant corporation had entered into an oral agreement whereby respondent was to crush, and process into oil, olives to be delivered by appellant at respondent's plant in Glenn County at an agreed price of \$18 per ton; that this work was to be done and the price was to be paid in Glenn County; that pursuant to the contract respondent processed 172.33 tons of olives and delivered the oil therefrom to appellant; that appellant had paid only the sum of \$110.04 on a total debt of \$3,100.14, leaving the sum sued for unpaid. Respondent also included in his complaint a so-called second and separate cause of action, being a common count for the recovery of \$2,990.10. He alleged a debt of \$3,100.14, being for the reasonable value of work, labor and services done at appellant's request "in the crushing and processing of olives"; he allowed the same credit of \$110.04 and asked for the same recovery, as in the first count. Respondent also included a so-called third and separate cause of action in which he sought recovery upon a balance on a mutual, open and current book account alleged to be owing to him from appellant "for the crushing and processing of olives" at appellant's request and at an agreed price. The same credit was allowed and recovery of the same balance due was asked. Appellant moved for a change of venue to the county of its residence, San Francisco. It supported this motion by an

affidavit which stated its principal place of business to be in that county, and averred further that the contract upon which plaintiff had brought suit was made September 8, 1950, in San Francisco, respondent Masselli being personally present in the office of appellant when the contract was made. It was averred further that the obligation on which suit was brought and the liability, if any, of appellant "to pay for the crushing of certain olives" arose, and the breach of the obligation, if any, occurred, in San Francisco. Appellant countered with an affidavit which alleged the contract to have been made in the month of June, 1950, at respondent's plant in Glenn County, appellant's president and general manager being personally present in Glenn County at that time. The affidavit further traversed the averments of appellant's affidavit in respect of the place where the obligation arose, where payment was to be made and where breach occurred. In addition to opposing the motion for change of place of trial upon the ground of residence respondent moved the court to retain the action upon the ground of convenience of witnesses. He averred that there were four material and necessary witnesses residing in Glenn County whereby respondent intended to prove his case. Appellant countered with a further affidavit wherein it was averred that of respondent's four witnesses three were employees of respondent. Further it was averred that appellant must produce at least five material and necessary witnesses at the trial; that two of them resided in San Francisco, and three in Los Angeles County. No issue was raised as to the residence of appellant.

[1,2] Appellant contends that the two common counts in the complaint are separate causes of action, transitory in nature; that no showing has been made that any of the constitutional grounds justifying suit in a county other than that of appellant's residence had been made with respect to these separate causes; that it was therefore entitled to a change of venue because of the inclusion of these separate causes in a complaint containing the first count, as to which count only was any issue made concerning where the contract was made,

where the obligation arose, and the like. These contentions cannot be sustained. It is obvious from the allegations of all three counts contained in the complaint that the common counts are not based on separate contracts and that there was in fact only one transaction out of which this suit arose. Although our case law permits the use of common counts, nevertheless the courts recognize that where the common counts follow a count wherein all of the facts on which plaintiff's demand is based are specifically pleaded and the common counts upon their face make it clear that they are based upon the same set of facts, the common counts are to be considered not as different causes of action, but as alternative methods of pleading the plaintiff's right to recover the money judgment he seeks. Thus it was said in *Hays v. Temple*, 23 Cal.App.2d 690, 695, 73 P.2d 1248, 1251:

"* * * It is the established law of California that, if plaintiff is not entitled to recover under one count in a complaint wherein all the facts upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of facts specifically pleaded in the other count. *Harris v. Kessler*, 124 Cal.App. 299, 303, 12 P.2d 467; *Powers v. Freeland*, 114 Cal.App. 146, 150, 299 P. 736.

"In *Harris v. Kessler*, supra, 124 Cal. App. 299, at page 303, 12 P.2d 467, 468, the court says: 'Nor do we find any ground for reversal because of the order of the court sustaining the demurrer to the second count in the cross-complaint without leave to amend. It was a common count for money had and received, the demand being for \$16,636.92, which was the identical amount claimed under the first count, and manifestly was based on the same state of facts set forth in the first count. It follows, therefore, that, if defendant was not entitled to recovery under the first count, wherein all of the facts upon which the demand was based were specially pleaded, he was not entitled to recover the same under a com-

mon count.” See, also, *Orloff v. Metropolitan Trust Co.*, 17 Cal.2d 484, 489, 110 P.2d 396.

In this case the two common counts obviously refer to the facts specially pleaded in the first count. Not only is the same recovery asked but it is also averred therein that the liability alleged is for crushing olives. The second common count further averred the same agreed price of \$18 per ton as set forth in the first count. Appellant cites *Crofts & Anderson v. Johnson*, 101 Cal.App.2d 418, 225 P.2d 594, in support of their position that we have different contracts here, but that case is not applicable for there the common count was based upon an account stated, which, as was pointed out, does rest upon a new contract arising later than the original contract whereunder the liability arose. That is not the situation here.

[3-6] Treating the proceeding for change of venue, therefore, as it would be treated if but one count, and that the first, was contained in the complaint, it is apparent from what has been said that we have a situation where issues of fact were raised by the verified complaint and the affidavits as to where the contract was made, as to where the obligation thereunder arose, as to where it was to be performed and as to where the breach occurred. Respondent had a right to bring the action and to have it tried in Glenn County if any of the foregoing grounds as listed in the controlling constitutional provisions existed. See Art. XII, sec. 16, Calif. Const.; *McDuffie v. California Tehama Land Corp.*, 138 Cal.App. 245, 32 P.2d 385; *Cook v. W. S. Ray Mfg. Co.*, 159 Cal. 694, 115 P. 318. For example, there were issues raised as to where the contract was made, for the complaint and the affidavit of respondent asserted it was made in Glenn County in June, appellant’s president and general manager being personally present at that time and place, whereas the affidavit of appellant averred that it was made September 8, 1950, in San Francisco, plaintiff being then and there personally present at that time and place. Where, as here, “The motion for change of venue was made and determined upon the allegations of the verified complaint and

the affidavits of the respective parties. * * * ‘all conflicts must be resolved in favor of the prevailing party * * *; and all reasonable inferences which are to be drawn must be in support of the trial court’s order’. * * * ‘In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed.’ * * * ‘It is the rule that the question of where the contract was to be performed is one of fact, and the determination by the trial court of that question will not be disturbed if there is any substantial evidence in the record to support it, and all conflicts must be resolved in favor of the prevailing party.’” *Hale v. Bohannon*, 38 Cal.2d 458, 466-467, 241 P.2d 4, 8. The record here amply sustains the trial court’s order denying the motion for change of venue based on the claim the action was begun in the wrong county.

[7-9] The action of the trial court in denying the change of venue on the ground of convenience of witnesses must also be sustained. “The granting or denial of a motion either to change or to retain the place of trial for convenience of the witnesses is addressed to the sound discretion of the trial judge. Such an order will not be disturbed on appeal except for an abuse of discretion. * * * The mere numerical majority of the witnesses on one side or the other does not necessarily determine the merits of the motion.” *Wood v. Silvers*, 35 Cal.App.2d 604, 607, 96 P.2d 366, 367, 97 P.2d 265. Assuming the validity of appellant’s contention that in determining convenience of witnesses the convenience of the party’s own employees is to be disregarded or at most to be lightly regarded, a point which we need not here rule on, yet the trial court was here confronted with a situation where three of appellant’s witnesses resided in Los Angeles and the court could well consider that it was no less convenient for these witnesses to come to Glenn County for trial than it would be to go to San Francisco. One of the remaining witnesses was a chemist who was ob-

viously an expert witness retained by appellant for his professional knowledge and experience. The issue presented, therefore, was one the solution of which lay within the discretion of the trial court. No abuse of discretion has been shown.

The order appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



117 Cal.App.2d 667

HILL v. LEVY et al.

Civ. 4621.

District Court of Appeal
Fourth District, California.

May 6, 1953.

In action for false arrest and imprisonment, the Superior Court, Kern County, rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence would not sustain trial court's finding that plaintiff, a private citizen, had not arrested defendant within a reasonable time after commission of offense occasioning arrest.

Reversed.

1. Arrest ⇨67

An arrest for a misdemeanor without a warrant cannot be justified if made after occasion has passed, even though misdemeanor was committed in presence of person making arrest. Pen.Code § 837.

2. Arrest ⇨67

Shortness of time between commission of offense and arrest is not controlling factor, in determining lawfulness of arrest made by private citizen, but is material only in determining whether arrest was made within reasonable time and as soon as circumstances permitted.

3. False Imprisonment ⇨31

In action for false arrest and imprisonment, evidence would not sustain trial

court's finding that plaintiff had not arrested defendant within a reasonable time after commission of offense occasioning arrest. Pen.Code, § 837.

4. False Imprisonment ⇨20(1)

Complaint alleging in substance, that defendant had by force compelled plaintiff to go with him to police office and there imprisoned and detained him without probable cause or without any right or authority so to do, injuring plaintiff in his credit and reputation to his damage, was insufficient.

West, Vizzard, Howden & Baker, James Vizzard, Bakersfield, for appellant.

Dorris, Fleharty & Phillips, D. M. Phillips, Bakersfield, for respondent.

MUSSELL, Justice.

Defendant Jack Levy appeals from a judgment rendered against him for the sum of \$600 in an action for false arrest and imprisonment. The amended complaint contains three causes of action. The trial court concluded that plaintiff Hill was not entitled to judgment on the first two causes of action and they are not here involved. Appellant contends that the trial court's findings are inconsistent and not supported by the evidence, and that a cause of action was not stated in the third count of the amended complaint.

On February 27, 1949, at about 5:00 o'clock P. M. appellant, with his wife and Mr. and Mrs. Reinik, entered the El Tejon Hotel in Bakersfield. They were seated in the dining room and ordered a meal. Plaintiff Hill and his wife, together with three other couples, were seated in a booth in the same room and the two parties were approximately 18 feet apart. Appellant testified that he then heard loud conversation with the consistent mentioning of the word "Jews"; that Hill repeatedly said "If they could not sell potatoes to the Armenians, they could always sell them to the God damn Jews"; that "Mr. Hitler took care of the Jews in Germany and that they would take care of the rest of them"; that "The conversation was ap-

parently centered on a deal of potatoes and acreage in Cuyama on which they were going to plant potatoes and it would not matter whether they got the money or not"; that "The conversation was that the government would give them \$1.45 or \$2.45 a sack for them and no God damn Jews were going to take the deal away from them and that was the conversation they carried on for 10 or 15 minutes"; that he heard other language of a profane nature, rose up from his seat and told Hill that "he had listened to the conversation long enough and for him to quit it; that there were women present"; that Hill replied "No son-of-a-bitch is going to make me shut up"; that Hill continued his remarks about the Jews and appellant then left the room and contacted the hotel manager; that Hill also left the room and talked with the manager and both appellant and Hill then returned to the dining room, where there was more profanity; that appellant then called the police. When they arrived a few moments later, appellant, in the presence of the officers, told Hill that he was under arrest. The officers then took Hill into custody and to jail, where he was detained for approximately an hour.

On April 14th, 1949, appellant filed a complaint against Hill in the police court of Bakersfield, charging him with a disturbance of the peace alleged to have been committed on February 27, 1949. A jury trial was had which resulted in an acquittal and the present action followed.

Hill's testimony as to what took place in the hotel was that he and his companions were discussing raising 160 acres of potatoes; that someone said the potatoes could be sold to Jews, Gentiles or any one; that Levy stood up and addressed Hill and his party and said "You fellows are talking loud and boisterous and I don't like it and if you don't shut up, I will call a cop and have you arrested"; that he, Hill, then said "If you are going to call a cop, call a whole bunch of them. Calling one would be a waste of your time and mine"; that Levy left the room and returned with the Hotel manager and demanded that he arrest Hill; that the manager would not make an arrest and that after a conversation between the

manager and Levy, the officers came and the arrest was made; that Levy pointed to Hill and said "I want this man arrested".

The trial court found "That said plaintiff was guilty of a breach of the peace by the use of profane language in the presence of women, and by boisterous conduct in a public place, which said breach of peace was a breach of peace of said defendant and the companions of defendant; but that at the time of said breach of peace by plaintiff, defendant Jack Levy failed to place said plaintiff under arrest, for a period of approximately one-half hour, and did not place plaintiff under arrest until such time as the police officers of the City of Bakersfield arrived at the El Tejon Hotel; that at said time, when said Police Officer on the request of said defendant placed said plaintiff under arrest, said plaintiff was not then and there guilty of a breach of the peace, or disturbing the peace, at the time said arrest was made." The court also found that the allegations of the first affirmative defense pleaded by defendant Jack Levy were true. These allegations, insofar as are material here, were that on or about the 27th day of February, 1949, at the El Tejon Hotel, plaintiff was loud, abusive and profane in his language, and directed toward defendants abusive, scurrilous and profane remarks; that the defendant Jack Levy requested the plaintiff to desist from such conduct and remarks; that upon plaintiff refusing to desist from such conduct and remarks, the police were notified and came to the hotel; that thereupon the defendant Jack Levy, acting as a citizen, placed said plaintiff under arrest for disturbing the peace; that said plaintiff was then taken into custody by the police officers and removed from the El Tejon Hotel.

The trial court apparently based its judgment in favor of plaintiff on the sole ground that the arrest of plaintiff was illegal because it was made at a time when the plaintiff was not then and there guilty of a breach of the peace and that a period of approximately one-half hour elapsed between the first breach of the peace by respondent and his arrest; and that under the circumstances, the arrest was not authorized under the provisions of section 837 of the

Penal Code which provides that a private person may arrest another for a public offense committed or attempted in his presence.

[1] A private person may arrest another for a public offense committed or attempted in his presence. Penal Code, § 837, subd. 1. However, an arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the person making the arrest. *People v. Craig*, 152 Cal. 42, 47, 91 P. 997. In *Jackson v. Superior Court*, 98 Cal.App.2d 183, 188, 219 P.2d 879, it was held that in order to justify an arrest without a warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest, he must then obtain a warrant therefor. Section 67 in Volume 4 of *American Jurisprudence*, page 46, is cited therein as stating the rule applicable. That section provides in part that a private person making an arrest must act promptly at the time of the offense; that in order to justify a delay there should be a continued attempt on the part of the person apprehending the offender to make the arrest; that he cannot delay for any purpose which is foreign to the accomplishment of the arrest; that if an officer sees an affray and calls other officers to his assistance, the fact that the actual arrest is made after the affray is over does not make the arrest without a warrant illegal; that the shortness of the interval does not really determine whether the right to make the arrest without a warrant exists, but the delay merely throws light on the question whether the arrest was made as soon as the circumstances permitted; that a delay by an officer of half an hour in order to procure help in making the arrest may be reasonable, while a delay of two hours may be unreasonable, especially if the officer meanwhile is doing nothing connected with the arrest; that where the facts are undisputed, the question as to what is a reasonable time within which an officer may make

an arrest without a warrant is a matter for the court to determine.

[2, 3] In the present case it is undisputed that the arrest took place within a very few minutes after respondent Hill ceased making the remarks which lead to his arrest. Hill testified that he was placed under arrest "within a matter of a few minutes—pretty soon—roughly 25 minutes after Levy spoke to him". In this connection Levy testified that the objectionable remarks continued after he first spoke to Hill. One witness testified that the officers came "possibly 10 minutes or more after Hill left the room and talked to the hotel manager. Another witness testified that not more than 5 or 10 minutes at the most elapsed after Levy left the room until the officers arrived. No one testified that a half hour elapsed from the time of the completion of the breach of the peace until the officers arrived and the arrest was made. The shortness of the time between the commission of the offense and the arrest is not the controlling factor in determining the lawfulness of the arrest. It is material only in determining whether the arrest was made within a reasonable time and as soon as the circumstances permitted. The evidence shows without question that Levy, after hearing objectionable remarks by Hill and his party, approached Hill and stated that if Hill did not "shut up" he would call a "cop" and have him arrested. It is apparent that Levy might have experienced considerable difficulty in making the arrest without help. In this connection Hill stated that it would be a waste of time to call only one officer. Levy then made an unsuccessful attempt to get help from the hotel manager and immediately thereafter called the officers. It does not appear that he went about other matters unconnected with the arrest or that he left the scene until after it was made. It is our conclusion that, under the circumstances shown by the record, Levy made the arrest within a reasonable time and that the trial court erred in holding that it was then unlawful.

[4] Appellant contends that the third cause of action of the amended complaint herein fails to state sufficient facts. We are

in accord with this contention. It is alleged therein, in substance, that the defendant by force compelled the plaintiff to go with him to the police office and there imprisoned and detained him without probable cause or without any right or authority so to do, injuring plaintiff in his credit and reputation to his damage. A cause of action for false imprisonment is not stated because it is not alleged that the imprisonment was made without a warrant. *Evans v. Wixom*, 38 Cal.App. 542, 543, 176 P. 873. Facts were not pleaded showing that the imprisonment was unlawful. *Dillon v. Haskell*, 78 Cal.App.2d 814, 816, 178 P.2d 462. The mere allegation that restraint was without right or authority is but a conclusion of law and insufficient and does not obviate the necessity of alleging facts showing wherein the illegality or lack of authority lies. *Burlingame v. Traeger*, 101 Cal.App. 365, 369, 281 P. 1051.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



117 Cal.App.2d 688

POTTER v. BOISVERT.

Civ. 8210.

District Court of Appeal, Third District,
California.

May 7, 1953.

Defendant filed a cross-complaint in which he sought a decree adjudicating that residential realty which was purchased in name of plaintiff with funds of partnership existing between defendant and plaintiff belonged to plaintiff and defendant equally. The Superior Court, Sacramento County, Glenn, J., rendered decree declaring that plaintiff was sole owner of property and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that under the clean hands doctrine defendant was not entitled to the relief sought.

Affirmed.

256 P.2d—40

Equity §65(2)

Where married man deserted his wife and was living with his paramour when residential real property was purchased with partnership funds of man and paramour, and title to property was taken in paramour's maiden name in order to prevent wife from discovering husband and making claim against property, the clean hands doctrine prevented married man from obtaining after death of wife a decree adjudicating that property belonged equally to him and to paramour.

Robert A. Zarick and Robert C. Fleming,
Sacramento, for appellant.

Emerson W. Read, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

In 1936 Helen Potter, plaintiff and respondent herein, and Wilfred J. Boisvert, defendant and appellant, left their respective homes in the East and also their respective spouses and together journeyed to California. Here they lived together and held themselves out to the public as being husband and wife until 1948, when they separated. During the intervening years they ran a grocery store and there was acquired also a residence property in which they lived. Thereafter respondent, Helen Potter, brought an action against Boisvert to have it declared that the grocery business had been a partnership between the two; that for his breach of partnership obligations she had exercised her right to dissolve the same. She asked for an accounting. Appellant answered the complaint and filed a cross-complaint in which he sought a decree adjudging that the residential real property having been purchased with partnership funds belonged to the two equally. He alleged that by agreement between the two the title had been taken in the maiden name of appellant and that as part of the understanding she agreed to hold his interest in trust for him. He charged that she had repudiated this trust and claimed she owned the property wholly. He asked that his interest be declared. The trial court found that the grocery business had been a

partnership business and cast the accounts between the parties. With that portion of the decree we are not here concerned. However, responsive to the issues tendered by the cross-complaint and the answer thereto, the court found that when this property had been purchased appellant Boisvert was married, had deserted his wife, had come to California, had here lived and cohabited with respondent as man and wife and was in that relationship when the real property was purchased; that at least the initial payment made thereon was from partnership funds, but that appellant for the purpose of defrauding and deceiving his wife and in order to prevent her from acquiring knowledge of his whereabouts and making claims against him and his property requested respondent to take the deed in her maiden name, which she did; that appellant continued his attitude of fraud and deceit toward his wife, and continued to conceal his whereabouts and his property from her knowledge until she died; and that now after her death he was seeking a decree of the court to extricate him from the situation in which through fraud and deceit he had placed himself. The court declared respondent was the sole owner of the property. From that portion of the decree so declaring Boisvert appealed.

There is ample support in the testimony for the court's findings. Appellant himself, when asked as to the reason why the title to the property was taken in his paramour's maiden name, declared that the property was deeded to her in that name because he feared that if "his wife ever caught up to" him she would take everything away from respondent and appellant; that his purpose was to keep his wife from learning about his acquisition of the property and claiming a right to share in it and that such was his only purpose in having the title vested of record in respondent. " " "He who comes into equity must come with clean hands." * * * Whenever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the

court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' " Taylor v. Bank of America, 67 Cal.App.2d 59, 68, 153 P.2d 617; Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296; Pomeroy's Equity Jurisprudence, §§ 397, 401; In re Estate of Xydias, 92 Cal. App.2d 857, 860, 208 P.2d 378. The application of the foregoing equitable maxims to the situation presented by the appellant's own testimony is clear.

That portion of the judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



117 Cal.App.2d 664

HARROLD v. HARROLD.

Civ. 8245.

District Court of Appeal, Third District,
California.

May 6, 1953.

Action by a wife against her husband for a divorce. The Superior Court, Sacramento County, Glenn, J., entered an order denying the wife's motion for an allowance for costs and attorney's fees on appeal from judgment rendered upon trial of a remanded issue and the plaintiff appealed and the defendant cross-appealed. The District Court of Appeal, Jones, J. pro tem., held that trial court under circumstances properly denied request for allowance of additional costs and counsel fees.

Order affirmed.

I. Divorce ⚖️182

In view of previous allowances made to wife and assets received by her, trial court properly denied wife's request for allowance of additional sum for costs and counsel fees on her appeal and husband's cross-appeal from decree entered in wife's divorce action following trial of issue remanded to trial court by District Court

of Appeal, which related to division of community earnings.

2. Divorce $\Rightarrow$ 182

Granting or rejection of request of wife for costs and attorney fees on wife's appeal and husband's cross-appeal from judgment entered in wife's divorce action is discretionary in trial court.

David Livingston and Louis F. DiResta, San Francisco, Wilke & Fleury, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

JONES, Justice pro tem.

This case is by the wife in an action for divorce and is from an order denying her motion for an allowance for costs and attorney's fees on appeal. The parties were married on November 26, 1936, each having been married before. They first separated in 1944. In the following year they entered into a separation agreement by which all property rights and reciprocal claims arising out of the marriage were settled between them. In accordance with the terms of this agreement the defendant transferred and assigned to the wife cash and other assets in excess of \$100,000. In September of 1945, the parties became reconciled and resumed marital relations, plaintiff keeping as her own the property obtained under the property settlement agreement and the income therefrom.

In March, 1948, the parties again separated, with the wife suing for divorce. She was awarded a decree and allowed \$2,000 for attorney's fees and \$400 per month for her own support for a period of five years. In making a division of the community property the decree of divorce failed to take into account the earnings of the defendant subsequent to July 31, 1948. Upon the wife's appeal the interlocutory judgment of divorce was affirmed except as to the division of these community earnings, 224 P.2d 66. This single issue was remanded back to the trial court for determination. As costs upon the appeal from the interlocutory decree the wife

was allowed the sum of \$383.65. To meet the expense of the trial of the remanded issue the court made her a further allowance of \$500.

Upon the trial of the remanded issue the community earnings were computed to November 1, 1951, the first date on which the final decree might be entered, and out of these earnings, which the court found to be \$88,224, she was awarded \$45,112. In addition, she continued to receive the \$400 per month for support awarded her under the interlocutory decree. The judgment entered on the remanded issue, provided that each of the parties should pay "his or her own remaining court costs and counsel fees", and "his or her own share of State and Federal income taxes covering community earnings". Mrs. Harrold appealed from the whole of this decree, and the husband from that part of it which awards the wife the sum of \$45,112. It is on account of this appeal and cross-appeal that she has moved for an allowance of additional costs and counsel fees.

[1,2] The sole ground urged for reversal of the order is that the court abused its discretion in denying the motion. It is recognized by appellant that the granting or rejection of the request of a wife for costs and attorney fees on appeal is a matter which lies within the sound discretion of the court. *Leupe v. Leupe*, 21 Cal.2d 145, 152, 130 P.2d 697. But it is contended that in this instance this discretion has been abused. Our view is to the contrary.

The numerous allowances previously made on account of attorney's fees and costs considered in connection with settlement made between the parties upon their first separation affords a solid foundation in support of the conclusion of the trial court that a further allowance was not necessary in order to enable appellant to meet expenses of the last appeal. As is said in *Kellett v. Kellett*, 2 Cal.2d 45, 49-50, 39 P.2d 203, 205, "The matter was so wholly in the discretion of the trial court that, in order to set aside its order refusing the application, a very strong case must be made out in favor of the plaintiff." The showing made by the wife here falls far short of this requirement.

In commenting upon a state of facts similar in many respects to the situation here presented the court in *Comey v. Comey*, 8 Cal.2d 453, 454, 66 P.2d 148, 149, said: " * * * the showing made in the counter affidavits, considered in connection with the history of the three prior appeals, affords ample support for the conclusion that the court below exercised a sound discretion in making its order denying plaintiff's application." So it may be said that in this case the previous generous settlements and allowances made to the wife afford ample support for the conclusion of the trial court that no need existed for any additional allowance.

The order appealed from is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



117 Cal.App.2d 728

JONES v. CITY OF ALHAMBRA.
Civ. 19328.

District Court of Appeal, Second District,
Division 1, California.
May 13, 1953.

Action against city for injuries allegedly caused by failure to keep sidewalk in safe condition. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered order sustaining a demurrer without leave to amend and a judgment for defendant, and plaintiff appealed. The District Court of Appeal, Doran, J., held that action was one for injury caused by wrongful act or neglect of another subject to one-year statute of limitations.

Judgment affirmed.

I. Limitation of Actions ⚡34(2)

Public Liability Act merely permitted action to be brought against city for injuries allegedly resulting from defective condition of city property and did not create liability of city for such injuries within

meaning of statute requiring action on "liability created by statute" to be commenced within three years. St. 1923, p. 675; Government Code, § 53051; Code Civ.Proc. § 338, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Liability Created by Statute".

2. Limitation of Actions ⚡31

Action against city for injury allegedly caused by failure to keep sidewalk in safe condition, though brought under Public Liability Act, was an action for "injury caused by wrongful act or neglect" of another within statute requiring such action to be brought within one year. St. 1923, p. 675; Government Code, § 53051; Code Civ.Proc. § 340, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Injury Caused by Wrongful Act or Neglect".

Brinton N. Bowles, Los Angeles, for appellant.

Harry E. Sackett, Los Angeles, for respondent.

DORAN, Justice.

The within action is for damages for personal injuries. A demurrer was sustained without leave to amend and from the judgment that followed plaintiff appeals.

As recited in respondent's brief,

"Appellant's Complaint, on its face, clearly alleges a cause of action for injury to Appellant caused by the alleged wrongful act or neglect of Respondent, City of Alhambra, in failing and neglecting to keep a certain sidewalk in good repair or a safe condition.

"The cause of action was brought under the Public Liability Act and Section 53051 of the Government Code which defined the circumstances and conditions under which a municipality may be liable for injuries resulting from the dangerous or defective condition of public property.

"The Complaint was filed on March 14, 1952, over one year from the date of the injury complained of, December 27, 1950.

"Appellant does not contend that she commenced her action within one year from the date of the alleged accident, but argues that the liability of Respondent is one created by statute, and is therefore governed by section 338, subdivision 1 of the Code of Civil Procedure, which provides that such an action be commenced within three years, and not by section 340, subdivision 3, of the Code of Civil Procedure, which provides that an action for injuries to one caused by the wrongful act or neglect of another must be brought within one year."

Appellant argues that, "Prior to the Public Liability Act of 1923, local agencies were not liable for negligent acts or omissions of their officers or employees, and it was solely by reason of that statute and the amendments following it that they were liable for their officers and employees' tortious acts or omissions. This was the finding in the case of *Douglass v. City of Los Angeles*, 1935, 5 Cal.2d 123, 53 P.2d 353."

Respondent, on the other hand, points out that, "The cause of action set forth in Appellant's Complaint is that kind of action which comes explicitly within the above quoted provisions of section 340, subdivision 3, Code of Civil Procedure, and the fact that, although the enactment of the Public Liability Act and Section 53051, Government Code, gave a person claiming damages for injuries resulting from defective conditions of a City's property, a right to seek redress therefor against the municipality, did not create a liability which did not, prior thereto, exist, but merely added another class against whom the redress or remedy could be sought.

[1] "The case of *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353, cited by Appellant, does not hold that the liability of a municipality for negligence is a new liability created by statute. That case, in fact, holds that prior to the Public Liability Act, the person injured by reason of the negligence of public officers in the maintenance of the public streets had to seek redress against the public officers themselves. The Act permitted an action to be brought

on a class of claims which were not previously allowed; it did not create a new liability."

[2] Section 340, subdivision 3 of the Code of Civil Procedure provides that "An action * * * for injury to or for the death of one caused by the wrongful act or neglect of another" must be brought within one year. Section 340 is the controlling law in the circumstances hence the decision by the trial court was correct.

The judgment is affirmed.

WHITE, P. J., concurs.



117 Cal.App.2d 612

In re GUASTI'S ESTATE.

TITLE INS. & TRUST CO. v. GUASTI et al.
Civ. 19462.

District Court of Appeal, Second District,
Division 2, California.

May 4, 1953.

Rehearing Denied May 21, 1953.

Hearing Denied July 2, 1953.

Proceeding on trustee's account wherein beneficiaries objected on ground that trustee in fixing its fees had re-evaluated assets of testamentary trust estates. The Superior Court, Los Angeles County, John Gee Clark, J., entered an order approving the account, and the beneficiaries appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that since the trusts required trustee to augment trust estates by exercising judgment in liquidation and conversion of assets and trust instrument, pursuant to agreement between testatrix and trustee, provided that trustee was to receive stipulated percentage of trust estates as a fee, trustee was entitled to re-evaluate the estates and to apply the percentages to the estates as re-evaluated, not as they existed at time of inception.

Affirmed.

I. Trusts Ⓒ315(1)

Language of will was important key in interpreting agreement referred to therein whereby trustee was to receive certain

percentage of testamentary trust estates as compensation, but it did not afford sole device for ascertaining meaning of agreement, and duties contemplated for trustee would also be considered.

2. Trusts ⇨315(1)

Where testatrix required trustee of testamentary trust to augment trust funds by exercise of judgment in liquidating and converting property, and provided that, pursuant to agreement, trustee was to receive stipulated percentage of trust estates as fee, trustee was justified in re-evaluating estate assets and in computing its annual fees by applying stipulated percentages to assets as re-evaluated, rather than as they existed at inception of trusts.

3. Trusts ⇨315(1)

In construing contract between testatrix and trustee of testamentary trusts concerning trustee's compensation, court would ascertain mutual intent of both parties as inferred from circumstances under which agreement was made and from matter to which it related. Civ.Code, § 1647.

4. Trusts ⇨118

Where testamentary trusts provided that trustee was to receive stipulated percentage of trust assets and said nothing as to time when assets should be re-evaluated or frequency of new appraisal, evidence of custom of trust companies in the community was indispensable in determining whether contract between testatrix and trustee providing for trustee's fees contemplated re-evaluation.

5. Trusts ⇨315(2)

Conduct of guardian of minor beneficiaries of testamentary trust in approving payment of trustee's fees on re-evaluated assets for period of seven years, and beneficiaries' consent for three years after attaining majority to practice of trustee in re-evaluating trust assets for purpose of determining trustee's fees in accordance with agreement with testatrix providing that trustee was to receive stipulated percentage of trust estates amounted to a fixed policy and an acceptance of the custom as a guiding rule for the trustee.

6. Contracts ⇨147(1)

It is the court's duty to give effect to intention of parties where it is not wholly at variance with correct legal interpretation of the contract.

7. Appeal and Error ⇨1008(1)

Where parol proof is admitted for purpose of assisting court to ascertain intention of parties to contract and conflicting inferences may be drawn, it is constitutional function and duty of trial court to determine meaning of parties and such finding is binding on reviewing court.

8. Contracts ⇨176(1)

The intent of contracting parties to agreement becomes legal question only when from evidence but one tenable conclusion can be reached.

9. Appeal and Error ⇨1008(1, 3)

Where construction of oral contract or of an uncertain written agreement is, with aid of testimony, not unreasonable or inconsistent with evidence, conclusion of trial court will not be disturbed on appeal.

10. Appeal and Error ⇨1008(1)

Trusts ⇨315(2)

Where testamentary trusts provided, pursuant to agreement between testatrix and trustee, that trustee was to receive stipulated percentage of trust estates as fee and trust instrument contained no provision as to whether trusts were to be re-evaluated for purpose of determining fee, and conclusion of trial court, in view of evidence as to custom, that trusts were to be re-evaluated was not unreasonable or inconsistent with evidence, such conclusion was binding upon District Court of Appeal.

11. Trusts ⇨329

Order approving account of trustee of testamentary trusts would not be reversed because of alleged error of \$26.64 in computing fees due trustee, in view of rule of de minimis.

Royal M. Galvin and George C. Bliss,
Beverly Hills, for appellants.

O'Melveny & Myers, Louis W. Myers,
Adrian C. Stanton, Los Angeles, for respondent.

MOORE, Presiding Justice.

By her last will probated June 18, 1937, decedent created a testamentary trust for the benefit of two grandsons, the appellants. By paragraph XXV she provided:

"The following schedule of charges has been agreed upon between Title Insurance and Trust Company and myself for its services as such Trustee hereunder: Two-fifths ($\frac{2}{5}$) of one per cent (1%) for all moneys that are invested in government securities, and three-fifths ($\frac{3}{5}$) of one per cent (1%) where the trust fund is composed of other and different securities or other property of every character. I furthermore direct that said Title Insurance and Trust Company, as Trustee, present and serve upon each other co-Trustee a semiannual statement of the condition of said trusts at the time of the rendering of such statement."

On December 4, 1951, Title Insurance and Trust Company filed its eleventh account current with petition for approval and allowance of trustee's fees. Objections thereto were filed by appellants on the ground that in fixing its fees, the trustee had re-evaluated certain assets of the trust estates based on their market value in 1951. The objections were overruled and the court heard proof of the circumstances surrounding the publishing of the will and ultimately determined that it is customary in Los Angeles for trust companies, banks and like institutions in handling testamentary trusts to re-evaluate the assets in the trust estate at least once a year for the purpose of assisting them in determining their annual fees, and held that the trustee was justified in re-evaluating the assets of the trust estate herein for the purpose of computing the trustee's fees due on the eleventh account current.

Was such holding error?

There are two trusts: one for Secondo inventoried at \$243,201.72; one for William in the sum of \$256,981.27. Of Secondo's, \$59,571.01 is invested in government bonds; \$183,630.71 consists of cash and securities other than government bonds. Pursuant to the rule of paragraph XXV appellants contend the trustee should have

reported its fees as two fifths of one per cent on the government bonds at \$238.28, and three fifths of one per cent of \$183,630.-71 at \$1,101.78. The latter sum is derived from computing the trustee's fee on Secondo's trust estate at the "carrying" or inventoried values of the assets, which makes a total of \$1,340.06. But basing the computation on the re-evaluations of the cash and securities other than government bonds, the total fees on Secondo's trust amounted to \$2,017.44 which is \$677.38 in excess of the fees computed on the inventoried values. By similar process the trust estate of William, consisting of government bonds \$58,579.64 and cash and other securities inventoried at \$198,401.68, paid the trustee \$603.87 more than it would have paid if the fee had been based on the inventoried values of the assets of his trust estate.

[1] Appellants contend that (1) by the terms of the will the trustee's compensation is strictly limited and (2) the intention of the testatrix should govern in interpreting her final testament. While the language of that writing is an important key in interpreting the agreement referred to in paragraph XXV, it does not afford the sole device for ascertaining the meaning of the contract. The duties contemplated for the trustee must also be considered.

In appointing trustees for the trusts the testatrix intended not that the trustees lock the cash and securities in a safety box and report their earnings periodically, but, on the contrary, by paragraph XXII she imposed upon the trustee *the duty* to "collect the income, rents, issues and profits of the trust and after the payments and deductions" designated in the will to "invest or apply and distribute the same for the use and benefit of the beneficiaries * * * [and] in the event the residue contains property other than money * * * to liquidate the said property and convert the same into money at such times and for *such sums as in their judgment* will be for the best interests of said estate, with the end in view of augmenting said trust fund, and for that purpose the express power of sale is hereby granted to said Trustees to sell on such terms and conditions and for

such amounts as in their judgment they deem for the best interests of said trust fund." (Emphasis added.)

By the above-quoted terms the testatrix placed squarely upon the trustees the burden of "augmenting the trust fund" by the exercise of their judgment along several avenues of their official activities. They were by such obligation required to be informed with respect to the values of real estate and of those securities in which they might invest, in the values of oil-bearing lands and petroleum products and to be acquainted with the world's petroleum production. Unless the trustees so perform their obligations as to be able to contribute to the growth of the corpus of the trust, they do not faithfully fill the office they hold. But in the event of their exercise of an intelligent judgment to the advantage of the trust estates, they are entitled to consideration therefor in the determination of their annual compensation as trustees. If they increase the trust fund from year to year, it is only fair that the amount of such increment constitute a part of the fund upon which the computation of their fees be made. While the trustees would have acted within their instructions had they in 1939 sold all the shares of Standard Oil of California held in the trust estates, the latter would be now bereft of more than \$60,000 if the shares had been sold at that time. Moreover, by virtue of the exercise of industry and good judgment the trustees acquired 2210 other shares of the same company. The increase of the value of such shares has served to add substantially to the trust estates.

[2] It is not intended by the foregoing to construe the contract as a specific promise to pay the trustees more for their services in proportion to the increment of the trust estate, but it suffices as another reason for holding that the trustee was justified in re-evaluating the assets of the estate to derive a just basis for computing its annual fees.

The assets of the trust estates have, by virtue of the judgment exercised by the surviving trustee, increased noticeably over their inventoried values. Such growth cannot in justice be ignored in determin-

ing the annual fees due the trustee. Proof of the exercise of a high order of fidelity and efficiency is everywhere deemed a relevant factor in fixing the compensation of a confidential agent. If, in the action at bar, the assets be found to have shrunk in value at the close of a year, the fees of the trustee should be less; if they are found to have increased, the fees should be more. The custom proved to have been in vogue in Los Angeles during the period after the establishment of the trust estates is, therefore, reasonable and just and is its own reason for its advent.

[3] Appellants overemphasize the importance of the intention of the testatrix in determining the meaning of paragraph XXV. But in construing the contract "agreed upon" by the testatrix and her trustees we are to ascertain the mutual intention of both parties. *Lane v. Gluckauf*, 28 Cal. 288, 294. Such intention is not always ascertainable from a consideration of what one party said or from what both said of the intention at the time of the contract. The mutual intention is, in the case of uncertainties, to be inferred from the "circumstances under which it was made, and the matter to which it relates." Civ.Code, § 1647.

[4] In finding what the contract was when the testatrix declared that the schedule of charges had been "agreed upon between Title Insurance * * * and her where the trust fund is composed of other and different securities or other property of every character," it became necessary for the court to consider the "circumstance" that it is the general custom of testamentary trustees to evaluate the assets of the trust funds yearly in order to derive a new basis for computing the trustee's fees. Not only did Title Insurance and Trust Company know that custom, but from his vast experience in handling testamentary trusts, the testatrix' attorney, Mr. O'Melveny, must have known it. It was therefore proper for the uncertainty of the agreement to be cured by proof of such custom. Because paragraph XXV provides for the trustee to receive three fifths of one per cent of the assets, excluding government bonds, and says nothing as to the

time when the assets shall be re-evaluated or the frequency of the new appraisal, evidence of the custom of Los Angeles trust companies was indispensable.

Appellants objected to the introduction of the proof of such custom and now assign as error the court's order in overruling their objection. That the ruling was correct is established by the decisions that "general usage, when not in contravention of law, is of governing force." *Luckehe v. First National Bank of Marysville*, 193 Cal. 184, 190, 223 P. 547, 550; *Gonyer v. Williams*, 168 Cal. 452, 456, 143 P. 736. In the *Luckehe* case, where the bank was employed to collect a draft, the court held not only that the bank's usage was admissible but expressly decided that where one selects a bank as a collecting agent, he, in the absence of special direction, is bound by any reasonable usage established among the banks at the place where the collection is made, despite his ignorance of such custom.

[5, 6] Not only was the proof of custom properly received as an aid to interpret the contract as requiring an annual re-evaluation of the assets, but the conduct of appellants in consenting to such procedure over a period of ten years amounts to a fixed policy and an acceptance of the custom as a guiding rule for the trustee. True, for portions of that time they were minors and in military service. But while under age their guardians with the court's approval represented them. Both appellants attained their majorities after having been discharged from the military service: Secondo became 21 in October 1946; William in March 1948. Therefore, their consent for three years, and the conduct of their guardian for the prior seven years in approving the payment of trustee's fees on the re-evaluation of the assets, establish appellants' construction of the contract to be the contrary of what they now contend. Appellants by their own behavior induced the finding of the custom of banks and trust companies. *Universal Sales Corporation, Ltd. v. California Press Manufacturing Company*, 20 Cal.2d 751, 761, 128 P.2d 665; *Mitau v. Roddan*, 149 Cal. 1, 13, 84 P. 145, 6 L.R.A., N.S., 275.

It is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the contract. The parties to a transaction are assumed to know best what was intended by the agreement under which they have acted. They are less likely to have been mistaken as to their intention during the period while harmony prevails than they are after subsequent differences have brought them into a legal controversy. See *Mitau v. Roddan*, *supra*.

[7-10] Appellants advance the thesis that this court is not bound by the finding which construes the contract in favor of the trustee. Not only do the facts and the law justify the correctness of the trial court's conclusions but we are bound by its construction of the contract. Appellants have apparently not read with care *Estate of Platt*, 21 Cal.2d 343, 353, 131 P.2d 825. That decision dealt with a written contract. There was no conflict of inferences. The appellate court could therefore interpret it without the aid of findings. But where parol proof is admitted for the purpose of assisting the court to ascertain the intention of the parties and where conflicting inferences may be drawn, it is the constitutional function and duty of the trial court to determine the meaning of the parties and such finding is binding on the reviewing court. The intent of the contracting parties to an agreement becomes a legal question only when from the evidence, but one tenable conclusion can be reached. *Estate of Rule*, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319. Therefore, when the construction of an oral contract or of an uncertain written agreement is with the aid of testimony not unreasonable or inconsistent with the evidence, the conclusion of the trial court will not be disturbed. *McKee v. Lynch*, 40 Cal.App.2d 216, 226, 104 P.2d 675.

[11] Concerning the trustee's alleged error of \$26.64 in computing the fees due on Secondo's Estate, the rule of *de minimis* applies. The order will not be reversed on that account.

The order is affirmed.

McCOMB and FOX, JJ., concur.

117 Cal.App.2d 681

SCHURZ et al. v. GELBER.

Civ. 19337.

District Court of Appeal, Second District,
Division 1, California.

May 7, 1953.

Hearing Denied July 2, 1953.

Action by real estate broker against landowner, to recover commissions of which plaintiff was allegedly deprived by defendant's repudiation of written agreement and refusal to consummate an exchange of properties negotiated on defendant's behalf by plaintiff. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained findings and judgment.

Affirmed.

1. Appeal and Error $\S$ 994(3)

Credibility of witnesses is matter for trial court to determine.

2. Appeal and Error $\S$ 989

Power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will uphold a disputed finding.

3. Brokers $\S$ 86(1)

In action by real estate broker, appointed by landowner as agent to negotiate exchange of properties, to recover commissions from landowner, evidence sustained findings that broker performed all terms of written exchange agreement, and that landowner's repudiation of such agreement deprived broker of commissions agreed to be paid by landowner and by other parties to exchange, the amount of which broker was entitled to recover.

4. Brokers $\S$ 43(2)

Real estate broker who, on Monday afternoon, mailed to the parties photostatic copies of their agreement for exchange of realty, executed on the preceding Saturday afternoon, sufficiently complied with code provision that when a licensee prepares or has prepared an agreement authorizing or employing licensee to purchase or sell real estate for compensation

or commission, such licensee shall deliver copy of such agreement to signer. Business and Professions Code, $\S$ 10142.

5. Frauds, Statute of $\S$ 103(1)

Agreement for exchange of realty, written upon standard form prepared by state real estate association, and containing all essential terms of the contract, was a sufficient memorandum to satisfy statute of frauds. Civ.Code, $\S$ 1624.

6. Brokers $\S$ 60

Where real estate broker's commissions, under express language of agreement to exchange realty, were to become due upon execution of agreement by all parties, consummation of the exchange agreement by the parties thereto was not a condition precedent to recovery of commissions.

7. Brokers $\S$ 86(1)

In action by real estate broker, appointed by landowner as agent for negotiation of exchange of properties, to recover from landowner commissions of which broker was allegedly deprived by landowner's repudiation of written exchange agreement, evidence sustained finding that landowner's execution of the agreement was not conditioned upon broker obtaining approval of landowner's wife.

8. Brokers $\S$ 61(3)

Refusal of landowner's wife to join in agreement for exchange of properties did not impair broker's right to commissions which landowner had agreed to pay.

9. Brokers $\S$ 86(1)

In action by real estate broker, appointed by landowner to negotiate exchange of properties, to recover from landowner commissions of which broker was allegedly deprived by landowner's repudiation of written exchange agreement, evidence sustained finding that the exchange agreement had not been cancelled or abrogated.

10. Appeal and Error $\S$ 931(1)

A reviewing court will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact.

Jack J. Lande, Beverly Hills, for appellant.

Irwin M. Fulop, Bernard Rolston, Beverly Hills, for respondent.

DORAN, Justice.

The present action was instituted by respondent, a licensed real estate broker, to recover commissions, alleging that appellant had repudiated a written agreement and had refused to consummate an exchange of real properties negotiated by the respondent broker.

The complaint alleges that on January 19, 1951, appellant Gelber, in writing, appointed respondent as agent for a period of two days to negotiate an exchange of properties between appellant and Mr. and Mrs. William C. Weifenbach; that on January 20, 1951, respondent secured from the Weifenbachs an acceptance of the proposed exchange agreement; that thereafter appellant repudiated the signed agreement and thus defeated respondent's right to commissions agreed to be paid by both parties, amounting to \$3,750.

The exchange agreement provided that appellant's "Vacant Residential Lot" in Glenroy Knolls should be exchanged for the Weifenbach's "Unfurnished Residence" at 1737 Mandeville Lane, in Los Angeles. Appellant therein agreed to deliver the vacant lot "free and clear", and the Weifenbachs agreed to deliver the residence property "subject to a mortgage of \$20,000.00 and provided first party (appellant Gelber) deposits in escrow \$50,000.00 cash which is payable to second party (Weifenbach) upon demand of escrow officer. As evidence of good faith first party (Gelber) deposits herewith \$5,000.00 with the Karl B. Schurz Company which will be placed in escrow upon the approval of this exchange agreement by the second party named herein (Weifenbach). Said \$5,000.00 to be credited against the \$50,000.00 cash consideration".

Said agreement obligates Gelber to pay Schurz a commission of \$750 "to become due upon the execution of this agreement by all parties hereto". In accepting the agreement Mr. and Mrs. Weifenbach prom-

ise to pay Schurz a further commission of \$3,000, which is likewise "to become due upon the execution of this agreement by all parties hereto". Before execution of the written agreement the parties made certain changes in the original draft, for example, the total price was changed from \$85,000 to \$90,000 less the value of Gelber's lot, \$15,000. "Tacked down" carpets and drapes were to be included.

On Monday, January 22, 1951, respondent went to the California Bank in Beverly Hills where escrow instructions were duly prepared and signed by Mr. and Mrs. Weifenbach, respondent broker depositing appellant's \$5,000 check as provided in the exchange agreement. After the escrow had been opened, respondent called appellant who then stated that payment on the check had been stopped and that Gelber would not pay more than \$85,000 for the property. On this same afternoon respondent sent appellant and the Weifenbachs photostatic copies of the exchange agreement by registered mail. Mr. and Mrs. Weifenbach did not cancel the escrow until February 28, 1951, some five weeks after appellant's repudiation and twenty days after the respondent had filed this action.

The trial court found that plaintiff broker had performed all the terms of the written agreement; that by reason of defendant's repudiation the exchange of properties was never consummated, which repudiation resulted in depriving plaintiff of the commission of \$750 agreed to be paid by defendant and the further commission of \$3,000 to be paid by the Weifenbachs, "upon the execution of this agreement by all parties hereto".

It was further held that the written exchange agreement constituted a sufficient memorandum to satisfy the Statute of Frauds, Section 1624 of the Civil Code; that said agreement had not been mutually waived, abandoned or rescinded, as claimed by defendant; that the agreement had not been obtained by fraud or by plaintiff's representation that the broker would obtain the consent of defendant's wife to the exchange, and that the execution of said agreement was not conditioned upon obtain-

ing consent and approval of defendant's wife; that it was untrue that the agreement was without consideration. Judgment was therefore ordered in favor of respondent in the sum of \$3,750 with interest and costs.

[1-3] Appellant's brief devotes considerable space to "an analysis of the testimony to determine the credibility of the witnesses * * * to determine the true facts". It is contended that the trial court's judgment finds no support "either in law or fact". In this connection it must be pointed out that credibility of witnesses is a matter for the trial court to determine, and that as stated by respondent, "the power of an Appellate Court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will uphold a disputed finding". Applying this rule to the present case, it cannot be said that the findings and judgment are without substantial support in the record. Any further analysis of the evidence is unnecessary and improper.

It is argued in appellant's brief that the exchange agreement "was illegal, null and void" because of respondent's alleged failure to comply with Section 10142 of the Business and Professions Code which provides that "When a licensee prepares or has prepared an agreement authorizing or employing such licensee to purchase or sell real estate for compensation or commission, such licensee shall deliver a copy of such agreement to the person signing same. Receipt for said copy may be made on the face of said agreement".

[4] As found by the trial court, the exchange agreement was executed on Saturday afternoon, January 20, 1951, and on the afternoon of the next business day, Monday, January 23, 1951, respondent mailed to the parties photostatic copies of the agreement. It may be noted that the statute does not require delivery of a copy "forthwith", nor does it provide that the agreement shall be invalid if the broker fails to deliver such copy. It is not here claimed that there was a failure to make delivery of the copy, but merely that it should have been delivered on Saturday in place of the following Mon-

day. Appellant's contention is without merit.

[5,6] Appellant's contention that the trial court "erred as a matter of law in finding that there was a sufficient memorandum to satisfy the statute of frauds, Section 1624 of the Civil Code, is likewise untenable. The agreement in question was written upon the Standard Form of Exchange Agreement prepared by the California Real Estate Association, and contained all the essential terms of the contract. Moreover, the present action is not between buyer and seller but is brought by respondent broker to recover commissions for services rendered, which commissions under the express language of the contract were "to become due upon the execution of this agreement by all parties hereto". Consummation of the exchange agreement by the parties thereto was not a condition precedent to recovery of the broker's commissions.

A similar exchange agreement was involved in *Rose v. Gardner*, 130 Cal.App. 302, 19 P.2d 1009, where the court held, in the language of the head note, that "there was no merit in the contention that the contract of exchange was unenforceable, and hence the agreement to pay a commission was without consideration where [as here] the defendant not only agreed to pay to plaintiff the commission on the execution of said exchange agreement, but also agreed that 'in the event any error cannot be corrected, this agreement shall be null and void, except as to the payment of the commissions'".

[7,8] The finding to the effect that appellant's execution of the agreement was not conditioned upon the respondent broker obtaining approval of appellant's wife, finds substantial support in testimony given by respondent Karl B. Schurz and saleslady Claire Baily that no such condition was mentioned at any time, notwithstanding appellant's claim that the contract was not binding because such condition had not been complied with. And, as said in *Russell v. Ramm*, 200 Cal. 348, 254 P. 532, 539, and elsewhere, the wife's refusal to join in the agreement "does not in the least affect or impair the right of the plaintiffs to the com-

pensation" which the husband had agreed to pay.

[9, 10] Nor is there merit in appellant's contention that the trial court should have found "that the alleged contract, Exhibit 2, had been waived, abandoned, and rescinded". The testimony of respondent Schurz was that there was no cancellation or abrogation, and under the well established rule that a reviewing court "will indulge all inferences and reasonable inferences which favor sustaining the finding of the trier of fact", *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557, 561, the finding herein must be sustained.

No reversible error has been pointed out, and all material findings are supported by substantial evidence.

The judgment is affirmed and the attempted appeal from the order denying a new trial is dismissed.

WHITE, P. J., concurs.



117 Cal.App.2d 541

SPAULDING v. JONES et al.
Civ. 15219.

District Court of Appeal, First District,
Division 2, California.
April 30, 1953.

Suit by granddaughter of deceased grantor, on behalf of herself and others similarly situated, for adjudication that realty conveyed by grantor to his daughter by deed absolute on its face was impressed with trust in favor of grantor's heirs. The Superior Court, Alameda County, Thomas J. Ledwich, J., entered judgment adverse to plaintiff, and she appealed. The District Court of Appeal, Goodell, J., held that evidence sustained finding that no trust arose.

Judgment affirmed.

I. Trusts ⇨44(3)

Clear and convincing evidence is required to justify court in finding from

oral testimony that a deed which purports to convey land absolutely in fee simple was intended to be a deed of trust.

2. Appeal and Error ⇨1012(1)

Where trial court has declared a deed, absolute and unconditional on its face, to be just what it purports to be, such judgment cannot be reversed unless the evidence is almost overwhelmingly the other way.

3. Appeal and Error ⇨991

Whether evidence offered to show that deed purporting to convey land absolutely in fee simple was intended to be a deed in trust is clear and convincing is question for trial court.

4. Evidence ⇨594

General rule that trial court cannot disregard uncontradicted testimony is inapplicable unless testimony is sufficiently positive in its character to be satisfactory from such standpoint, and even positive and uncontradicted evidence may be disregarded under certain circumstances.

5. Appeal and Error ⇨1012(1)

Since credit and weight of testimony are for determination of trial court, appellate court cannot control trial court's finding or conclusion denying credence thereto, unless there are no matters or circumstances impairing accuracy of testimony.

6. Witnesses ⇨316

Inconsistencies in testimony only affect credibility of witness or reduce weight of his testimony.

7. Trusts ⇨108

Although family connection between grantor and grantee is not sufficient, alone, to support finding of confidential relationship, it may be considered with other evidence upon that issue.

8. Trusts ⇨103(2)

Fact that deed, absolute upon its face, was made from father to daughter, and alleged fact that it was without consideration, did not in themselves suffice to raise a resulting trust in favor of other children of grantor.

9. Trusts ⇨110

In suit to establish that real estate conveyed by father to daughter was subject to a trust in favor of father's heirs, evidence was insufficient to establish that father and daughter stood in a confidential relationship, or that deed was procured by daughter by exertion of any pressure or undue influence.

10. Appeal and Error ⇨1071(5)

If judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by the evidence or are uncertain or are otherwise defective.

John M. Hoffmann, Howard C. Erickson, Robert V. Winkler, Hoffmann & Erickson, Oakland, for appellant.

H. Raymond Hall, Oakland, for respondents.

GOODELL, Justice.

The plaintiff sought an adjudication that a piece of real property was subject to a trust. The court held against her contentions and from a judgment for the defendants she appeals.

The property, on 24th Street near Telegraph Avenue in Oakland, has an area of 65 by 135 feet and is improved with a two-story dwelling numbered 532 24th Street, referred to in the pleadings and briefs (and herein) as "532". The building is very old.

On January 3, 1905 it was owned by Alexander de Leo de Laguna who on that day conveyed it by gift deed to his oldest daughter Anita, reserving a life estate in himself. On May 5, 1909 she conveyed it by gift deed to her sister Laura de Laguna, in whose name it stood until November 30, 1931, when Laura put the title into joint tenancy in her own name and that of her close friend Kate Bardenwerper. Laura died on September 24, 1948 and a proceeding was brought terminating the joint tenancy. After appellant had asserted her claim that about 1905 the property had become impressed with a trust

and had so remained throughout the intervening transfers of title, Kate, on April 25, 1949, conveyed "532" to respondent Jones in whose name it now stands.

Alexander de Leo de Laguna died testate on March 4, 1905, two months after his deed to Anita, and his estate was probated and distributed. In addition to Anita and Laura he left three daughters, Frederica, Bertha and Augusta, a son named Theodore, and another son named William, who was appellant's father. All seven children died before this suit was brought.

The case was tried on plaintiff's second amended complaint and before submission leave was granted to file a third amended complaint to conform to the proof. In their answers defendants pleaded the statute of limitations, § 338, subd. 4, Code Civ.Proc. and laches, and the court found for the defense on both pleas.

The action was brought by appellant on behalf of others similarly situated but no other relatives aligned themselves with her.

Appellant's contentions appear from the allegations of her third amended complaint, which may be summarized as follows: de Laguna owned other property and prior to his death he and all his children entered into an oral agreement for the purpose of settling *at the time* the rights of inheritance of each child in *all* his property, and to achieve an economical and equitable distribution of *all* thereof; that in furtherance of said agreement *all* his property was transferred to Anita, to be held in trust for the benefit of his children and the issue of deceased children; that at his death all his property except "532" was to be divided and distributed among the children and the issue of deceased children; that "532" was to be held in trust by Anita until it was sold, at which time the proceeds were to be divided equally among the children and other descendants of de Laguna; that Anita stood in a confidential relationship to all the participants in the agreement; that "532" was conveyed to Anita without consideration other than her promise to hold it in trust, and was conveyed to her in reliance on such promise.

It was alleged, further, that upon the death of de Laguna in 1905 the agreement to distribute the property was carried out, and Anita retained title to "532" and occupied it until her death in 1910; that on May 5, 1909 she conveyed it to Laura, who was one of the participants in and beneficiaries of the agreement, and that her deed to Laura was made with the consent of the other children and in continuance of the trust agreement. It was alleged that the property was not sold on Anita's death because a fair price was not obtainable; that Laura continued to occupy the premises as trustee but that on November 30, 1931, without the knowledge of the beneficiaries Laura created the joint tenancy as already stated.

Laura left a will by which "532" was left to Kate, her surviving joint tenant, in disregard (so it is alleged) of the oral trust agreement; the will was admitted to probate on the petition of respondent Jones, its executor; that under the will and the joint tenancy deed Kate will obtain complete title to "532" unless the court declares a trust for the benefit of de Laguna's descendants.

It was also alleged that since filing the original complaint plaintiff discovered that Kate had conveyed "532" to respondent Jones; that he took with knowledge of the trust; that no consideration was paid; that the conveyance was made to defraud plaintiffs of their interests; that plaintiffs were unaware, until the death of Laura, of any breach of fiduciary duty, because of the confidential relationship and because Laura continued in uninterrupted possession until her death.

The court found that by the father's transfer to Anita no trust had been imposed upon her to hold the property for the benefit of anybody; that she made no promise to hold it in trust, and that her father in conveying to her did not rely on any promise to so hold it. It found that there was no agreement between de Laguna and his children that Anita would hold "532" in trust for them or anybody else, and that no such agreement was performed or carried out; further, that de Laguna's will was admitted to probate and

his estate disposed of in accordance with the decree of distribution and not pursuant to any testamentary agreement. It found that the deed of May 5, 1909 from Anita to Laura was made without any promise by Laura to hold the property in trust, and that Anita did not rely on any promise made by Laura to deal with the property in any way, but that the conveyance was absolute and in fee simple and not made in furtherance of any trust or other agreement. And, finally, it found that there were no limitations in any of the deeds conveying the property (a) to Anita, or (b) from her to Laura, or (c) from Laura to Harriet Price, or (d) from Harriet to Laura and Kate as joint tenants.

Appellant contends that the findings just summarized are not supported by the evidence, but are contrary thereto. She does not challenge the finding that there was no "written memorandum establishing any trust or agreement to deal with the property in any particular manner" since there is no contention that there was any writing.

The real problem in the case is whether a trust arose out of the original transfer of January 3, 1905; every other question is subordinate to that.

[1] The transfer from de Laguna to Anita was made by a deed absolute on its face, and the authorities are uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land absolutely in fee simple was intended to be something different, as a mortgage or trust, such testimony must be clear and convincing—"something more than that modicum of evidence which appellate courts sometimes hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly-expressed deed, solemnly executed and delivered." *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 P. 543, 544. (Emphasis added.) The language just emphasized was repeated in *Wehle v. Price*, 202 Cal. 394, 397, 260 P. 878. The opinion in the *Sheehan* case, which deals with a trust question, summarizes the various forceful expressions which the courts have used "in declaring how strong

such evidence must be" to overthrow a deed. It cites also a New York case which speaks of "The security of titles and sound public policy" as among the reasons for the rule. [Wilson v. Parshall, 129 N.Y. 223, 29 N.E. 297.]

[2] To these cases might be added Emery v. Lowe, 140 Cal. 379 where, at page 384, 73 P. 981, at page 983, the court said: "A judgment decreeing a deed which is on its face an absolute and unconditional conveyance of property to be something else should be based on clear and satisfactory proof (Sheehan v. Sullivan, 126 Cal. [189] 196, 58 P. 543, and cases there cited), and an appeal from such a judgment sometimes presents a difficult question; but where, as in the case at bar, *a trial court has declared such an instrument to be just what its purports to be, an appellant from such a judgment cannot expect a reversal unless the evidence is almost overwhelmingly the other way* * * *." (Emphasis added.)

[3] Recent restatements of the rule are found in Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583, and Hobart v. Hobart Estate Co., 26 Cal.2d 412, 446, 159 P.2d 958. In the Beeler case [24 Cal.2d 1, 147 P.2d 587] the court says that "whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide", citing cases.

Appellant was the only witness who testified respecting conversations out of which a trust might have arisen. From 1894 when she was 4 until 1922 when she married, she lived with her parents at 528 24th Street a door or two away from "532". The earliest conversation she could remember took place, she testified, "Some time before I would say 1904 or '3. Very early, because this was a continuous conversation about this property.

"Q. Now, can you recall any one particularly, a specific conversation between Anita and Laura and/or your grandfather? Do you recall your grandfather's conversation? A. Oh, yes, very well. * * *" It "was either in my home or my grandfather's home, which was next door, * *

the conversations were held, all of them, either in my home or my grandfather's home when the family was present." When asked who were present on such an occasion, she replied "My grandfather was present part of the time, and my Aunt Anita was always present, as I remember, and my father was present * * *. Some of them were there with one or the other of the children, depending on which was home at that time. * * * There were many conversations.

"Q. And at this late date is it possible for you to give the exact conversation which took place at such a time and place? A. Oh, no, I couldn't give any exact words * * *.

"Q. Now * * * will you give us your best recollection of what was actually stated at the first of such conversations, and particularly in regard to the real property, the subject of this action? A. Well, of course I can't distinguish the conversations, as I said, because we lived almost next door—they ran from day to day, so there was a series of conversations. My grandfather * * * said to this effect: that he wished to occupy the property and continue enjoying the rents, as he always had done, and * * * that upon his death the property which he had was to be divided among his children equally and including the daughter of Ottilla, who was alive, the mother having previously died. He said that he would convey the property to Anita to hold it for the children so that there would be no loss of the property by any forced sale, and so that it could be disposed of when it was the right time to sell it * * *.

"Q. Now, was Anita present at that conversation? A. She was present at a conversation when that was said * * *" and she added so was Laura.

The foregoing summarizes the only testimony there was with respect to discussions claimed to have been held prior to de Laguna's death.

Appellant then testified that Anita "wasn't tremendously robust, but she managed the house. She was, of course, unemployed. She was not very well. She

went around on a tricycle, for instance, which shows you she didn't walk very much." She was then asked whether, *after the grandfather's death*, she recalled "any conversation between your Aunt Anita de Laguna and your Aunt Laura de Laguna and/or others who were interested, in regard to the disposition of this property? A. Yes * * *.

"Q. Do you know whether or not your Aunt Anita de Laguna disposed of any property which she received from your grandfather, in accordance with the terms of the conversations of which you have testified to, and distributed the proceeds of that property to any of those entitled to it? A. Yes * * *.

"Q. * * * Now then, at the death of Anita de Laguna had the property * * * No. 532-24th Street been sold, and the proceeds distributed? A. No."

She testified to a conversation respecting "532" between Anita and Laura, at which her father and mother were present "and, probably some others, but I can't remember." When asked who were living in "532" she answered: "Aunt Anita was living in the upstairs apartment, which was also occupied by other members of the family who lived out of town, when they came into town * * *. The whole family used the top floor of it.

"Q. Now, do you recall how long prior to the death of Anita was it that this conversation took place with Laura? A. I couldn't say except that it was before December 1909, because my father died in December 1909.

"Q. * * * Will you tell us in your best recollection what was said by all of the parties at that conversation? A. The discussion was relative to was ought to be done with 532, its sale or disposition, and who should take the title to the property, because my Aunt Anita was failing in health * * *.

"Q. Now * * * will you tell us what was said by Laura, what was said by your father or any other person who was a party to this conversation? A. There wasn't only one conversation, you know. My Aunt Anita said that if it was agreeable

to the others, she would transfer the title of 532 to Aunt Laura and let her hold it for the family interest. My father who was present, and the other relatives who came frequently home and * * * who knew of this arrangement, assented to it.

"Q. Just tell us what was said at this particular conversation * * * what did Laura say in response to the statement of your Aunt Anita? A. Well, she said that she would hold the property and not sell it until a good price could be had for the property.

"Q. Now * * * I think you have testified that there were numerous conversations. Now then, from time to time, and prior to the time of the death of your Aunt Anita, were all of the then living brothers and sisters of Anita and Laura, did they engage in the same or similar conversations with Anita and Laura, as they would come to town? * * * A. Before her death, yes. I would say they weren't all together at any one time.

"Q. At various times when they would come to town there would be conversations, is that correct? A. Yes, that is correct."

The foregoing is the sum and substance of all the testimony there is with respect to the conversations out of which this trust is claimed to have arisen or continued and the findings indicate that the court was not convinced by it.

Appellant argues that it was uncontradicted and therefore had to be accepted as conclusive, but as long ago as 1860 the Supreme Court held that "A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements." *Blankman v. Vallejo*, 15 Cal. 638, 645.

[4,5] In *Lohman v. Lohman*, 29 Cal. 2d 144, 149, 173 P.2d 657, 660, the court said: "Moreover, a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it * * *." Citing *Berg v. Journeymen's Plumbers & Gas Fitters Union*, 5 Cal.App.2d 582, 584, 42 P.2d 1091, 1092. In that case this court said: "The general rule that uncontradict-

ed testimony cannot be disregarded by the trial court is subject to many qualifications and exceptions. The rule has no application unless the testimony is sufficiently positive in its character to be satisfactory from that standpoint, and, even though the evidence is both positive and uncontradicted, it may be disregarded under certain circumstances. [Citations.] As was said in *Hufstetler v. Dept. of Industrial Relations*, 107 Cal.App. 741, at page 746, 290 P. 922, 924, quoting from 10 California Jurisprudence, 1145: 'As it is within the province of the trial court to determine what credit and weight shall be given to the testimony, *the appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony.*'" (Emphasis added.) The language just emphasized is found in *Blanc v. Connor*, 167 Cal. 719, 723, 141 P. 217.

There are in this case many facts and circumstances which could have been taken by the trial court as creating a conflict or as inconsistent with appellant's testimony, or as impairing its accuracy.

First and foremost are the several deeds themselves, each of which is absolute on its face and as to which the court expressly found that there were no limitations whatever. Under the rule of *Emery v. Lowe*, supra [140 Cal. 379, 73 P. 983], in the face of such a finding there can be no reversal "unless the evidence is almost overwhelmingly the other way". In *Olson v. Olson*, 4 Cal.2d 434, 438, 49 P.2d 827, 829, it was said: "The deed of gift, a written instrument, signed and acknowledged by appellant, and unimpaired by any presumption of undue influence arising out of a marital relation between the parties, was entitled to the full credit given to it by the trial court, and standing alone, furnishes sufficient support for the findings of the trial court upon which the judgment with reference to the real property was predicated."

The trial court undoubtedly treated the weight of appellant's testimony to be seriously impaired by the fact that in all the years from the early 1900's to Laura's death none of the children or grandchildren

had made any attack on the several transfers or asserted that any trust had been created either before or after de Laguna's death. Moreover, appellant brought this suit on behalf of all others similarly situated, and the fact that none of her relatives saw fit to join her was doubtless considered by the court in evaluating her testimony, compare *Sheehan v. Sullivan*, 126 Cal. 189, 190, 58 P. 543, supra.

The finding that de Laguna's estate was not disposed of pursuant to any testamentary agreement shows that appellant's testimony had been effectively contradicted by the probate record and the deeds from the sisters and brothers to Anita.

That finding is based upon the decree of distribution and several deeds. The will, dated August 8, 1892, was not offered in evidence, but the following part thereof was read into the record:

"I give, devise and bequeath to my beloved daughters Anita and Bertha, the house and grounds, 65 by 135, known as the home cottage, with all of the furniture except my library, which I bequeath to my son Theodore, book cases included. To my beloved daughters Frederica, Laura and Gussie, I give and bequeath each an undivided interest in the two houses east of the home cottage and grounds 86 foot frontage and having a depth of 135 feet, and the remainder 100 feet deep."

The decree recites that the devisees and legatees were Frederica, Laura, Augusta, Bertha, William, Theodore, and Herman, children, and Mary Ruth Hutchinson (presumably a grandchild). Anita is not shown therein as a devisee or legatee. She was, however, the executrix. The decree recites that all the devisees and legatees, except Herman who predeceased the testator, had conveyed to Anita all their right, title and interest in the property of the estate. These conveyances are in evidence and all were recorded at the same time, and before distribution.

The decree distributes the residue of the estate in the following language: "The whole thereof to said Anita de Laguna, *absolutely in fee*" (emphasis added) and then describes the parcel next door to

"532" and the Kelsey property across the street, but makes no mention of "532", doubtless because the testator had already conveyed it to Anita.

These conveyances were the basis for the decree vesting in Anita the residue of the estate (consisting of the two parcels not involved herein) which decree, it should be observed, uses the language "*absolutely in fee*". This documentary evidence was apparently taken by the court as establishing that the estate was not distributed "pursuant to any testamentary agreement" and that no trust had been created prior to the testator's death. If, as appellant claims, all these children had been parties to any trust agreement respecting *all* the de Laguna property either before or after their father's death they presumably would not have made these deeds to Anita. There would be no conceivable reason to do so since, but for their deeds to Anita the property would have been distributed to them share and share alike. It was just such a distribution that the alleged trust was supposed to have contemplated and effected.

[6] While it is true that "Inconsistencies only affect the credibility of the witness or reduce the weight of his testimony * * *," *Stromerson v. Averill*, 22 Cal.2d 808, 814-815, 141 P.2d 732, 736, citing 10 Cal.Jur. p. 1146, § 364, still there are within appellant's own evidence and pleadings discrepancies, inconsistencies and contradictions which the trial court presumably considered in evaluating her testimony.

All four verified complaints alleged that *prior to de Laguna's death he and all his children* "entered into an oral agreement for the purpose of settling the rights of inheritance of each of the children * * * in and to all" his property, and appellant testified that the conversations were in 1903 or '4. On cross-examination, however, she was confronted with a letter which she wrote to respondent Jones and his wife (a niece of Kate) on October 4, 1948, ten days after Laura's death, reading in part as follows: "I hope that Aunt Laura's will—whatever it may be—may not bring the bitterness attendant upon Aunt Dica's passing. You perhaps know

that '532' stands upon a somewhat different basis than any other property 'owned' by Aunt Laura. In 1905, *on Grandpa's death*, an agreement *among his heirs* resulted in the home house (532) going to Aunt Anita with the understanding that when it was sold—which was to be on Aunt Anita's death—the property would be divided among the heirs. The purpose of this was to afford Aunt Anita the house for her life. It was one-half rented and brought in a small but steady income. Aunt Anita died, and by her will the title to the property passed to Aunt Laura, but the duty to share the proceeds when sold went with the title. One of the reasons Aunt Laura hung onto the house and did not sell was that she did not want to divide the proceeds. Aunt Gus-sie was very bitter about it and I talked both to her and to Aunt Bertha and to Aunt Dieka about it. No one wanted to force a sale but it seemed unfair for her to keep it by refusing to sell it." (Emphasis added.)

There is a wide discrepancy arising, on the one hand, from appellant's allegations and testimony that the trust was created by the owner of the trust *res*, himself, and, on the other, from her statement in the letter, *written a year before this litigation was commenced*, that the trust arose out of an agreement among de Laguna's heirs *after his death* which meant, of course, that it was *not* created by the owner of the trust *res* at all. The discrepancies are not only as to the *time* of the creation of the trust, but as to the *manner* of its creation, and the *person or persons* who created it.

There are other discrepancies arising from appellant's testimony or written statements and documentary evidence in the record. One is the statement in the letter that "In 1905, on Grandpa's death, an agreement among his heirs resulted in the home house (532) going to Aunt Anita." This is contradicted by the gift deed to Anita from her father made on January 3, 1905, two months before his death.

The letter says "532" had gone to Anita "with the understanding that when it was sold—which was to be on Aunt Anita's death—the property would be divided among the heirs" and the original, amended and second amended complaints so alleged.

"The purpose of this", says the letter, "was to afford Aunt Anita the house for her life." The third amended complaint, however, departs from all three earlier complaints, and from the letter as well, by alleging "that 532, by virtue of said agreement, was to be *held in trust* by Anita F. de Laguna *until said property was sold*, at which time the proceeds of said sale [were] to be divided equally." (Emphasis added.)

The letter says "Aunt Anita died, and by her will the title to the property passed to Aunt Laura * * *." This is inconsistent with the third amended complaint which alleges that title passed from Anita to Laura by gift deed dated May 5, 1909 recorded on October 10, 1909, some months before Anita's death, which deed is in evidence.

Finally, it must be borne in mind that at the time of the conversations in 1903-4 by which, under appellant's theory, a trust was created, and the participants in these conversations were talking about "life interests" in real property and the avoidance of "forced sales" and such technical matters, the witness was a child of but 13 or 14 years.

[7-9] Appellant contends that the strict rule (discussed earlier) with respect to attempts to overthrow deeds absolute on their face does not apply in cases where a conveyance is made between parties occupying a confidential relation. *Katz v. Enos*, 68 Cal.App.2d 266, 277, 156 P.2d 461, 467, is cited, where it was said "that the presumption and burden of proof rule contended for by appellants does not apply where a confidential relationship is shown to exist between the parties at the time of the execution of the deed." The court went on to say, 68 Cal.App.2d at page 278, 156 P.2d at page 467: "Here the court found that such relationship did exist, and it would seem that the evidence is sufficient to support such finding." *In the case at bar there was no such finding and could have been none* since there was no evidence that confidential relations existed between de Laguna and Anita (father and daughter) or between Anita and Laura (sisters) within the meaning of the law. In *Knapp v. Knapp*, 15 Cal.2d 237, 242, 100 P.2d 759, 761, it was

said: "although family connection alone is not sufficient to support a finding of a confidential relationship, it may be considered with other evidence upon that issue. *Johnson v. Clark*, 7 Cal.2d 529, 61 P.2d 767; *Odell v. Moss*, 137 Cal. 542, 70 P. 547." In the *Knapp* case the parties were brothers; in *Johnson v. Clark*, supra, they were sisters; in *Odell v. Moss*, supra, they were brother and sister. In *Smith v. Mason*, 122 Cal. 426, 427, 55 P. 143, the court said: "It is not alleged that Daniel Hoover was in any respect incompetent to execute the deed to defendant, nor that he at all mistook its contents, nor that defendant procured it by means of undue influence or fraudulent promises, or, indeed, that she made any effort whatever to obtain it. The fact that the instrument was made from father to daughter, and the alleged fact that it was without consideration, do not in themselves raise a presumption of fraud, nor suffice to raise a resulting trust in favor of other children of the grantor. *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691; *Emmons v. Barton*, 109 Cal. [662] 671, 42 P. 303; *Soberanes v. Soberanes*, 97 Cal. 140, 31 P. 910; *Francis v. Wilkinson*, 147 Ill. 370, 35 N.E. 150; *Perry, Trusts*, § 201; *Civ.Code*, § 1040. The judgment should be affirmed." The foregoing language, paraphrased, is directly applicable here. *Soberanes v. Soberanes*, 97 Cal. 140, 31 P. 910, supra, involved a deed from a mother to her adult son; *Soberanes v. Soberanes*, 106 Cal. 1, 39 P. 39, 527, likewise. In *Nessen v. Nessen*, 218 Cal. 59, 61, 21 P.2d 415, 416, the court said: "The relationship of parent and child alone, without a showing of a practically exclusive opportunity designedly created for the purpose of influencing the grantor in favor of one to the exclusion of several children, and no claim is advanced that such a showing was made, can hardly be said to cast a burden upon the grantee to dispel every suspicion thrown in his direction by his brothers and sisters. [Citations.]" See also *In re Estate of Ricks*, 160 Cal. 450, 461, 117 P. 532 cited approvingly in *Re Estate of De Soberanes*, 182 Cal. 525, 528, 189 P. 103.

The case of *Sheehan v. Sullivan*, 126 Cal. 189, 58 P. 543, supra, has many points of

similarity to this case. That case involved a conveyance from a husband to his wife, as to which a daughter sought unsuccessfully to have a trust declared. The court points out that there was no attempt to prove undue influence as a fact. There was no such attempt made herein. Despite the fact that the conveyance was from husband to wife the court still applied the strict rule, see 126 Cal. 193-194, 58 P. 544-545, and did not hold that the rule was any different because of a husband-wife relationship or that the burden shifted. We repeat that in *Katz v. Enos*, supra, the court found a confidential relation to exist (supported by an extremely aggravated set of facts) while here there was no evidence whatever of such relationship.

The original complaint makes the broad and sweeping allegation that Anita "was one of the children of said grandfather, and was a blood relative of all of the participants of said agreement, and stood in a confidential relationship to all the participants to said agreement." It then alleges that there was no consideration for the first conveyance from de Laguna to Anita.

As far as the father was concerned, there is no evidence in this case even tending to show that his deed of January 3, 1905 to Anita was procured by her by the exertion of any pressure or undue influence. She was the oldest daughter but there is nothing in the record to show that she had ever attended to any of her father's business affairs, had advised or counseled him in any way, occupied any "superior position", or had handled any transactions or in any other way conducted herself so as to occupy a confidential relationship as that expression is used in the cases and understood in the law. Moreover, it nowhere appears that the father was incompetent or of weak mentality, or at all subject to influence. Anita, on the other hand, was in poor physical condition and, it could be easily inferred, needed protection and security.

Appellant attacks the findings that her claim is barred by laches and the statute of limitations. There is no reason to discuss this subject, for if the evidence is sufficient to support the finding on the principal issue

as to whether a trust arose—and we are satisfied the court correctly found that it was sufficient—there is no necessity to go further.

[10] It is the rule that "if a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by the evidence or are uncertain or are otherwise defective. However unsupported or inconclusive any number of findings may be, if in any case there be at least one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be concluded on appeal that the Court rested its judgment upon that finding (or such findings) and the others will be disregarded." 2 Cal.Jur. pp. 1028-9 quoted in *Porter v. Miller*, 201 Cal. 750, 754, 258 P. 595.

The legal title to "532" is now vested in respondent Jones, the husband of a niece of Kate Bardenwerper. The latter conveyed it to respondent on April 25, 1949, after the appellant had raised the questions now in litigation, following the death of her Aunt Laura. Miss Bardenwerper conveyed the property under a declaration of trust, which respondent Jones accepted, which provided in part, that he was "To ascertain and determine the moral or legal right, if any, of the de Laguna family, or any of the heirs of Laura de Laguna to all or any portion of the trust property. In making such determination the Trustee is to examine the Last Will and Testament of Laura de Laguna, any instructions that said Laura de Laguna may have made, any and all documents that were in the possession of said Laura de Laguna, to talk with any or all members of the de Laguna family or any of the heirs of Laura de Laguna that the Trustee may determine may be helpful in ascertaining any moral or legal claim of that said family * * *."

It goes without saying that the present appeal is concerned only with the question whether a trust arose in the early 1900's and if so, whether it continued through the several transfers of title into the joint ten-

ancy of Laura and Kate, and thence into Kate's sole ownership. The trial court determined that no trust ever arose, hence that no trust relation could have continued, and, as already appears, we are satisfied that that judgment must be affirmed.

We mention the present Bardenwerper-Jones trust relation simply because it is in the case, as a piece of evidence. It has no evidentiary force in this litigation. It is of interest as showing that Miss Bardenwerper was willing to leave it to others to determine whether "532" should go back to the de Laguna family *all things considered, including moral claims and moral rights*. This litigation is concerned only with such claims and rights as are within the cognizance of the courts.

The judgment appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



117 Cal.App.2d 624

BERRY v. BERRY.

Civ. 18624.

District Court of Appeal, Second District,
Division 3, California.

May 5, 1953.

Rehearing Denied May 27, 1953.

Hearing Denied July 2, 1953.

Action by a husband for a divorce, wherein defendant wife filed a cross-complaint for divorce. The Superior Court of Los Angeles County, Charles E. Haas, J., entered a decree granting wife a divorce and dividing community property and the defendant appealed from the judgment and from an order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that where husband at time of marriage was operating a business which was continued after marriage, and earnings of business were due to services rendered to such business by hus-

band, such earnings were properly held to be community property.

Appeal from order dismissed and judgment affirmed.

1. Husband and Wife ⇨259

Where husband at time of marriage was operating a business which was continued after marriage, and earnings of business were due to services rendered to such business by husband, such earnings were properly held to be community property.

2. Husband and Wife ⇨248½

Where husband at time of marriage was operating business, and subsequent increases in value of husband's plant, machinery, and equipment were due to increased demand for machine tools and manufacturing facilities following entry of United States into war, such increases would be husband's separate property and would not be community property. Civ. Code, § 163.

3. Husband and Wife ⇨254

Generally property purchased with commingled funds of husband and wife will be deemed community property in absence of clear showing that it was acquired with separate funds.

4. Husband and Wife ⇨254

Generally property purchased with commingled earnings of husband and wife, or other commingled community and separate property, not clearly capable of segregation, will be deemed community property.

5. Husband and Wife ⇨254

There is both a community and a separate interest in property purchased with separate and community funds of husband and wife where each contribution is clearly ascertainable.

6. Divorce ⇨286

Where findings as to amount of community property made in husband's action for divorce, wherein wife filed cross-complaint for divorce, were based on conflicting evidence and inferences, and wife on her appeal did not show such findings to be in error, such findings could not be disturbed by District Court of Appeal.

7. Divorce ⇨249(1)

Courts are not as matter of law more lenient as regards disposition of community property in divorce actions with husbands who inflict severe physical injuries upon their wives than with husbands who are found out in adultery.

8. Divorce ⇨104, 146

In husband's divorce action wherein wife filed cross-complaint for divorce on ground of extreme cruelty, trial court did not under circumstances abuse discretion in denying wife's motion made after taking of evidence to have trial reopened and for leave to amend cross-complaint by adding cause of action for adultery.

9. Divorce ⇨252

Award of \$39,410 of community property valued at \$60,189.16 made to wife who was granted divorce on ground of extreme cruelty was equitable and fair under record and was not insufficient.

10. Divorce ⇨235

\$150 monthly support for one year awarded to wife who was granted divorce on ground of extreme cruelty, plus one-half of husband's income from personal services he rendered to husband's business for two years, was not so unreasonably low under record as to evidence abuse of discretion.

11. Divorce ⇨227(2)

\$5,000 counsel fee awarded to wife's counsel by interlocutory decree of divorce granted to wife on ground of extreme cruelty, which was in addition to \$750 awarded to wife's prior counsel, was not so inadequate under record as to be subject to revision.

Jerry Giesler, Harold C. Holland, Beverly Hills, for appellant.

John Hall, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff Ernest V. Berry and defendant were married on December 19, 1942. At the time plaintiff owned three precision grinding companies located in Los Angeles,

Phoenix and Oakland, having a net book value of \$82,996.42, had \$10,000 in a vault, and was sole stockholder of a corporation of net worth of \$38,405.09 as shown on its books. In November, 1948, plaintiff filed a complaint for divorce, and in April, 1949, defendant answered and cross complained for divorce. By stipulation it was agreed the net book value of all assets as of December 31, 1949, was \$238,369.65. On January 5, 1951, by interlocutory decree defendant was granted a divorce on the ground of extreme cruelty and the decree divided the community portions of the stipulated assets as well as plaintiff's earnings from January 1, 1950, to date of decree. In lieu of an interest in specific assets defendant was awarded \$39,410 payable in 36 equal monthly instalments, all the community interest in the home in which she lived (value not stated), plus \$150 per month for one year, plus one-half of plaintiff's net earnings from personal services from January 1, 1950 to December 31, 1951. Costs and attorneys' fees also were awarded. From this decree defendant appeals, claiming insufficiency of each of the awards.

Basically, the problem facing the trial court was to determine the extent of the community interest in the accumulations during the marriage. The parties stipulated as to the book value of plaintiff's assets as of December 31, 1949, and further stipulated as to the amount of all gains after taxes made by plaintiff between January 1, 1943 and December 31, 1949. The court then found that all ordinary income of the various businesses was community property. It further found as to specific transactions involving sales of businesses and various assets what proportions, if any, of the gains were community. From these totals of community gains the court deducted the living expenses of the parties paid by plaintiff, and after finding that the remaining community gains had been reinvested and were included in the December 31, 1949 asset total, made the awards in question. Broadly, the question on appeal is whether the trial court proceeded properly.

Initially, defendant contends that the court's method was incorrect in that it

should have started with the presumption all present assets were community property and subtracted only those assets plaintiff could trace back to his separate property owned at the time of marriage. She says plaintiff failed to produce such proof and that all the assets should have been found to be community property. She contends, in the alternative, that the court should have determined the proportion of the share of the community in the assets as of the time of trial, should have placed a value thereon and should have awarded her substantially more than half thereof in kind or in money.

According to the findings plaintiff at the time of marriage had assets of \$131,401.51, consisting of his three plants worth \$82,996.42, cash of \$10,000 and ownership of a corporation worth \$38,405.09; May 31, 1943, the plant at Phoenix was sold for \$34,587.70 cash (including cash retained and machinery sold later), business earnings during 1943, after deducting taxes and living expenses, amounted to \$30,552.12; April 25, 1944, plaintiff bought one parcel of land in Palos Verdes, paying \$10,000 and giving security on the land for \$20,000; April 30, 1944, he bought the Hard Chrome business and property for \$91,000, paying \$56,000 in cash, of which \$35,000 was borrowed from a bank on his separate credit, and the balance in time payments; June 1, 1944, he sold the plant at Oakland for \$40,000, retaining cash in the business and receivables amounting to \$29,617.16; August 1, 1944, he sold the Los Angeles plant for \$170,000, receiving \$35,000 in cash and an additional \$50,000 in 25 monthly instalments; in this sale he retained cash and other assets of the business amounting to \$33,521.79 and later repossessed the plant; his earnings, after taxes and deduction of living expenses in 1944 were \$13,245.56; on June 23, 1945, he sold Hard Chrome real estate for \$40,000 cash. In 1944 and 1945 he bought additional unimproved land at Palos Verdes in the name of his corporation, Finance, Inc.; the total purchases amounted to 130 acres, three of which he sold for \$13,000. According to the books of the corporation the land was carried at \$120,611.69, road improvements at \$19,614.-

19, building \$64,782.51, and furniture was carried at \$6,017.10. There were various sales of machinery belonging to the business owned by plaintiff at the time of marriage. It appears that Finance, Inc. held a mortgage of \$18,437.50, secured by real estate, title to which was to be reconveyed to the corporation. In 1945 plaintiff's business sustained an operating loss of \$7,715.-76 and in later years earned operating profits as follows: 1946—\$2,955.92; 1947—\$8,379.59; 1948—\$4,370.54; 1949—\$1,651.09. Th action was tried in February of 1950. At that time the evidence did not show satisfactorily the gains resulting from the sales of plaintiff's several businesses and his other transactions. In May, 1950, the cause was reopened for the appointment of a referee to take an accounting of the transactions in property. In September, 1950, the parties stipulated as to the amounts and sources of gains as they are set out in the accompanying table, and a referee was not appointed.

All the major figures as to sales we have used were based upon book values of property sold and actual sales prices. Defendant points out that there were total gains to December 31, 1949, of \$167,234.36, whereas there was a gain in book values of only \$116,968.14. She says that this leaves unaccounted for \$50,266.22, and it appears to be her contention that the plaintiff had concealed assets in that amount.

The court found plaintiff had not concealed any assets and defendant has not successfully challenged this finding. It would serve no purpose to review the arguments upon this point. If the findings as to community gains are sustainable it is immaterial whether plaintiff has accounted for all the assets which belonged to his separate estate.

The accompanying schedule is explanatory of the findings as to the accumulations of community property. The item "Business and salary income" was arrived at by treating as community earnings the net from business operations and salary income to December 31, 1949, of \$79,058.75 and deducting therefrom living expenses of \$35,134.59.

Sources and Court's Allocation of
Income Earned After Marriage
(Jan. 1, 1943—Dec. 31, 1949)

Source	Amount	Separate Property	Community Property	Calculated Per Cent Community
1. Business and Salary Income	\$43,924.16		43,924.16	100
2. Gains realized after marriage on sales of machinery and equipment				
(a) Acquired before marriage	17,829.95	17,829.95		None
(b) Acquired after marriage				
(1) Hard Chrome machin- ery and equipment	11,566.02	7,711.02	3,855.00	34.19
(2) Other machinery and equipment	2,639.72	2,139.72	500.00	18.56
(c) Repossessed machinery	2,461.36	2,051.36	410.00	16.66
3. Gain on sale of Hard Chrome real property	15,762.36	13,762.36	2,000.00	12.68
4. Interest Income	14,075.21	12,075.21	2,000.00	14.21
5. Gain on repossession of Los Angeles plant	23,238.64	19,738.64	3,500.00	15.06
6. Gain on sale of Oakland plant	21,390.01	18,890.01	2,500.00	11.7
7. Gain on sale of Phoenix plant	14,355.93	12,855.93	1,500.00	10.45
Totals	\$167,234.36	\$107,045.20	\$60,189.16	

Note: Sources and amounts are per stipulation of the parties.
Allocations are per the court's findings.
Per Cent Community is calculated from the findings.

Stipulated Book Net Worth
December 31, 1949

Precision Engineering Company	\$ 50,220.52
Finance, Inc. (Pers. Corporation)	188,149.13
Total Book Value	\$238,369.65
Community Share of Book Values	60,189.16
Per Cent Community share of Assets as of December 31, 1949	25.25035%

[1] The case was tried on the theory that the value of plaintiff's services was the major factual question to be determined. Plaintiff devoted all his time to the business and the court found all the earnings of the business were due to his services and were therefore community property. This finding was definitely favorable to defendant. The method used was a proper one.

In the leading case of *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488, 491, 23 L.R.A.,

N.S., 880, a rule was declared for the ascertainment and allocation of separate and community interests in gains where a husband at the time of marriage is operating a business which is continued after marriage. The court should award the husband "the reasonable gain to the separate estate from the earnings properly allowable on account of the capital invested." The community interest consists of the share of the gains attributable to the personal char-

acter, energy, ability and capacity of the husband where he has contributed his personal services to the operation of the business. This method of allocation has been followed in all the later cases where it was necessary to apportion interests in a business owned and operated by the husband at the time of marriage. In *re Estate of Gold*, 170 Cal. 621, 151 P. 12; *Witaschek v. Witaschek*, 56 Cal.App.2d 277, 132 P.2d 600; *Cozzi v. Cozzi*, 81 Cal.App.2d 229, 183 P.2d 739; *Stice v. Stice*, 81 Cal.App.2d 792, 797, 185 P.2d 402.

[2] Without discussing the applicability of the foregoing rules defendant contends that where profits and gains of a husband's business owned before marriage, which are due to his personal services, are retained in the business and commingled with its funds, any property purchased with the commingled funds becomes community property. Upon this theory she claims community ownership of all presently owned property consisting of Precision Engineering Company and the Palos Verdes land standing in the name of plaintiff or his corporation. This theory calls for abrogation of the rule of the *Pereira* case as it applies to the facts found by the trial court. The present case illustrates the wisdom of that rule. Less than six years elapsed between the marriage and the separation of the parties. All the present assets were derived from plaintiff's separately owned business and his personal services. According to the stipulation they are worth a minimum of \$238,000 and they represent plaintiff's lifetime earnings. The court, in applying the rule of the *Pereira* case, had no difficulty in evaluating plaintiff's services. It favored the community by allocating to it all earnings of the businesses and a substantial share of gains on sales, without making any deduction therefrom of a share as compensation for the use of plaintiff's valuable plants. It will be noted that by far the greater part of gains from sales came from sales of properties owned by plaintiff before marriage. All the evidence on the subject was to the effect that the increases in value of the plants, machinery and equipment were due to increased demand for

machine tools and manufacturing facilities following our entry into the war. Increases due to that cause alone would be plaintiff's separate property. Civ.Code, § 163; *Logan v. Forster*, 114 Cal.App.2d 587, 250 P.2d 730; *Van Camp v. Van Camp*, 53 Cal.App. 17, 199 P. 885. Defendant urged upon the trial court that something should be allowed the community for plaintiff's efforts in making the sales and that the community had an interest in the property. We must presume that in making allocations to the community of shares of the gains the court took into consideration all proper factors, including any interest which the court may have believed the community had in the property itself and also the value of plaintiff's services in making the sales. It is at once apparent that the result reached was far more just and reasonable than would have been an award to defendant of the major share of plaintiff's business and the assets of his wholly owned corporation.

[3-5] Appellant in her briefs does not recognize the existence of the rule of the cases we have cited and upon which the trial court made its determination of the property rights. She has cited many cases which applied the general rule that property purchased with commingled funds will be deemed community property in the absence of a clear showing that it was acquired with separate funds. In none of them would the rule pertaining to a separately owned going commercial business have been applicable. *Falk v. Falk*, 48 Cal. App.2d 762, 120 P.2d 714, upon which defendant chiefly relies is not in the category of the commercial business cases. In that case a physician had some \$150,000 at the time of his marriage. During 21 years of married life his net business earnings were about \$161,000. In allocating the community property the court found that his separate funds and his earnings were so inextricably mixed that it was impossible to trace either into specific properties owned at the time of trial. Nevertheless the trial court awarded him securities of the value of \$48,000 upon the theory that he had owned other securities of that value at the time of his marriage. The judgment was ordered modified by award-

ing these securities to the community. This was merely the application of the general rule under which property purchased with commingled earnings of husband and wife, *Truelsen v. Nelson*, 42 Cal.App.2d 750, 754, 109 P.2d 996, or other commingled community and separate property, not clearly capable of segregation will be deemed community property. *Fountain v. Maxim*, 210 Cal. 48, 51, 290 P. 576; *Buehler v. Buehler*, 73 Cal.App.2d 472, 166 P.2d 608. All the other cases on the subject cited by defendant fall into the same category. They were all cases in which the evidence did not furnish a satisfactory basis for the segregation of separate and community interests. The rule of the *Pereira* case presupposes that it is feasible for the court to evaluate the services rendered to a going commercial business by the husband or wife for the benefit of the community. When this can be done satisfactorily there is a basis for segregation. As said in *Faust v. Faust*, 91 Cal. App.2d 304, 309, 204 P.2d 906, 909: "There is both a community and a separate interest in property purchased with separate and community funds where each contribution is clearly ascertainable. *Miller v. Brode*, 186 Cal. 409, 413, 199 P. 531." See 3 Cal.Jur. 10-Yr. Supp. § 40, p. 524; *Vieux v. Vieux*, 80 Cal.App. 222, 251 P. 640; *In re Estate of Caswell*, 105 Cal.App. 475, 482, 288 P. 102. The court found there was no commingling of separate and community funds. This was true in a legal sense inasmuch as the interest of the community in the funds could be satisfactorily established.

[6] The method employed by the court was a proper one. The parties both produced extensive testimony by accountants. Their respective theories were expounded at length both orally and in writing. The findings as to the amount of community property may not be disturbed. They were based upon conflicting evidence and inferences and defendant has not shown them to be in error. *Todd v. McColgan*, 89 Cal. App.2d 509, 514, 201 P.2d 414.

After the evidence was in defendant applied for the appointment of appraisers to value all the properties in question, as of the time of trial. The court expressed its willingness to have appraisals made or to

receive evidence of present values should it become necessary. It would have become necessary only in the event the court had determined that defendant should be given a cash award or an allotment in kind based upon the present value of the community interest. The court was not required to make such an award. The case had been tried upon the basis of book values. The book values at the time of the marriage amounted to only \$82,996.42 for the plants, and \$38,405.09 for the Finance, Inc. assets, a total of \$121,401.51. The plants and their equipment were sold as set out above for more than \$300,000. It is clear, then, that the book values as of the time of the marriage were far below actual values or that the actual values increased greatly due to the state of war, or that both factors contributed to the great difference between the sales prices and the values as shown on the books. There were good reasons for not ascertaining the present value of the assets. A sufficient one is that the method employed by the court for determining the extent of the community interest was the proper one and the only one available in view of the evidence and the theory on which the case had been tried. In addition, if increase of actual values above the book values at time of marriage had been shown, it would have been necessary to ascertain the actual values at the time of marriage in order to determine the value and extent of plaintiff's separate interest. No evidence was given or offered as to the actual original values. Moreover, there is merit in plaintiff's contention that defendant withdrew her request to have the court take evidence as to the actual value of the remaining assets.

[7,8] Subsequent to the taking of evidence, defendant made a motion to reopen the trial and for leave to amend her cross-complaint by adding a cause of action for adultery to the cause of action for cruelty. She stated in her affidavits that she had recently been to the home where she and plaintiff had lived and discovered that there was another woman and a baby living in the home with plaintiff. Affidavits were filed by and on behalf of plaintiff that long before the trial defendant had accused

plaintiff of having illicit relations with the woman in question. Defendant's own testimony on the first day of the trial lends support to these averments. The trial court concluded from the affidavits that insufficient diligence had been shown and that the application came too late. We cannot say that denial of the motion was an abuse of discretion. There was undisputed evidence that plaintiff had been guilty of extreme cruelty, and it is clear from the record that the parties expected a divorce would be granted to defendant upon that ground. Defendant was entitled to receive more than one-half the community property whether the ground was extreme cruelty or adultery. She contends that if the court had found plaintiff guilty of adultery she would have received a greater award than was made on the finding of extreme cruelty. We doubt that she is correct in this assumption. It is not true as a matter of law, nor do we know it to be a fact, that the courts are more lenient with husbands who inflict severe physical injuries upon their wives than with those who are found out in adultery. Not only was there no abuse of discretion in denying the motion, but under the circumstances there has been no showing here of prejudice.

[9,10] Defendant claims insufficiency in the award of a share of the community property, and also in the award of support of \$150 a month for the period of one year, plus one-half of plaintiff's net earnings for his personal services from January 1, 1950 to December 31, 1951. Of the community property, valued at \$60,189.16, defendant was awarded approximately two-thirds, or \$39,410. This division, in our opinion, was equitable and fair to defendant. There is less to be said for the award of support.

However, defendant is an able bodied woman, 46 years of age, and a competent stenographic secretary. Before her marriage she had been steadily employed at a salary of \$250 per month. The marriage had not been of long duration. In the later years plaintiff's business was not prospering. All these conditions considered, and in view of the division of community property, support in the amount of \$150 per month for one year, plus one-half of plaintiff's income from personal services for two years, while moderate, was not so unreasonably low as to evidence an abuse of discretion.

[11] By the interlocutory decree defendant's present counsel were awarded \$5,000 as attorneys' fees. This was in addition to the sum of \$750 awarded to her former counsel. The award is claimed to be inadequate in view of the vast amount of work involved in preparing and presenting defendant's case. If we were to agree that a larger allowance would have been reasonable, this would not mean that we would be justified in saying that the award was so inadequate as to be subject to revision. The trial court has a broad discretion in such matters. *Heck v. Heck*, 63 Cal.App.2d 470, 476, 147 P.2d 110; *Westphal v. Westphal*, 122 Cal.App. 388, 10 P.2d 122. Counsel were awarded \$3,000 attorneys' fees on the appeal. There is no appeal from this order.

The order denying motion for a new trial being non-appealable, the purported appeal therefrom is dismissed; the judgment is affirmed.

PARKER WOOD, J., concurs.

VALLÉE, J., did not participate.

OSBORN v. OSBORN et al.*

Civ. 19311.

District Court of Appeal, Second District,
Division 2, California.

May 4, 1953.

Rehearing Denied May 21, 1953.

Hearing Granted July 2, 1953.

Suit to quiet title in defendant, or, in the alternative, to establish a constructive trust, pursuant to agreement whereby title was to be held by plaintiff's father until father's death, when it should vest in plaintiff, and by virtue of a deed delivered in escrow pursuant to such agreement. The Superior Court, Los Angeles County, entered judgment from which plaintiff appealed. The District Court of Appeal, Moore, P. J., held that where deed from father to son was delivered in escrow, with title to vest on father's death, condition was one which was bound to occur regardless of act of parties, and title passed to son at time of deposit of deed subject to life estate in the father.

Judgment reversed, with instructions; appeal from order denying motion for new trial dismissed.

McComb, J., dissented.

1. Escrows ⇨1

The term "escrow" is not used exclusively in sense that there must be a binding contract to support an escrow, but it is applicable to situations where there is no underlying contract, but merely a gift.

See publication Words and Phrases, for other judicial constructions and definitions of "Escrow".

2. Escrows ⇨8(1)

An escrow holder is considered the agent of both parties prior to the performance of the designated conditions.

3. Escrows ⇨12, 13

Where a deed is delivered to an escrow holder, title remains in the grantor until performance of the specified conditions or happening of the designated event, at which time it vests in the grantee, except that if the condition upon which deed is to be delivered is one which is certain to occur, regardless of any act of the parties, the title to the property passes to the grantee at time of the deposit of the deed in escrow, subject, however, to a life estate in the property in grantor.

* Subsequent opinion 267 P.2d 333.
Cal.Rep. 255-256 P.2d-39

4. Escrows ⇨13

Where father and son, who were involved in dispute as to their respective interests in certain property, executed an agreement, pursuant to stipulation approved by court, whereby title was to be held by father until his death, when it should vest in son, and pursuant thereto a deed was deposited by father with escrow holder, condition of father's death was one which was bound to occur regardless of any act of the parties, and son acquired, at time of delivery to escrow holder, the title to the property, subject to life estate in the father, or, at the very least, son acquired equitable title capable of specific performance by virtue of agreement with father.

5. Escrows ⇨13

Where agreement between father and son in compromise of dispute as to title to certain property provided for holding of title by father until his death, and vesting in son upon father's demise, recitals in trust agreement pursuant to deposit by father of deed in escrow for son, giving father right to revoke deed in event son should wilfully harm him, or wilfully fail or refuse to carry out terms of trust agreement, did not affect passing of title to son, but such recitals merely restated the legal rights of the parties and provided for restoration of status quo in event of breach of a condition of cooperation.

6. Deeds ⇨56(2)

The delivery of an instrument is a question of intent, and the main thing to which the law looks is whether grantor indicated his will that instrument should pass into possession of grantee, and, if that will is manifest, then conveyance inures as a valid grant, although deed never comes into hands of grantee.

7. Life Estates ⇨5

Father who was life tenant of property in which son held vested remainder was under a duty to do no act to injury of son as remainderman, and was required, by virtue of a "quasi trust" relationship, to report to son, as remainderman, an attempt to divest son of his title by execution of which father had knowledge. Code Civ.Proc. § 542 subd. 2; Civ.Code, § 818.

8. Parent and Child ☞1

A father who owned life estate in property in which son owned vested remainder had a general fiduciary duty, because of his capacity as father, not to seize or assert an undue advantage by reason of superior knowledge of facts likely to affect title of their common estate.

9. Trusts ☞103(2)

Where father owned life estate in property in which son had vested remainder, and neither father nor stepmother advised son of execution and sale of son's interest, and father, who had attended sale, procured transfer of certificate of sale to stepmother for amount grossly inadequate in relation to actual value of remainder, father, by virtue of fiduciary father-son relationship, and stepmother, as father's alter ego, had duty to inform son, and stepmother held title for son as constructive trustee.

Guerin & Guerin, by John J. Guerin, Los Angeles, for appellant.

Louis Warren, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant sued to quiet title to lot 97, Casa Verdugo Villa Tract, Los Angeles County, and in the alternative to establish a constructive trust. The bases of his claim are (1) an agreement settling a dispute whereby the title should be held by his father until death when it should vest in appellant; (2) a deed executed by the father conveying lot 97 to appellant delivered in escrow pursuant to the agreement.

In 1922 Chloe I. Osborn acquired lot 97 by grant deed from her brother. Her intestacy at death left her worldly possessions to her husband, Thomas D. Osborn, and their son, appellant herein. While her estate was in probate, a dispute arose between father and son in regard to their inheritance. It was settled, however, by a stipulation subsequently approved by the court, the material part of which is as follows:

"It is further stipulated and agreed by and between the parties hereto that upon

the execution of the within Stipulation that Thomas D. Osborn will execute either by deed, contract or declaration of trust sufficient documents, conveyances or declarations so that the property known as Lot 97, Casa Verdugo Villa Tract, etc., will be retained in the name of Thomas D. Osborn during his lifetime and that the same should vest in his son Merinoeth R. Osborn at the time of the demise of the said Thomas D. Osborn."

Subsequent to the distribution of the property to Thomas on July 7, 1939, he executed a grant deed with appellant named as grantee of lot 97 and delivered it to attorneys Harry A. Franklin and Caryl Warner with instructions to retain possession of the deed until his death, then to deliver it to appellant. The conveyance excepted and reserved to the grantor "exclusive possession and the use and enjoyment in his own right of the rents, issues and profits of said property * * * for and during the term of his natural life." Also, it declared that it was "executed in accordance with the terms and conditions of that certain trust agreement of July 7th, 1939 * * and is subject to all conditions, exceptions and reservations as in said trust agreement provided."

By the terms of the trust agreement, *inter alia*, the grantor reserved "the right to revoke the deed in the event second party [Merinoeth] wilfully harms grantor, and second party reserves the right to cancel this agreement if grantor wilfully harms second party" and that "wilful failure or refusal on the party [sic] of either party hereto to carry out the terms and conditions of the within trust agreement, or the wilful failure or refusal of either party to comply with the obligations herein provided, on his part to be performed, shall permit either party to rescind this agreement."

Thereafter, respondent Warner asserted appellant's indebtedness to him for legal services and on October 15, 1941, resigned as trustee with the announcement that he had found it necessary to enforce payment. He assigned his account to his secretary, Charlotte Champion, and prosecuted the action to a default judgment against appellant

after having attached the latter's interest in lot 97. At the execution sale, appellant's interest was sold to Miss Champion for \$366.37. On the request of Thomas, the certificate of sale was transferred to his second wife, respondent Louise Osborn, for \$415. It will be borne in mind that at no time after Warner's judgment was entered did anyone give appellant notice of the pending sale or of the actual sale of his interest until the early part of 1946.

Anticipating a sale of his reversionary interest to his father on January 14, 1946, appellant executed a writing with his father purporting to cancel the trust agreement. Pursuant thereto, appellant and his wife executed quitclaim deeds conveying lot 97 to Thomas. By the terms of the writing Merinoeth was to receive \$3,500 for his interest, less about \$464 which Thomas had caused him to believe was still owing to Warner. Thomas agreed to pay such sum directly to the judgment creditor. It is clear that at the time of such arrangements for his sale to Thomas, Merinoeth did not know of the execution sale of his interest to Miss Champion or of the subsequent assignment of the certificate of sale to Louise.

But on March 7, 1946, Merinoeth rescinded the contract of January 14 and demanded the return of the quitclaim deeds. Seven days later Thomas' attorney, Franklin, communicated Thomas' acquiescence in the rescission, brought back the deeds intended for Thomas and returned to the latter the money and checks Thomas had deposited with Franklin for Merinoeth.

Such was the status of the father and son transactions when Thomas died intestate on December 31, 1946. Merinoeth thereupon filed this action to quiet the title of lot 97 in himself. Subsequently, he amended his complaint whereby he sought to impose a constructive trust as alternative relief. In response thereto, Louise filed her cross-complaint for a judgment quieting title in herself. The trial court refused relief to both parties, holding that the trust agreement had "created only an escrow" which was "not irrevocable"; that title had not "passed to [Merinoeth] on the death of the grantor"; that since appellant had no interest himself, neither Miss Champion

nor Louise obtained anything by virtue of the certificate of sale. Merinoeth has appealed from the judgment and from the order denying a new and different judgment.

The questions for decision, therefore, are: (1) whether the deposit of a deed with third parties by the father, conveying the property to appellant in settlement of a dispute over the estate in which each claimed an interest, created any legal or equitable rights in appellant, and (2) whether respondent acquired any interest by virtue of the execution sale of lot 97.

Effect of the Stipulation and Trust Agreement

Appellant contends that the trial court confused the effect of (1) gift by deed where possession is retained by an escrow holder until the grantor's death and then delivered to the grantee and (2) compliance with the terms of a specifically enforceable contract where the escrow holder retains possession of the deed until certain contingencies occur, then delivers it to the grantee. The record clearly establishes that an enforceable agreement was executed by Thomas and Merinoeth, and that Thomas pursuant thereto delivered his deed to escrow holders who were to hold possession until the decease of Thomas, and then deliver the deed to the son.

[1-3] It is often asserted that there must be a binding contract to support an escrow. *Thomas v. Birch*, 178 Cal. 483, 489, 173 P. 1102; *Security-First National Bank v. Clark*, 8 Cal.App.2d 709, 712, 48 P.2d 167; *Elliott v. Title Ins. & Trust Company*, 64 Cal.App. 508, 511, 222 P. 175. Nevertheless, the term "escrow" in this state is not used exclusively in the above sense; it is applied to situations where there is no underlying contract, but merely a gift. *Whitney v. Sherman*, 178 Cal. 435, 438, 173 P. 931; *Hunt v. Wicht*, 174 Cal. 205, 208, 162 P. 639, L.R.A.1917C, 961; *Williams v. Kidd*, 170 Cal. 631, 637, 151 P. 1. The escrow holder is considered the agent of both parties prior to performance of the designated conditions. *Shreeves v. Pearson*, 194 Cal. 699, 707, 230 P. 448; *People v. Hess*, 104 Cal.App.2d 642, 681,

234 P.2d 65; appeal dismissed, 342 U.S. 880, 72 S.Ct. 177, 96 L.Ed. 661; *Sousa v. First California Company*, 101 Cal.App.2d 533, 539, 225 P.2d 955; *Lenchner v. Chase*, 98 Cal.App.2d 794, 805, 220 P.2d 921; *Majors v. Butler*, 99 Cal.App.2d 370, 374, 221 P.2d 994. Title remains in the grantor until the performance of the specified conditions or until the designated events have occurred, at which time it vests in the grantee. This rule is subject to one important exception: "where the condition upon which the deed is to be delivered is one which is certain to occur, regardless of any act of the parties, such, for example, as the death of the grantor * * * the title to the property passes to the grantee at the time of the deposit of the deed in escrow, subject, however, to a life estate in the property in the grantor." *Whitney v. Sherman*, 178 Cal. 435, 438, 173 P. 931, 932.

[4] There can be no doubt, in the instant case, that the trust agreement and grant deed from Thomas to Merinoeth were executed in pursuit of the court-approved stipulation as the compromise of a disputed claim. It is equally certain that the consideration moving to Thomas was entirely adequate. The contract underlying the escrow arrangement was clearly of an enforceable nature under the most rudimentary principles of equity. The contingency whose occurrence required manual delivery of the deed to Merinoeth was his father's death, which was "certain to occur regardless of any act of the parties." Hence by virtue of Thomas' solemn covenant and deed, title of the property passed immediately to Merinoeth, subject to a life estate in Thomas Osborn. That such was the intention of the parties as well as the legal effect of the arrangement is borne out by the express provisions of the grant deed and trust arrangement, as well as by the stipulation. And even though the legal title had not passed to Merinoeth by virtue of such instruments, it is beyond cavil that, at the very worst, equitable title passed to him, since by execution of the stipulation with his father, Merinoeth gained the right to specific performance of the agreement.

[5,6] In conformity with appellant's contentions, it is clear that the so-called

conditions in the trust agreement were nothing more than restatements of the legal rights of the parties. See *Deming v. Smith*, 19 Cal.App.2d 683, 687, 66 P.2d 454. They provide merely for restoration of the status quo in the event of a failure of consideration or a breach of a condition of cooperation. In any event, the subsequent conduct of Thomas and his wife: their failure to notify Merinoeth of the impending sale of his remainder, their purchase of Miss Champion's interest after the execution sale and their offer of \$3,500 to Merinoeth for his remainder, less the sum allegedly due to Caryl Warner—indicates that Thomas considered the interest of Merinoeth vested and valid. Even had the delivery of the deed to Franklin and Warner been technically imperfect, Thomas' subsequent conduct was convincing evidence of his definite understanding and true intention that the remainder belonged to his son and that he purposed by the deed he placed in Franklin's hands to effect a valid transfer of title at his own death. See *Moore v. Trott*, 162 Cal. 268, 274, 275, 122 P. 462, 465. "The delivery of an instrument is a question of intent * * *. 'The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee, and, if that will is manifest, then the conveyance inures as a valid grant, although * * * the deed never comes into the hands of the grantee.'" *Ibidem*.

Effect of the Execution Sale

Since Merinoeth had actually a vested remainder in the property, his interest was subject to execution, Code Civ.Proc. sec. 688, and if the execution was legally effective, that interest passed to Miss Champion and thence to Louise. Although the trial court made no findings on the propriety of the execution, it will be assumed that the statutory requirements, Code Civ.Proc., secs. 542, 674, 682, 688, were followed. Moreover, it is unnecessary to a decision of this case to determine whether or not the delivery of the deed to Warner and Franklin created a trust, as well as an escrow; and, if so, whether Warner could relieve himself from his fiduciary duties by the simple expedient of tendering his resigna-

tion to the beneficiary of the trust, and could properly cause an action to be prosecuted against the latter. Those questions are now moot. Further pursuit of such inquiries could not effect a different result.

Although Thomas Osborn and respondent Louise had knowledge of Warner's judgment against appellant, the court found that neither of them gave appellant any information with reference thereto, or advised him of the peril of allowing a judgment against him to remain unsatisfied, nor did either of them advise appellant of the prospective sale of the latter's interest in lot 97. While the pertinent statute does not require notice to the remainderman of a contemplated execution on his interest in real property, Code Civ.Proc., sec. 542, subd. 2, nevertheless Thomas was morally and legally obligated to give appellant notice of the future sale for two unassailable reasons:

[7] (1) As life tenant he was under a duty to do no act to the injury of the remainderman. This has been characterized as a "quasi trust" relationship, see Civ. Code, sec. 818; *Hardy v. Mayhew*, 158 Cal. 95, 104, 110 P. 113; *Bliss v. Security-First National Bank*, 81 Cal.App.2d 50, 54-55, 183 P.2d 312, and imposes upon the life tenant, at least, a duty to report to the remainderman any attempt to divest the latter of his title.

[8] (2) As Merinoeth's father, he owed him the general fiduciary duty not to seize or assert an undue advantage by reason of a superior knowledge of facts likely to affect the title of their common estate.

[9] The finding was that Miss Champion "transferred the Certificate of Sale to Louise L. Osborn, at the instance of Thomas D. Osborn, who attended the sale." [Italics added.] Despite the finding of the absence of actual fraud, under no circumstances can Louise be regarded a bona fide purchaser of the remainder. The gross inadequacy of the price paid (about \$450) in proportion to the actual value of the remainder, not less than \$3,500; the failure to notify Merinoeth; Thomas' position as life tenant; the fiduciary father-son relationship; Louise's position as Thomas' alter

ego—all these factors charged Louise with scienter and a duty to speak into the ears of appellant. Coupled with the above facts is a damning admission of guilty knowledge, evidenced by the conduct of Thomas and Louise when they sought to "purchase" Merinoeth's interest from him three and a half years after execution had been levied and sale made, still concealing from him the assignment of Warner's claim to Miss Champion and the subsequent chain of facts.

It is the conclusion of this court that appellant is the owner of lot 97 and that title should be quieted in him; that whatever title or interest respondent may have, she holds as constructive trustee for appellant.

Judgment is reversed with instructions to enter judgment (1) quieting the title of lot 97, Casa Verdugo Villa Tract, in Merinoeth Osborn and for costs; (2) decreeing that Louise Osborn has no interest in the property.

The appeal from the order denying appellant's motion for a new trial is dismissed.

FOX, J., concurs.

McCOMB, Justice.

I dissent. From a judgment in favor of defendants after trial before the court without a jury in an action to quiet title or establish a constructive trust, in a parcel of real property, plaintiff appeals. There is also a purported appeal from the order denying a motion for a new trial.

Undisputed facts: April 21, 1922, Chloe I. Osborn, mother of plaintiff, acquired the real property which is the subject of this litigation by grant deed from her brother. Thereafter she died leaving as her sole heirs her husband, Thomas D. Osborn and plaintiff, her son. A dispute arose between plaintiff and his father relative to the real property which was finally resolved by the parties' entering into a stipulation subsequently approved by the probate court, the material part of which reads:

"It is further stipulated and agreed by and between the parties hereto that upon execution of the within Stipulation that Thomas D. Osborn will execute either by deed, contract or declaration of trust, suffi-

cient documents, conveyances or declarations so that the property known as Lot 97, Casa Verdugo Tract, etc., will be retained in the name of Thomas D. Osborn during his lifetime and that same should vest in his son, Merinoeth R. Osborn, at the time of the demise of said Thomas D. Osborn."

Subsequently the probate court distributed the property to Thomas D. Osborn as his separate property. Thereafter Mr. Osborn executed a deed purporting to convey the real property to plaintiff and delivered the same to defendants Harry A. Finkenstein and Caryl Warner with instructions to retain possession of the deed until his death and then deliver it to plaintiff. The agreement provided that wilful failure or refusal of either party to carry out the terms and conditions would permit either party to rescind and permit the grantor to cancel the deed delivered to defendants Finkenstein and Warner.

Defendant Warner resigned as a trustee and on January 3, 1947, Mr. Osborn's attorney, H. W. Hess, instructed defendant Finkenstein not to deliver the deed to plaintiff.

December 31, 1946, Mr. Osborn died without leaving a will and there has been no probate of his estate instituted. After the trial of the present action the court found that neither plaintiff nor defendants are the owners of the real property in question.

Questions: First: Did the trial court properly decline to quiet title in the parcel of land in question in plaintiff?

Yes. The following rules are here pertinent:

(1) An escrow is a written instrument or personal property which is delivered to a third party by the grantor, maker, promisor or obligor to be held by the depository until the happening of a designated event or the performance of a designated condition and then to be delivered to the grantee, promisee or obligee. (Civil Code, sec. 1057. See also cited cases in 10 Cal.Jur. [1923] Escrows, section 1, note 2, page 576.)

(2) When a deed is deposited by a grantor with a third person to be handed to the

grantee on the death of the grantor, there is no delivery unless accompanied by an intention of the grantor that title shall immediately pass to the grantee. Where the deed is handed to the third person without any intention of a present transfer of title, but on the contrary, with the intention of the grantor to reserve the right of dominion over the deed and the right to revoke or recall it there is no effective delivery. Where the grantor when depositing the deed intends that it shall be delivered to the grantee only after the death of the grantor and that title shall vest only on delivery to the grantee, the deed upon the death of the grantor is inoperative, there having been no valid delivery of the deed. (Williams v. Kidd, 170 Cal. 631, 637 et seq., 151 P. 1.)

(3) Plaintiff in a quiet title action must depend on the strength of his own title and not on the weakness of that of defendant. Thus, if he fails to prove title in himself, he is not entitled to recover. (Alspach v. Landrum, 82 Cal.App.2d 901, 903 [1], 187 P.2d 130; Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 825 [13], 129 P.2d 383.)

Applying the foregoing rules to the facts in the present case we find that under rule (1) the handing of the deed to defendants Finkenstein and Warner created an escrow, and since Mr. Osborn reserved the right to revoke or cancel the deed upon the happening of certain conditions, there was no intent to make an unconditional delivery of the deed. Therefore, it not having been delivered to plaintiff prior to his father's death, under rule (2) the deed was never delivered and no title passed to plaintiff. Hence, under rule (3), plaintiff having failed to prove title in himself the trial court properly held that he was not entitled to have title quieted in him.

Second: Was there substantial evidence to sustain the trial court's finding that the transaction between the parties did not create a trust agreement but merely created an escrow?

Yes. The transaction falls squarely within the definition of an escrow as set forth under rule (1), supra. There is a total absence of any of the elements of a trust agreement. Therefore the court's finding is supported by substantial evidence.

An order denying a motion for a new trial in a civil case is nonappealable, therefore in my opinion, the purported appeal from such order should be dismissed and the judgment affirmed.



**OAKLAND MEDICAL BLDG. CORP. v.
AUREGUY.***
No. 15496.

District Court of Appeal, First District,
Division 1, California.

May 8, 1953.

Hearing Granted July 2, 1953.

Action was brought on a note. The Superior Court, City and County of San Francisco, entered judgment on the pleadings in favor of plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that parol evidence was admissible to show that note was to be repaid by maker only on receipt by maker of money owing him from third person and that consideration for note failed.

Judgment reversed.

1. Bills and Notes ⇨475

Failure of answer to deny allegations of complaint as to execution and delivery of note operated as an admission of the truth of such allegations.

2. Bills and Notes ⇨487

Pleading ⇨345(1.3)

If allegations of separate defense in answer showed claim of defendant that there had only been a conditional delivery of note sued on, court would not be justified, because of failure to deny delivery of note, in granting judgment in favor of plaintiff on pleadings, and, at worst, the answer would be deemed ambiguous or uncertain and could be corrected by amendment.

3. Bills and Notes ⇨64

For delivery of note to be merely a conditional delivery, facts must show that

* Subsequent opinion 261 P.2d 249.

delivery was conditional and not for purpose of transferring the property in the note. Civ.Code, § 3097.

4. Pleading ⇨350(3)

Though defendant's answer was not a model in pleading, defendant was nevertheless entitled to any relief warranted by facts pleaded, and court erred in granting motion for judgment on the pleadings without affording defendant an opportunity to amend for purpose of curing defects.

5. Evidence ⇨432

As between original parties to an instrument, maker may show by parol evidence an original lack of consideration, or subsequent failure of consideration.

6. Evidence ⇨432

Parol evidence is admissible to show absence or failure of consideration as against one not a holder in due course.

7. Evidence ⇨432, 463

In action on note, parol evidence was admissible to show that note was to be repaid by maker only on receipt by maker of money owing him from third person and that consideration for note failed.

W. A. Lahanaier, John F. Gallen, San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland and Emmet B. Hayes, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment on the pleadings in favor of plaintiff.

Question Presented.

Basically,—would parol evidence be admissible to prove the oral agreement alleged, namely, that the promissory note was to be paid *only* if the maker received a certain payment from a third party?

Record.

[1] The complaint alleged the execution and delivery by decedent in his lifetime of a \$5000 promissory note set forth in haec verba. Defendant answered, admitting, by failure to deny, these allegations; denying, however, that any amount

was due, owing or unpaid. By separate defense defendant alleged that one Herrscher was an officer and principal stockholder of both plaintiff and Andrew Williams Stores, Inc., a corporation, and the duly authorized agent of both corporations in their dealings with decedent on the matters involved in the execution of the note; that the Williams corporation was indebted to decedent in the sum of \$10,000; that Herrscher "representing to said decedent that he was acting on behalf of both corporations hereinabove mentioned, promised and agreed that the sum of \$5,000.00 would be advanced to said decedent by the Oakland Medical Building Corporation, to be repaid to said corporation by said decedent only upon receipt by said decedent of the \$10,000.00 then owing to decedent from Andrew Williams Stores, Inc., a corporation; that pursuant to said representation, promise and agreement, and in reliance thereon, said decedent accepted said sum of \$5,000.00 and executed a note therefor"; that no part of the \$10,000 has been paid.

On the motion for judgment on the pleadings defendant conceded that the agreement alleged in the special defense was an oral one. Holding that the admission in the general answer of delivery barred defendant from showing a conditional delivery, and that evidence to show the alleged agreement would constitute an attempt to vary a written instrument by parol evidence, the court granted the motion and entered judgment in favor of plaintiff for the principal, interest and attorney's fees.

Delivery.

[2,3] Both the court and plaintiff laid stress upon the technical contention that because the answer failed to deny the complaint's allegation of delivery, defendant cannot raise the question of a conditional delivery so as to bring the case within the rule of *Harper v. French*, 29 Cal.App.2d 214, 84 P.2d 216, where it was held that parol evidence is admissible to show a conditional delivery of a promissory note. There, in the answer, there was a flat denial of delivery. The answer should be considered as a whole and if the allegations of

the separate defense showed a claim of conditional delivery, the court would not be justified, because of such failure to deny alone, in granting a judgment on the pleadings. At worst, the answer would be ambiguous or uncertain and could be corrected by amendment. See *MacIsaac v. Pozzo*, 26 Cal.2d 809, 161 P.2d 449; *Fabro v. Dardi & Co.*, 93 Cal.App.2d 247, 252, 209 P.2d 91. However, on this point we agree with the court in *McArthur v. Johnson*, 216 Cal. 580, 15 P.2d 151, which held, in effect, that to be a conditional delivery the facts must show that the two requirements of section 3097, Civil Code, be met, namely, (1) the delivery must be "conditional," and (2) "and not for the purpose of transferring the property in the instrument." (Emphasis added.) Here there was no allegation that the property in the instrument was not to be transferred, nor do the facts alleged so indicate. Moreover, at the trial defendant stated that delivery of the note was admitted.

Consideration.

Actually, the defense which the answer attempted to allege was an oral agreement to the effect that the principal of the note was to be repaid *only* upon receipt by decedent of the moneys owing him from Andrew Williams, and that the consideration for the note failed, as was the case in *Harper v. French*, supra, 29 Cal.App.2d 214, 84 P.2d 216, where the court held that oral testimony should have been admitted to show the conditional delivery of the note, referred to above, *and* the alleged oral agreement that the note was not to be paid if the purchaser of certain property from the maker of the note failed to make a payment on the purchase price.

[4] While defendant's answer is not a model in pleading, "they are nevertheless entitled to any relief warranted by the facts pleaded * * *. Under the circumstances, it was clearly error for the court to grant the motion for judgment on the pleadings without affording defendants an opportunity to amend, since the defects could be cured by amendment." *MacIsaac v. Pozzo*, supra, 26 Cal.2d 809, 815, 161 P.2d 449, 452.

There appear to be in the authorities two diametrically opposite lines of decision concerning the question of whether parol evidence is admissible as between the original parties to a note to prove an oral agreement that a promissory note unconditional on its face is to be paid only from a certain fund or only in the event of a certain contingency. The parol evidence rule is a very flexible one, and its application quite perplexing. The situation concerning this rule is well stated in 32 C.J.S., Evidence, § 929, p. 852: "There is perhaps no rule of law or of evidence which is more flexible or subject to a greater number of exceptions than the rule which excludes parol evidence offered to vary or explain written documents. While it has been said that in the multitude of exceptions much confusion has arisen, so that the exact limit to be placed on the exceptions depends not only on the peculiar facts of each case, but also to some extent on the peculiar cast of thought of the individuals composing the court, it may be stated generally that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case. The result is that, while the decisions are fairly uniform with respect to their abstract statements of the limitations of and exceptions to this rule, when the question arises as to whether a case presenting a particular state of facts comes within the general rule, or is taken out of it by one of the recognized limitations or exceptions, or again brought within it by one of the numerous limitations of, and exceptions to, those limitations and exceptions, the authorities are in many instances in hopeless conflict." (See also section 948 for discussion of the exception to the rule permitting oral evidence to show want or failure of consideration, and section 951 discussing the application of the exception to promissory notes.)

On the theory that unless said fund was received by the maker or the contingency occurs there is a want or failure of consideration, evidence to show such oral agreement was held admissible in *Harper v. French*, supra, 29 Cal.App.2d 214, 84 P.2d 216, and in the following cases: *Billings*

v. Everett, 52 Cal. 661, where it was alleged that by oral agreement the note was not to be paid unless the payee constructed a certain canal; *Jefferson v. Hewitt*, 103 Cal. 624, 37 P. 638, where it was alleged that by oral agreement the note was not to be paid unless the payee constructed a certain railroad; *North v. Evans*, 117 Cal. App. 317, 3 P.2d 609, where it was alleged that by oral agreement the notes were not to be paid until the happening of a certain condition; *Muir v. Hamilton*, 152 Cal. 634, 93 P. 857, where it was alleged that by oral agreement the notes were not to be paid unless certain litigation was resolved in favor of the maker. In *Cooper v. Cooper*, 3 Cal.App.2d 154, 39 P.2d 820, it was held that oral testimony was admissible to show that the note was not intended by the parties as a promissory note but merely as a receipt for money paid the defendant pursuant to an oral declaration with respect to capital stock, and also to show want of consideration.

In *Richardson v. Lamp*, 209 Cal. 668, 290 P. 14, it was held that parol evidence was admissible to show an oral agreement that the promissory note sued upon, was only to be paid from moneys due the makers from third parties on the theory that "The true consideration or the want of consideration may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts to show a valuable consideration." 209 Cal. at page 670, 290 P. at page 15. This is in accordance with section 1962, subdivision 2, Code of Civil Procedure, which provides that the following presumption is deemed conclusive: "The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; *but this rule does not apply to the recital of a consideration*". (Emphasis added.)

[5] The rule of these cases is succinctly stated in the *Muir* case, supra, 152 Cal. at page 636, 93 P. at page 858, " * * * as between the original parties to an instrument, nothing is better settled than that the maker may show an original lack of consideration, or subsequent failure of consideration, which latter was done in this case.

And equally is it well settled that such lack or failure of consideration may be shown by parol. [Citations.]”

[6] Moreover, “Parol evidence is admissible to show absence or failure of consideration as against one not a holder in due course.” Brannan’s Negotiable Instruments Law, Beutel, 6th ed., § 28, p. 416.

“There is nothing in the Act or in the rule against parol evidence to vary the terms or legal effect of a writing which, as between the parties, precludes proof of no consideration or failure of consideration.” Uniform Laws, Annotated, vol. 5, part 1, § 28, note 341, p. 395.

Then, there is a line of cases holding that parol evidence cannot be admitted for this purpose because it would violate the parol evidence rule. Among these cases is *McArthur v. Johnson*, supra, 216 Cal. 580, 15 P.2d 151, where in an action on a note, parol evidence was admitted which tended to establish an oral agreement that it was to be paid only out of the maker’s share of certain commissions earned jointly by him and the payee. On appeal it was held that such evidence was inadmissible to show an agreement that the note should be paid out of a particular fund. There, the parol evidence was to show that the note, differing from its face, was to be paid only out of certain commissions. In our case it was not to be paid necessarily from the moneys to be received from Andrew Williams but only if defendant received such moneys. If he did not, the consideration would fail. This, however, is a distinction without a difference. *Van Fleet-Durkee, Inc., v. Oyster*, 91 Cal.App.2d 411, 205 P.2d 32, likewise held that parol evidence to prove that the notes were to be paid only out of profits of the mining venture was not admissible. Apparently, however, it held admissible evidence to show that there was an understanding that the notes were to be cancelled as a part of the maker’s interest in a new partnership.

[7] In the cases strictly applying the parol evidence rule, above mentioned, there was no discussion of the defenses of want or failure of consideration, and therein lies the distinction between the two lines of

cases. In our case, the language of the answer is susceptible of the interpretation that the \$5000 which decedent received from plaintiff on the execution of the note was merely an advance part payment of the moneys due decedent from the other corporation, to be repayable only in the event decedent received that indebtedness. This was a situation similar to that in *Cooper v. Cooper*, supra, 3 Cal.App.2d 154, 39 P.2d 820, where through the admission of parol evidence the note was held to be merely a memorandum of the transaction. In our case the moneys to come from the other corporation not having been received, there would be a partial failure of consideration for the note executed by him.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



GOWANLOCK v. TURNER et al.*

Nos. 15359, 15449.

District Court of Appeal, First District,
Division 1, California.

April 30, 1953.

Hearing Granted June 18, 1953.

Class suit brought by platform men and bus operators employed in the operating department of municipal railway system for a determination of a controversy over the interpretation and application of the city and county charter provisions governing their hours of work and rates of pay. The Superior Court, City and County of San Francisco, rendered judgment favorable to petitioners, and an appeal was taken. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that charter provision, defining basic work day as eight hours, to be completed within ten consecutive hours, and providing overtime pay for all labor performed in excess of eight hours in any one day, did not guarantee either eight hours work per day or eight hours pay per day.

Reversed in part and affirmed in part.

* Subsequent opinion 267 P.2d 310.

1. Municipal Corporations Ⓒ213

Municipal charter provision, defining basic work day for municipal bus operators as eight hours, to be completed within ten consecutive hours, and providing overtime pay for all labor performed in excess of eight hours in any one day, did not guarantee either eight hours work per day or eight hours pay per day.

2. Statutes Ⓒ227

Declaration in statute is directory, not mandatory, unless means are provided for its enforcement. St.1931, p. 3050, § 125.

3. Municipal Corporations Ⓒ213

Municipal charter provision, requiring that municipal bus operators' wages be fixed by averaging highest wage schedules in effect on other street railway systems in state, required utilization of minimum wage guarantee factors of such other systems in calculating wage to be paid local bus operators. St.1911, p. 437.

4. Mandamus Ⓒ14(1)

Demand upon civil service commission was not necessary condition present to maintaining mandamus to force commission to act, where it appeared that demand upon commission would have been futile.

5. Declaratory Judgment Ⓒ292

Fact that employees, petitioning for determination of controversy over interpretation of municipal charter provisions governing wages and hours of municipal bus operators, had attained seniority which, under present operating conditions, assured them of minimum wage, did not deprive them of right to raise question as to whether charter guaranteed minimum wage, since changing conditions might make minimum wage guarantee of value to them.

6. Declaratory Judgment Ⓒ305

Where petitioners appeared, in suit for determination of controversy over interpretation of municipal charter provisions governing wage and hour rates of municipal bus operators, not as members of union but as employees of municipality, and neither of unions representing em-

ployees in operating department of municipal railway system was, as such, a party to action, fact that petitioners belonged to but one of the two unions would not deprive them of right to prosecute class suit.

Dion R. Holm, City Atty., City & County of San Francisco, and A. Dal Thomson, Public Utilities Counsel, City & County of San Francisco, San Francisco, for appellants Turner and others.

Lamson, Jordan & Walsh, San Francisco, for appellant Robinson.

Tobriner & Lazarus, Mathew O. Tobriner, Stanley H. Neyhart, San Francisco, for respondents.

FRED B. WOOD, Justice.

The petitioners, permanent employees of the city and county of San Francisco, platform men and bus operators in the operating department of the municipal railway system, brought this action on their own behalf and on behalf of all other employees similarly situated, to determine a controversy over the interpretation and application of sections 125 and 151.3 of the City and County Charter concerning hours of work and rates of pay of such platform men and bus operators.

The action was brought against the Manager of Utilities of the Public Utilities Commission of the city and county, members and the secretary of the Civil Service Commission, and the controller of San Francisco. They were designated "respondents," below. Joseph Robinson, a taxpayer of San Francisco, intervened as a respondent on his own behalf, and on behalf of all taxpayers similarly situated.

The complaint contains five counts. In the first four counts the petitioners seek writs of mandate; in the fifth count they pray for declaratory relief.

The trial court found for the petitioners on Counts One, Four and Five, and rendered judgment thereon in their favor. The respondents, including the intervenor, have appealed from the judgment.¹

1. Hereafter in this opinion, we will refer to the respondents as "appellants"

and to the petitioners as "respondents" unless otherwise indicated.

In addition to the major questions of interpretation, appellants present these questions: Is the judgment uncertain and contradictory in its several provisions? Are the respondents in a position, have they the legal right, to raise the questions which they present? Is there a legal basis for viewing this as a class suit? We will consider the major questions first.

(1) *In respect to hours of service and overtime, section 125 of the charter* states that "Persons employed as platform men or bus operators in the operating department of the municipal railway system shall be subject to the following conditions of employment: The basic hours of labor shall be eight hours, to be completed within ten consecutive hours; there shall be one day of rest in each week of seven days; all labor performed in excess of eight hours in any one day, or six days in any one week, shall be paid for at the rate of time and one-half." Stats.1931, ch. 56 of Res., p. 2973, at 3050.²

This clause was first placed in the charter in 1925, by an amendment adding section 20 to Article XII of the former charter. Stats.1925, ch. 10 of Res., p. 1159, at p. 1164. It then read as now except that in the introductory portion the words "shall receive" appeared where the words "shall be subject to" now appear.

Respondents interpret this clause as prescribing for them a work day of eight hours within a range of ten hours, guaranteeing them eight hours of work in ten hours upon six days of each week, and awarding them pay for the full eight hours in ten each day even if the work assignment on a particular day covers a shorter period, such as three, four, or six hours.

Appellants interpret this clause as a formula for the payment of overtime (not as a guarantee of eight hours of work within a spread of ten each day), that it simply prescribes overtime pay (time and one-half) for all hours worked in excess of eight within ten hours and for all hours worked after the expiration of the ten-hour

range regardless of the number of hours worked within the ten-hour range.

The trial court found and declared that this clause provides "that each petitioner and employee similarly situated should receive and be paid for eight hours of work in each scheduled working day, said eight hours of work to be completed within ten consecutive hours after commencement of work, and * * * that all labor performed in excess of eight hours in any one day shall be compensated for at the rate of time and one-half the rate of pay for such work." Finding IX, C.T. 71; Concl. of Law, (a), substantially the same, C.T. 85; that the "purpose and intent of section 125 was to enable the employees of the Railway to complete a day of eight hours of work within ten hours", Finding XX, C.T. 82; Concl. of Law, (k), C.T. 90.

The judgment directs the issuance of a writ of mandate commanding appellant Turner, Manager of the Public Utilities Commission of San Francisco, to approve and transmit to the appellant Civil Service Commission time rolls or pay rolls showing "that each petitioner and employee similarly situated is credited for at least eight (8) hours of work on each scheduled work-day, in which each petitioner and employee similarly situated: (a) reports for work, and (b) performs each and every street car, bus or operating assignment designated within ten hours after reporting for said work * * *." Judgment, (1), C.T. 94-95; follows Concl. of Law, (e), C.T. 86-87. The judgment also declares that "each petitioner and employee similarly situated is entitled to wages for at least eight (8) hours of work performed by each petitioner and employee similarly situated on each scheduled work day, in which each petitioner and employee similarly situated: (1) has reported for work, and (2) has performed each and every street car, bus or operating assignment designated within ten hours after reporting for said work." C.T. 95; follows Concl. of Law, C.T. 85.

[1,2] *We do not find in this clause any guaranty of eight hours work per day, nor*

2. Subsequent amendments of § 125 have made no changes in this clause. See

Stats.1941, p. 195, at 202; and p. 3250, at p. 3251.

any guaranty of eight hours pay per day. It is neither a minimum nor a minimum-maximum hours or wage per day provision.

This clause is so clear and cogent in its wording, we find it difficult to express its meaning in other words than those which it uses. It starts with the statement: "The basic hours of labor shall be eight hours, to be completed within ten consecutive hours". Basic³ for what? We may reasonably expect to find that out later on in the sentence. Without more, we have nothing but a formula: Eight hours in ten. Next it says, "there shall be one day of rest in each week of seven days". This, too, is a formula; one day in seven. Next come the words that give significance to these formulae. They tell us the use we must make of these formulae: "all labor performed in excess of eight hours in any one day, or six days in any one week, shall be paid for at the rate of time and one-half." These formulae are to be used in ascertaining what is overtime. Use of the first formula indicates that labor performed "in excess of eight hours in any one day," comprehends all work done after the lapse of ten hours as well as all work done after eight hours of actual service. The second formula operates in similar fashion. All labor performed "in excess of * * * six days in any one week [all work done on the day of rest]," must be paid for at time and one-half. With this, each formula exhausts its function. The charter requires no further use of it.

Let us make another approach. It is a familiar principle of statutory interpretation that a declaration in a statute is directory, not mandatory, unless means be provided for its enforcement. The only means of enforcement here provided is the requirement that all labor performed in excess of eight hours in any one day, all labor performed after the span of ten hours in any one day, and all labor performed in excess of six days in any one week (all work done on the day of rest) "shall be paid for at the rate of time and one-half." Nothing is said about paying for labor not per-

formed if a person's hours of work on a given day fall short of eight hours or fall short of eight hours within a span of ten or are less than 48 hours upon six days of a given week. We can but conclude that this clause was not intended to require payment for labor not performed, was not intended to guarantee eight hours of work per day, was not intended to guarantee eight hours of pay per day.

Persuasive of this view is the interpretation made by the Supreme Court of the United States, of a federal statute which declared that "eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or on behalf of the government of the United States". Act of June 25, 1868, ch. 72; 15 Stat. L. 77. The court deemed this but a direction by the government to its agents and not a prohibition of the making of contracts which fixed a different length of time for a day's work. The court said "the government officer is not prohibited * * * from agreeing, when it is proper, that a less number of hours than eight shall be accepted as a day's work." *United States v. Martin*, 94 U.S. 400, at page 403, 24 L.Ed. 128; followed in 1915 by the Supreme Court of Massachusetts, in *Woods v. City of Woburn*, 220 Mass. 416, 107 N.E. 985, interpreting a similar state statute. Respondents cite three cases in support of their interpretation of section 125. *Chatfield v. City of Seattle*, 198 Wash. 179, 88 P.2d 582, 121 A.L.R. 1279; *Goss v. Justice of District Court of Holyoke*, 302 Mass. 148, 18 N.E.2d 546; and *Graham v. City of New York*, 167 N.Y. 85, 60 N.E. 331. But those cases are not helpful. In none of them is the precise text of the significant provision of the salary and hours fixing statute or ordinance completely furnished. In the *Goss* case, none of it is furnished. In the *Chatfield* case only the hours per day feature ("Eight hours shall constitute a day's work" [198 Wash. 179, 88 P.2d 589]), not the wage feature, is given. The decision as printed does not give that portion of the

3. "Basic" means: Of or pertaining to the base or essence; fundamental; as, a basic fact; constituting a basis; as, a

basic wage. Webster's New International Dictionary, 2d Ed.

ordinance which implemented this declaration concerning hours of work. This declaration, standing alone, unaided by any enforcement feature, would be directory, not mandatory. There must have been something in the ordinance which made it mandatory. In the Graham case the court did not quote the statute. It did say that "The salary was \$1,200 a year, payable in equal monthly installments." That bears no similarity to our section 125.

Let us also examine the City and County Charter as it read in 1924 and 1925, during the time when this amendment to that charter was written, presented to the voters of San Francisco, and considered and approved by the Legislature of the State.

We find one feature of the charter which was particularly significant. Section 33 of Article XVI declared: "No deputy, clerk, or other employé of the city and county shall be paid for a greater time than that covered by his actual service."⁴

If the proponents of the 1925 amendment desired to require payment of eight hours of pay per day even though on a given day a fewer number of hours of labor be performed, they should have said so in no uncertain terms, in order to negative the prohibition of no pay "for a greater time than that covered by his actual service" declared in section 33 of Article XVI of the very charter being amended. The fact that they did not do so is persuasive of the view that they harbored no intent to make such a requirement.

Another provision of the old charter similarly serves as an aid to interpretation. We refer to section 7b of chapter 2 of Article III. It was one of a number of sections which dealt with street railway franchises granted by the city and county. They were added to the charter in 1911. Section 7b declared: "Every franchise shall provide that employees of the person or company or corporation operating a street railroad shall be paid not less than three dollars

a day and that eight hours shall be the maximum hours of labor in any calendar day, the same to be completed within ten hours; *provided*, that nothing in this section shall be construed to prohibit overtime employment, wages for such employment to be paid at one and one half times the said rate of wages proportionate to each hour of such extra service."⁵ Here we have in clear and unmistakable terms a minimum wage and maximum hours provision, followed by permission for overtime employment if paid for at time and one-half. With such a provision already in the charter, concerning street railways privately owned, its omission from the 1925 amendment, concerning street railways publicly owned, suggests that the sponsors of that amendment intentionally avoided, studiously avoided, writing into their proposal either a guaranteed wage or a guaranteed hours per day provision.

Let us next consider the interpretation given this clause of the 1925 amendment by the officials charged with its administration, and by their legal adviser, before this controversy arose and this question reached the courts for consideration and determination.

The concurrent resolution approving this amendment to the charter was filed with the Secretary of State, January 27, 1925, Stats.1925, p. 1159, and took effect on that date. Pol.C., § 324; now Gov.Code, § 9602.

Meanwhile (January 16, 1925), Superintendent F. Boeken reported to the Board of Public Works (then in charge of the municipal railway) that schedules for all lines had been practically completed to meet the requirements of the new charter amendment. He estimated that of the 980 platform men required, 348 would be extra men, and estimated that the earnings of the latter would be reduced from \$153 to \$90 per month.

4. Section 33 was a part of the former charter from its inception, Statutes of 1899, ch. 2 of Res., p. 241, at p. 364, and continued therein, unchanged, until that charter was superseded by the new charter in 1932. It was carried into section 150 of the new charter, enlarged

to include officers. Stats.1931, ch. 56 of Res., p. 2973, at p. 3066.

5. Added to the charter by the Statutes of 1911, ch. 25 of Res., p. 1661, at p. 1694. It continued unchanged during the life of the former charter. It was a part of that charter in 1924 and 1925.

Frank B. Halling, during that period, was president of Local 518 of the Amalgamated Street Railway Employees of America. March 10, 1925, he wrote Superintendent Boeken, at the latter's request, giving his interpretation of the new amendment.⁶ He said in part "Our interpretation of the foregoing [§ 20 of Art. XII of the Charter] and also the opinion of legal minds with whom we have consulted is that the stipulations contained therein merely provide a basis of compensation and do not prevent the performance of any labor beyond the limitations described.

"Supplementary to our opinion we refer you to the Adamson Eight Hour Law for Trainmen which while not identical, is in many respects similar to Charter Amendment No. 21.

"We might also refer you to employment in many industries where the hours of labor must be stretched over a range that will supply the requirements of all concerned; in which event, the employer is subject to a penalty similar to that affixed by Amendment No. 21.

"As an illustration of our opinion as to how the law would apply where the ten hour limit as set forth in the Amendment has been exceeded we present a few examples where runs exceed said limit:

"Run 15-A, reports at 7:49 A.M. relieved at 11:19 A.M. first part; reports for second part at 2:14 P.M. and finishes at 6:36 P.M.

"Here you will find that from 7:49 A.M. until 5:49 P.M. is the ten hour range.

"The law provides that the crew working said run shall be paid straight time for work actually performed therein; which is in this instance, 7 hours and 5 minutes, and, for all work actually performed beyond the ten hour range, which in this particular case is 47 minutes, they shall be paid at the rate of time and one-half or one hour and eleven minutes; making a total of 8 hours and 16 minutes.

"Tripper runs would be treated in the same manner.

"36-J, reports at 6:20 A.M. off at 8:37 A.M., reports for second part at 3:09 P.M. off at 6:03 P.M.

"6:20 A.M. to 4:20 P.M. being the ten hour range, straight time prevails for all labor performed therein; which is 3 hours and 36 minutes, and the overtime rate prevails for labor performed between 4:20 P.M. and 6:03 P.M., which is 1 hour and 43 minutes; computed at the overtime rate is 2 hours and 34 minutes, making a total for this run of 6 hours and 11 minutes.

"The other feature of the amendment relative to one day of rest in seven may be construed in this manner.

"You will note that the amendment establishes eight hours as being the basic day and that therefor an employee working less than eight hours in any one day is not subject to this portion of the Amendment and may be permitted to work on the seventh day at straight time.

"This may continue until such employee has worked 208 hours which is equivalent to 26 eight hour days, after which, the overtime rate shall prevail.

"Providing that the time consumed in putting in the 208 hours shall have exceeded 26 days in one month."

During March and the early part of April a number of conferences, attended by Superintendent Boeken and other city officials and representatives of the men, were held in an endeavor to work out a satisfactory method of operation under the new amendment. April 15, 1925, in response to a series of questions propounded by the Board of Public Works, the city attorney rendered an opinion in which he said in part: "Most legislation limiting the hours of employes and restricting the number of days a week upon which labor may be performed, is adopted upon the theory that the shortening of time of labor promotes the health and comfort of the employe, and therefore, produces greater efficiency. But it is manifest from the very language of Section 20 that it does not restrict the hours of labor for that reason. It creates a basic day and a basic

6. The parties stipulated that the San Francisco Labor Council was one of the sponsors of the 1925 amendment.

week for the purpose of fixing compensation. It is expressly declared:

"The basic hours of labor shall be eight hours to be completed within ten consecutive hours; there shall be one day of rest in each week of seven days. All labor performed in excess of eight hours in any one day or six days in any one week shall be paid for at the rate of time and one-half."

"Therefore, it was manifestly the intention of the framers of this section of the charter that the men should be allowed to work in excess of the basic hours, but that in the event that they did work they should receive extra compensation. It is meaningless to provide a restriction upon the hours of actual labor when in the same sentence, it is expressly declared that all labor performed in excess of eight hours in any one day or six days in any one week shall be paid for at the rate of time and one-half. The act forbidding females to work more than eight hours in twenty-four is direct and positive with no provision for the payment of any overtime and prescribes a penalty for its violation. Statutes 1911, page 437. So are all similar acts prescribing the limitations upon the right to labor."

He was further of the opinion that the provision that "the basic hours of labor shall be eight hours, to be completed within ten consecutive hours" did not prevent the persons referred to from performing their work within a period of time in excess of ten hours; also, that it would be lawful for a platform man who had worked eight hours a day for six consecutive days, to work on the seventh day, and that the same was true of a man who worked less than 48 hours during that six day period; and that "the employe is entitled under the said section to time and one-half for any and all time after the period of ten consecutive hours has elapsed during which time he has actually worked," and "the employe who works on the seventh day is entitled to time and one-half."

April 24, 1925, the Board of Public Works adopted a resolution directing the superintendent of the railway to so arrange the schedules that no platform man or bus operator be employed on the seventh con-

secutive day (except men on the extra list who had worked less than 48 hours in six days; all work on the seventh day to be paid for at time and one-half); to so arrange the schedules that a minimum of overtime would be required of an employee who worked eight hours in any given day; and to fix eleven hours as the maximum range to be used. In that resolution the board recited in part that "the City Attorney in answer to the inquiries of this Board expresses as his opinion that the terms of the charter amendment recently ratified by the Legislature pertaining to the Municipal Railway, do not prohibit the employment of platform men or bus operators on the seventh consecutive day, nor in excess of eight hours in any given day, nor beyond a range of ten hours in any given day, provided that in case said employee is employed on said seventh day, or in excess of said eight hours, or outside a range of the said ten hours, he must be paid time and one-half therefor" and that "the amendment referred to was drafted and presented by the members of Division No. 518 of the Amalgamated Street Railways Employees of America, who were particular to have incorporated therein the following: 'There shall be one day of rest in each week of seven days.'"

Thus, it appears that at the very beginning of operations under the new charter amendment in 1925, the officials charged with its administration and enforcement, their legal adviser, and the representatives of the platform men and bus operators interpreted its provisions substantially the same as do the appellants herein.

Has there been any material change in that interpretation, over the years, upon the part of the administrative officials? The evidence indicates there has been no such change. At the trial, the parties entered into a stipulation setting forth the significant facts concerning the establishment of routes for the operation of street cars and motor coach or trolley coach lines, the working schedule, runs necessary to service the routes, the "general sign-up," "extra lists" of men, and other related matters, descriptive of the method of operating this railway as of the time of trial. The facts so stipulated reflect no

change of administrative interpretation from that adopted early in 1925. The stipulation is too long for inclusion in this opinion. The following excerpt will serve to illustrate the administrative interpretation which the facts recited reflect: "(10) At the Geneva and Ocean Avenue Headquarters, all of the employees on the extra list are required to remain on report time, and during a time when a run is not yet available, and are paid for said period of time at the straight time rate for not less than two hours and for such additional time at said rate as may be required by the Dispatcher for report time. * * * [Similar provisions concerning other Headquarters.] * * * On occasions, it occurs that a man on the extra list at one Headquarters is needed at another, in which event said man is sent by Management from the former to the latter, with his traveling time compensated for at the legal rate; (11) Some of the men on the extra list are not afforded an opportunity by the Municipal Railway to work eight hours a day. The management of said Railway, including Respondent Turner and the Public Utilities Commission of the City and County of San Francisco, have, for some time last past, maintained and now pursue the policy of providing for work for men upon the extra list to the extent that each man thereon obtains a minimum, throughout a period of two weeks, of pay representing forty hours per week, although said man (referring to 'some of the men', as above stated in line 23), are ready and desirous of working eight hours a day."7

Concerning the continuity of administrative interpretation over the years, 1925-1951, some evidence was adduced at the trial. April 23, 1932, Fred Boeken, manager of the municipal railway, issued a bulletin which stated: "Commencing Monday, April 25, 1932, no allowance will be made in the way of overtime for runs which extend beyond a range of ten (10) hours." April 29, 1935, these provisions were revoked by a new bulletin issued by

the manager, reading as follows: "Commencing Wednesday, May 1, 1935, overtime will be allowed for runs which extend beyond a range of ten (10) hours." William H. Scott, now general manager of the municipal railway (from 1913 to 1935 he was auditor), produced the record which contained these bulletins. He testified that from 1917 until the creation of the present Public Utilities Commission in 1932, he represented the municipal railway in all labor negotiations. Mr. Bullock represented the Board of Supervisors and Mr. Hammond the Board of Public Works. That was before and after 1925. During that period of time he was never confronted with any demands to the effect that the workmen on this railway were guaranteed an eight-hour day. The first time that he realized that a demand was being made by any employee of the railway to the effect that the charter guaranteed him an eight-hour day was in the spring of 1949 at a meeting in Mr. Turner's office, attended also by three or four union representatives. Edward G. Cahill was manager of utilities from April 1, 1932, until October, 1945. In that capacity he certified pay rolls upon the municipal railway. In performing that function he was mindful of the requirement of section 150 of the new charter that "No officer or employee shall be paid for a greater time than that covered by his actual service", and abided by it. He testified that the 1932 bulletin which we have quoted did not come to his attention until sometime after its issuance. In late 1934 he was approached by union representatives concerning it. He investigated the situation, took it up with the Public Utilities Commission and recommended that it be changed. This resulted in the above quoted bulletin of 1935. During those discussions with the union representatives, Cahill said, no claim was made by them that the men were entitled to an eight-hour day by virtue of the charter provision. Henry S. Foley, an employee of the municipal railway for approximately 33 years preceding 1951, was one of those represen-

7. The evidence shows a marked unevenness in rider demand each day. It is extremely high in the morning between 7:20 and 8:40 and in the evening be-

tween 4:55 and 5:30. In consequence, by 7:00 P.M. two-thirds of the equipment is withdrawn from service and by midnight demand is extremely low.

tatives. He testified that in 1946 the City and County Controller notified the railway management they would have to discontinue paying for "dead time"; at that time operators whose runs finished at 7:45, and so on, up to eight hours were paid a full eight hours' pay. Subsequently, Foley requested reinstatement of the practice of allowing eight hours' pay for such runs.

William H. McRobbie, engaged in various employments on the municipal railway over the years, a member of the same union as Mr. Foley, testified that he was active in the union in 1932, and following, to restore the range time, overtime pay for work done after the ten hour span. Finally, his committee met with Mr. Cahill, the Mayor, and the City Attorney. There was a discussion as to whether it was legal to pay this penalty time for any work performed in excess of ten hours spread. The City attorney orally stated that in his opinion it was legal. That meeting was about two weeks before the issuance of the 1935 bulletin restoring range time. Asked if at that meeting there was any assertion that the men, by virtue of the charter, were afforded a guarantee of eight hours a day, he said "No, there was no assertion that the men, all the men would be guaranteed eight hours a day; however, we did contend that the regular runs should be eight hours and any work performed in excess of the ten hours spread should be paid for at the rate of time and a half; that was all that was discussed." Concerning the regular runs, he explained that the city and county had been giving eight hours pay for those runs which were in fact but seven hours and 45 minutes; that after the range time was taken away, the contention was being made by those who took it away that the pay for such runs should be only for actual time, seven hours and 45 minutes. He said that he and his committee did refer to the charter "in this respect: That the implication was contained in that Charter amendment that would pay time and a half for all work in excess of the ten hour spread; that was the main contention at that time"; that there was also talk "for the restoration of that pay between seven hours and forty-five minutes and eight hours."

Respondents attach some significance to two items which they suggest show an administrative interpretation in favor of an eight hour guaranteed work day. The first of these appears in a letter dated March 19, 1925, from Mr. Boeken, then superintendent of the municipal railway, to Hon. Ralph McLaren, then Acting Mayor of San Francisco, concerning the problem of complying with the provisions of Charter Amendment No. 21, the 1925 amendment. Concerning estimated costs for an average month, there was included this item: "Cost for time allowed for runs under eight hour \$2,898.23. This item does not enter into Amendment 21." Appellants explain this statement by reference to management's established practice prior to 1946 of paying a full eight hours' pay for a regular run of seven hours and 45 minutes. This seems the only reasonable inference that can be drawn considering the relatively low monthly cost noted, and in view of the interpretations made of the 1925 amendment by the city attorney in April and by Mr. Halling, president of Local 518, in March, 1925. The second item consists of an unsigned memorandum dated September 4, 1925, entitled "Municipal Railway, San Francisco, data re working conditions of platform men." This memorandum was prepared in response to a written request from another transit company and consists of a short summary of working conditions before and after the effective date of Charter Amendment No. 21. In it this statement appears: "Previous to Charter amendment, schedules were made out on an eight hour day with no limits as to range, except that they were kept as near ten hours as possible. All *regular* runs under eight hours were paid full eight hours and time and one half was paid for all time beyond eight hours and twenty minutes. Number of hours after Charter amendment 21? Conditions same as above, except that overtime is paid after eight hours instead of after eight hours and twenty minutes, and one [and one-] half time is also allowed after the tenth hour range. * * *" (Emphasis added.) The statement concerning eight hours' pay for all regular runs should be read in the light of the practice then in force of treating a regular run of seven

hours and 45 minutes as the equivalent of a full eight-hour regular run. We conclude that these two items, viewed in their setting, are in harmony, not in conflict, with our analysis of the administrative interpretation.

This is all of the significant evidence of administrative interpretation which has been brought to our attention by the parties or discovered by us in the record. It does not support the finding that the "administrative construction adhered to throughout the years of Section 125 of the Charter is not in contravention of petitioner's [respondents', upon this appeal] construction."

(2) *In respect to the fixing of "the wages of platform employees and bus operators of the municipal railway", section 151.3⁸ of the charter* directs the Civil Service Commission, each year, to certify to the Board of Supervisors "the two highest wage schedules in effect on July 1st of that year for" such employees "of other street railway systems in the State * * *."

The board thereupon fixes wage schedules for such employees "which shall be the average of the two highest wage schedules so certified" by the commission. If such average is less than the rate fixed therefor in San Francisco's salary standardization ordinance adopted March 18, 1946, the board shall fix the wage schedules at the same rates as those fixed in that ordinance.

Respondents claim that section 151.3 requires the commission to include guaranteed hourly, weekly, or monthly wage rates, if any, in effect in such other railway systems. The appellants claim that 151.3 does not require the inclusion of any such guaranty factors.

The court found that in 1949 the commission certified that the wage schedules of Torrance Municipal Bus Lines, Torrance, and the California Street Cable Line, San Francisco, were the two highest. The court further found that the Torrance schedules

provide monthly guaranteed wages ranging from \$231 to \$265 according to the number of years of service of the employee; also, that the California Street Cable schedule provided for a guaranteed work week of six days or 48 hours per week;⁹ but that the commission refused to certify those elements of the two highest wage schedules, certifying only the hourly rate for each. In this connection we observe that the court also found that the commission when certifying the Torrance hourly rate, included the several monthly wage rates ("1st year of service \$221 per month equal to \$1.275 per hour * * * 5th year of service \$265 per month equal to \$1.52884 per hour") and recited "Factor used to convert to per hour rate is — 4 $\frac{1}{3}$ weeks of 40 hours each per month or 1.73.33 hours per month."

The court found that because of the omission of the "minimum guaranteed work week features" of these two systems from the certification, the commission had deprived the respondents and others similarly situated of a "daily and weekly wage equivalent to the average of the wages receivable by platform employees and bus operators" of the two systems mentioned.

The conclusions of law followed these findings. The judgment gave declaratory relief and ordered the issuance of a writ of mandate requiring the commission to certify to the Board of Supervisors "in addition to the hourly rate of wages of the two highest wage schedules in California, any guarantee or minimum daily, weekly, or monthly wage contained in said schedules, affecting the wage rate or wages."

Although this conclusion may have been based in part upon the premise that section 125 guarantees wages for at least eight hours each scheduled work day upon which an employee performs every assignment given him, the conclusion does not necessarily fall with that premise. If section 151.3 should, in a given year, guarantee a mini-

8. Stats.1947, ch. 2 of Res., p. 3264, at p. 3266.

9. Appellants do not question the accuracy of this finding as to these features of the Torrance and California Street

schedules, except that they claim that the California Street "extra platform men were in direct terms excluded from the eight hour provision."

mum wage because the two highest wage schedules of other systems embrace such a provision that year, it would operate and apply to the respondents and others similarly situated quite independently of section 125. Especially so, in view of the positive declaration in section 151.3 that the wages of platform employees and bus operators shall be determined and fixed as provided in section 151.3 "Notwithstanding the provisions of section 151 or any other provisions of this charter".

Let us analyze the significant portions of section 151.3.

It was added to the charter as a new section by an amendment which took effect January 15, 1946. Ch. 8 of Res., 1st Ex. Sess.1946; printed in Stats.1947, p. 219, at 233. At that time it provided for the establishment of rates of pay for "groups and crafts" predicated upon rates fixed in collective bargaining agreements, under the conditions described in section 151.3.

The section was later enlarged by an amendment which took effect January 7, 1947. Stats.1947, ch. 2 of Res., p. 3264, at 3266. The amendment slightly modified the original text and added the provisions which now govern the fixing of wage schedules for platform men and bus operators. In this form section 151.3 consists of two distinct parts, although not separately designated as such by paragraph or subdivision numbers. For convenience of reference we designate them as Part I (the original text as modified in 1947) and Part II (the substantive addition made in 1947).

It is important to consider both Parts, for Part I has been judicially interpreted. That interpretation may be helpful in ascertaining the meaning of Part II. The significant portions of the section read as follows:

"Section 151.3 [Part I] Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid through-

out the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as the compensations for such groups and crafts engaged in the city and county service. The rate of pay so fixed by the board of supervisors shall be determined on the basis of rates of pay certified by the civil service commission on or prior to April 1st of each year and shall be effective July 1st following: provided, that the civil service commission shall review all such agreements as of July 1st of each year and certify to the board of supervisors on or before the second Monday of July any modifications in rates of pay established thereunder for such crafts or groups as herein provided. The board of supervisors shall thereupon revise the rates of pay for such crafts or groups accordingly and the said revised rates of pay so fixed shall be effective from July 1st of the fiscal year in which the said revisions are determined.

* * *

"[Part II] Notwithstanding the provisions of section 151 or any other provisions of this charter the wages of platform employees and bus operators of the municipal railway shall be determined and fixed, annually, as follows:

"(A) On or before the second Monday of July of each year the civil service commission shall certify to the board of supervisors the two highest wage schedules in effect on July 1st of that year for platform employees and bus operators of other street railway systems in the State of California;

"(B) The board of supervisors shall thereupon fix wage schedules for platform employees and bus operators of the municipal railway which shall be the average of the two highest wage schedules so certified by the civil service commission; provided, if the average of the two highest wage schedules shall be less than the rates of pay fixed for such service in the salary

standardization ordinance adopted by the board of supervisors on March 18, 1946, the board of supervisors shall fix wage schedules for such service which shall be the same as the rates fixed for such service in the said ordinance;

"(C) When, in addition to their usual duties, such employees are assigned duties of instructors of platform employees or bus operators they shall receive twenty (20¢) cents per hour above the rates of pay fixed for platform employees and bus operators as herein provided;

"(D) The rates of pay so fixed for platform employees and bus operators as herein provided shall be effective from July 1st of the fiscal year in which such rates of pay are certified by the civil service commission;

"(E) Platform employees and bus operators shall be paid one and one-half times the rate of pay fixed as herein provided for all work performed on six days specified as holidays by ordinance of the board of supervisors for such employees. * * *

Part I was interpreted by this court in *Adams v. Wolff*, 84 Cal.App.2d 435, 190 P.2d 665. (A petition for a hearing by the Supreme Court was denied by that court.) The case involved the rates of pay of municipally employed machinists and mechanics.

The pertinent collective bargaining agreements prescribed pay at a fixed sum for day work on the basis of a work week consisting of five days, except that when certain holidays fell on work days the same rate of pay per week was fixed, pay for a four-day week with such holidays off without loss of pay. Also, those agreements increased the rate of pay 10% and 15%, respectively, for work on night and midnight shifts. They also provided that a foreman would receive 10% in excess of the journeyman rate. (The city conceded the foreman pay differential if Part I were found constitutional.)

The judgment of the trial court allowed the holiday pay, the increased rates for night and midnight shifts, and the increased rate for foremen. We affirmed the judgment.

We did so after analyzing the section [Part I] and finding that by it "the people have set up a standard for determining rates of pay that will insure these public employees a wage scale commensurate with wages received by workers in the same field in private industry." 84 Cal. App.2d at page 443, 190 P.2d at page 671.

Concerning holiday pay and premium pay on the night and midnight shift, we said: "Section 151.3 requires the 'rate of pay' to be fixed in the manner there set forth. It is contended that this relates only to the 'basic' rate of pay, and that holiday and premium pay on night shifts does not relate to the 'basic' rate of pay but relates to 'working conditions,' and it is urged that the fixing of working conditions is beyond the scope of § 151.3. It is probably true that § 151.3 relates only to the 'basic' rate of pay and does not relate to 'working conditions.' But that in no way assists defendants. It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry. That means that when the public employees work on a night shift, or where a work week is interrupted by a holiday they are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that night shift pay and pay for holidays is a part of the 'basic' rate of pay, and is as much a part of the wage structure as the hourly wage itself. If evidence were necessary on such an obvious matter it was supplied by Norman Beals, San Francisco representative for the State Personnel Board, who so testified. The 'basic' 'rate of pay' is the take home pay of the employee. The charter provision guarantees that the take home pay of public employees shall be the same as private employees. That obviously includes holiday and premium pay for night work." 84 Cal.App.2d at pages 444-445, 190 P.2d at page 671.

Later, we had for consideration the question whether or not Part I of section 151.3 envisioned and embraced provisions for vacation with pay (five days each year,

after one year of service; ten days, after three years of service) if contained in the pertinent collective bargaining agreements. We concluded that it did, by the same process of reasoning as that used in *Adams v. Wolff*, supra. *Adams v. City and County of San Francisco*, 94 Cal.App.2d 586, 211 P.2d 368, 212 P.2d 272. A petition for hearing by the Supreme Court was denied by that court. We said: "The 'rate of pay' is the 'take home pay' of those on the list of employees in good standing eligible for active duty. * * * Pay for an unworked holiday is part of the basic rate of pay. *Adams v. Wolff*, supra. The number of holidays is designated in the private collective bargaining agreement. With equal right and authority may the same agreement control the number of vacation days. The *period of vacation*, if any, set forth in a private bargaining agreement is the period that the public employees must accept, for the reason that it is part of the basis upon which 'rate of pay' is computed." 94 Cal.App.2d at page 592, 211 P.2d at page 372.

We further observed: "The holding in *Adams v. Wolff*, supra, that section 151.3 [Part I] was intended to equalize take home pay and that holiday pay is a part of the basic rate of pay must be considered controlling, and forces a determination that vacation pay directly and with certainty affects the hourly, the weekly, the monthly or the yearly wage." 94 Cal.App.2d at page 594, 211 P.2d at page 373.

The five and ten day vacation periods which Part I of section 151.3 thus prescribed, prevailed over the two weeks' period prescribed by section 151 of the charter because of the declaration at the very beginning of Part I that its provisions operate and apply "Notwithstanding any of the provisions of section 151". Later, the addition of sections 151.4¹⁰ and 151.5¹¹ modified the scope of section 151.3, (both Part I and Part II) in relation to vacation privileges. That modification leaves intact the scope and application of Parts I and II of section

151.3 in relation to other "take home pay" features appearing in collective bargaining agreements or in the "two highest wage schedules".

Section 151.5 in declaring that vacation rights "contained * * * in any street railway or bus wage schedules," as well as those "contained in any collective bargaining agreements," shall "in no way increase, reduce or otherwise affect or be deemed to affect" the "wage or pay rate or schedule determinations made pursuant to the provisions of said section 151.3", recognizes the possibility that Part II as well as Part I comprehends and embraces guaranteed or minimum wages. We do not view these provisions as a legislative interpretation or determination that section 151.5 does comprehend and embrace such features. It is probable that these references to Part II of § 151.3 were of a precautionary nature, to preclude the possibility of such an interpretation in relation to "vacation rights," especially in view of the use of the words "or be deemed to affect". Significantly, however, section 151.5 removes from the purview of § 151.3 [Part II as well as Part I] only the vacation with pay element of the take home pay feature, no other element thereof, such as premium pay for night shifts or guaranteed daily, weekly, or monthly wages.

What of the similarity, if any, of the provisions of Part II of section 151.3 to Part I of that section, and the applicability to Part II of our interpretation of Part I?

They are similar in this: Each reaches out for a yardstick; Part I to collective bargaining agreements in private industry, Part II to other street railway systems, public or private. Part I uses the term "rates of pay"; Part II, "wage schedules." Part I uses the rate ("such rate"), established by collective bargaining agreements, which is "generally prevailing" in San Francisco. Part II uses "the average of the two highest wage schedules" of other street railway systems than the San Francisco municipal railway system.

10. § 151.4 added: 1949 first Ex.Sess., ch. 4; Stats.1950, p. 36, at 46.

11. § 151.5 added: 1950 third Ex.Sess., ch. 10; Stats.1951, p. 100, at 102.

The only seeming differences¹² are: (a) "The average" in Part II, instead of "such rate" in Part I; and (b) "wage schedules" in Part II, in contrast to "rates of pay" in Part I. Neither of these is a differentiating factor. "The average rate" denotes a fixed and certain quantity or quality equally as does "such rate." "Wages schedules" is equally as comprehensive in its scope and sweep as is the expression "rates of pay"; perhaps more comprehensive, certainly not less comprehensive.

[3] The conclusion seems irresistible that Part II sets up a standard for determining wage schedules (rates of pay) that will assure the municipal platform men and bus operators of San Francisco a wage scale commensurate with the highest wages received by workers in the same field in this state (the same take home pay), using the average of the two highest as a yardstick.

We conclude that Part II comprehends "guaranteed or minimum daily, weekly, or monthly wages" (as found by the trial court), within the scope of the yardstick prescribed by Part II of section 151.3, as factors to be ascertained and certified by the civil service commission to the board of supervisors for the information and use of the board in fixing the indicated wage schedules.

Appellants ask how minimum wages can be averaged when one is a monthly wage and the other is weekly, or when one street railway system has a minimum wage and the other not. The answer is that this question is not here involved. It is the function of the Board of Supervisors (not the Civil Service Commission) to do the averaging, when it fixes the wage schedules, and the board is not a party to this action.

[4] Appellants make the further claim that, prior to suit, the petitioners made no demand upon the Civil Service Commission to include the minimum wage factor when certifying the two highest wage schedules to the court. This, of course, has reference to the writ of mandate not the declaratory relief count on that subject.

The answer is that the record demonstrates that such a demand would have been futile. *Moreing v. Shields*, 28 Cal. App. 513, 152 P. 964; *Moore v. Superior Court*, 20 Cal.App. 299, 128 P. 946.

Appellants further contend the judgment is erroneous in directing a peremptory writ of mandate on this subject because the alternative writ of mandate did not include such a provision. The answer to this point is that the respondents in their amended petition asked for a writ of mandate for certification of the minimum wage features of the Torrance and California Street Lines, and for general relief; the appellants joined issue; the case was thoroughly tried; and the appellants have not indicated that they presented this point to the trial court.¹³ The trial court, of course, did not in its judgment command the commission to certify the minimum wage features of the Torrance and California Street Cable Lines. Certification occurs each year. No one could predict what two street railway systems might in future years have the highest wage schedules. The court did appropriately direct the commission to include minimum wage features appearing in any wage schedule certified by it to the Board of Supervisors in any year in the future. In this situation, the principles enunciated in *Buxbom v. Smith*, 23 Cal.2d 535, at pages 542-543, 145 P.2d 305, apply.

(3) *We do not find the judgment uncertain or contradictory in its provisions.*

12. We are mindful of the fact that paragraph (E) of Part II fixes pay at time and one-half for work done on certain holidays and paragraph (C) prescribes 20¢ per hour extra for instruction service, features not in Part I. These features, however, are limited in scope and obviously do not change the overall resemblance of Part II to Part I.

13. The alternative writ was issued in July, 1949. The second amended petition was filed in March 1951. The return to the second amended petition was filed May 8, 1951. The case was tried on the issues thus joined, the trial commencing June 7, 1951.

Should ambiguities develop, we believe they could be resolved by reference to the findings of fact and conclusions of law.

(4) *The practice and procedural points presented by the appellants* include the following claims asserted by them: (a) the respondents are not in a position, have not the legal right to raise the questions presented by them, (b) there is no true basis for a class suit, and (c) the judgment is incapable of complete enforcement for lack of proper parties and for failure to include the controller and the Civil Service Commission in the writ of mandate to Turner.

[5] (a) *The claim that the respondents are without legal right to raise the questions presented by them* seems predicated upon the asserted fact that the seniority of each of the respondents is such that he, in fact, has an eight-hour day. This we think is not a significant factor. It appears to be true that a high seniority may presently assure a platform man or bus operator of a run of such a length that he will be able to put in eight hours each day, perhaps eight hours within a span of ten; and thus also be assured of his minimum wage. However, it is possible, under appellants' interpretation of the charter that management in response to rider demand might find it necessary to readjust the service in such a manner as to reduce a good many regular runs to considerably less than eight hours, and divide others into parts, spreading them over a span considerably in excess of ten hours. In other words, it appears that each senior employee has this sword of Damocles suspended over him by a potentially slender thread. He believes that the charter makes certain guaranties. He should be able to have such questions determined before the sword falls. (The second amended petition in this action was filed March 14, 1951, and the judgment is not yet final.) The law accords him that right. He, therefore, is properly in court, asserting his claim.

[6] (b) *Appellants contend there is no true basis for a class suit.* They question the propriety of extending the benefits of this judgment to include other "employees similarly situated."

They present two bases for this claim. The first is that there are two unions to which the employees in the operating department of the municipal system respectively belong, no employee having membership in both unions. It is asserted that the respondents belong to but one of these unions and therefore cannot very well represent those employees who give adherence to the other union. This, we think, is a false quantity. The respondents appear in this action as employees of the city and county, not as members of a union. Neither of the unions, as such, is a party to the action.

The other premise is that each of the respondents "is afforded the identical work schedule sought for in this second amended petition, if they had not of their own volition, absented themselves from work." Appellants' Opening Brief, pp. 61, 62. From this premise (assuming solely for the purpose of discussion the accuracy of this quoted statement), appellants conclude that the respondents do not belong to the same class or group as those operators, whether regular or extra men, who do not presently enjoy such a schedule. That conclusion does not follow. For, as we have seen (in sub-paragraph (a), above), respondents' enjoyment of the sought for schedule (under appellants' interpretation of the charter) is not a matter of right; i. e., a mere privilege, enjoyed today and gone tomorrow. This certainly puts these respondents in the same class as all other operators, whether regular or extra men.

(c) *Appellants claim that the judgment is incapable of complete enforcement* because of the absence as parties of the Public Utilities Commission and the city and county itself, and the mandate to Turner does not run also to the controller and the Civil Service Commission.

In this connection they direct attention to the fact that Manager Turner, who by this judgment is directed to certify time rolls or pay rolls in a certain manner, works under the direction of the Public Utilities Commission and the commission, not a party to the action, would not be bound by the judgment. They direct at-

tention also to the fact that although the members and secretary of the Civil Service Commission are parties, the judgment does not operate directly upon them by way of ordering them, when scrutinizing pay rolls, to recognize the certification of eight hours per day per man by Turner. They make the same observation in respect to Controller Ross who, though a party to the action, is not by the judgment expressly directed to do anything.

We may assume for the purpose of this discussion that the controller and the Civil Service Commission and its secretary, although parties to the action, might not be bound by Manager Turner's certification of pay rolls. That would not necessarily render the judgment incomplete or abortive. Should the judgment in the form rendered become final, it would be binding upon Manager Turner and would govern him in the certification of pay rolls. The mere fact that it might not be binding upon and govern these other officials, including the members of the Public Utilities Commission, would furnish no sufficient reason in itself for reversal of the judgment. There is no basis for assuming that these other officials would disregard the law as thus adjudicated. Should they disregard it as thus finally adjudicated, the remedy would be the institution of another legal proceeding of an appropriate nature.

The judgment is reversed in so far as it declares that respondents (the petitioners, below, and employees similarly situated) are entitled to wages for at least eight hours each scheduled work day (as stated in sub-paragraph (a) of paragraph 3 of the judgment) and in so far as it orders and decrees that a writ of mandate issue ordering appellant James Turner to approve and transmit to the Civil Service Commission time rolls or pay rolls showing that each respondent and employee similarly situated is credited for at least eight hours of work within a span of ten, each scheduled work day (as stated in paragraph 1 of the judgment). In all other respects the judgment is affirmed. Each party will bear his own costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

INDUSTRIAL INDEMNITY CO. et al. v. GOLDEN STATE CO., Limited et al.
Civ. 15023.

District Court of Appeal, First District,
Division 2, California.
April 30, 1953.

As Amended on Denial of Rehearing
May 29, 1953.

Hearing Denied June 18, 1953.

Action by insurance corporation and others for declaratory relief regarding rights of subscribers of reciprocal insurance exchange under agreement by which business of exchange was transferred as a whole to insurance corporation, the stock of which was substantially owned by partnership serving as exchange's attorney-in-fact. Cross-petitions were filed in behalf of subscribers. The Superior Court, City & County of San Francisco, entered judgment favorable to the transfer agreement, from which certain defendants, and cross-defendants, appealed. The District Court of Appeal, Nourse, P. J., held, inter alia, that the transfer and assumption agreement violated statute providing that an admitted insurer's officers, directors, trustees, or any persons having authority in management of insurer's funds, shall not directly or indirectly purchase, or be interested in purchase of, any assets of insurer, and was void, and that, accordingly, no action could be maintained upon such agreement.

Judgment reversed with directions.

1. Insurance $\S$ 1212½

Transfer and assumption agreement whereby insurance corporation, the stock of which was substantially owned by partnership serving as attorney-in-fact of reciprocal insurance exchange, would take over all assets, assume liabilities and take over and reinsure all policies of exchange, was void as violative of statute providing that an admitted insurer's officers, directors, trustees, or any persons having authority in management of insurer's funds, shall not directly or indirectly purchase, or be interested in purchase of, any of assets of insurer, and no action could be maintained thereon. Insurance Code, §§ 1101, 1280-1530, 1282.

2. Contracts $\S$ 105, 138(1)

A contract made contrary to terms of a law designed for protection of public

and prescribing a penalty for violation thereof, is illegal and void, and no action may be brought to enforce such contract.

3. Contracts ⇨138(6)

Where illegality of contract sued upon appears as a matter of law from the whole case before the court, the court should on its own motion refuse to entertain the action.

4. Insurance ⇨12½

Transfer and assumption agreement whereby insurance corporation, the stock of which was substantially owned by partnership serving as attorney-in-fact of reciprocal insurance exchange, would take over all assets, assume all liabilities, and take over and reinsure all policies of exchange, was not a transfer for purpose of liquidating only, but a beneficial sale of assets to the corporation, prohibited by Insurance Code. Insurance Code, §§ 1101, 1280-1530, 1282.

5. Insurance ⇨12½

Insurance Commissioner had no authority to require insurance corporation, the stock of which was substantially owned by partnership serving as attorney-in-fact of reciprocal insurance exchange, to take over business of exchange, and Commissioner's threatened suspension or revocation of certificates of authority of exchange and corporation, if his objections to interrelation of partnership and corporation were not remedied, did not bring transfer and assumption agreement between corporation and exchange within statute excepting purchase of assets which Commissioner requires to be sold, from prohibition against purchase of insurer's assets by anyone interested in management of insurer's funds. Insurance Code, §§ 1101, 1105, 1106, 1282.

6. Insurance ⇨12½

Where transfer and assumption agreement whereby insurance corporation, the stock of which was substantially owned by partnership serving as attorney-in-fact of reciprocal insurance exchange, would take over all assets, assume all liabilities and take and reinsure all policies of exchange, was a sale in violation of Insurance Code,

Insurance Commissioner's approval of such transaction could not override the law and validate the agreement in absence of statutory authority to do so. Insurance Code, §§ 1101, 1106, 1282.

7. Corporations ⇨313

Generally, a corporate officer or director may not seize for himself, to the detriment of his corporation, business opportunities in the corporation's line of activities which the corporation has an interest and prior claim to obtain, and if he seizes them in violation of his fiduciary duty, the corporation may claim for itself all benefits so obtained by him.

8. Corporations ⇨313

Doctrine of corporate opportunities is equally applicable in all situations in which a person manages or transacts business for another or for others to whom he stands in a fiduciary relation without being trustee of an express trust.

9. Insurance ⇨12½

Attorney-in-fact of a reciprocal insurance exchange, who manages business of exchange under powers of attorney of subscribers, is fiduciary in character to same extent as that of the management of an incorporated mutual insurance company, although neither is a real trustee, and the doctrine of corporate opportunities is equally applicable. Insurance Code, §§ 1280-1530.

10. Corporations ⇨315

Although directors or officers of a going corporation cannot engage in a competing business to detriment of corporation which they represent, generally, they are not, by reason of fiduciary relationship, precluded from entering into and engaging in business enterprise independent from, though similar to, that conducted by the corporation, provided that, in so doing, they act in good faith and do not interfere with business enjoyed by the corporation.

11. Corporations ⇨313

The determination of the particular factual circumstances under which a corporate officer or director, or other fiduciary, takes business opportunities for himself,

and the application of the ethical standards of fairness and good faith required of a fiduciary to such set of facts, is mainly for the trier of facts.

12. Insurance ⇨12½

In determining whether an attorney-in-fact of a reciprocal insurance exchange had violated his fiduciary duty in taking opportunities for further insurance business for himself, whether further expansion of the exchange would or would not benefit existing subscribers may be taken into consideration. Insurance Code, §§ 1280-1530.

13. Insurance ⇨12½

In cross-actions on behalf of subscribers of "reciprocal insurance exchange, wherein it was claimed that all of the insurance business contracted by insurance corporation belonged in equity to exchange, from whose business it was alleged to have been disloyally diverted by partnership serving as attorney-in-fact of exchange, whose partners substantially owned the stock of insurance corporation, evidence sustained finding that the partnership did not breach its fiduciary duty to subscribers when it engaged in writing of insurance through medium of corporation, and that the business of the corporation was not in equity the property of the exchange. Insurance Code, §§ 1280-1530.

14. Appeal and Error ⇨996

If conflicting inferences may reasonably be drawn from the evidence, even though it is uncontradicted, which inference shall be drawn is question for trier of facts, and its decision can not be set aside by the appellate court.

15. Appeal and Error ⇨1008(1)

Only where there is no conflict in the evidence and no conflicting inferences can be drawn therefrom does finding of trial court amount to a conclusion of law not binding on a reviewing court.

16. Appeal and Error ⇨1010(1)

Findings based on direct evidence are binding on reviewing court, when supported by any substantial evidence.

17. Appeal and Error ⇨901

Appellant who contends that findings of fact are not supported by evidence must

point out evidence involved and show wherein it does not support such findings.

18. Appeal and Error ⇨1010(1)

Burden is on appellant, contending that evidence is insufficient to sustain trial court's determination, to show such lack of substantial facts in record that reviewing court may say, as matter of law, that there is no ground on which trial court could have based any reasonable inference in support of its finding, and unless such burden is met, judgment appealed from should not be reversed.

19. Contracts ⇨134

An illegal contract cannot be ratified.

20. Appeal and Error ⇨959(1)

Where allowance or rejection of an amendment was within discretion of trial court, ruling would not be disturbed on appeal in absence of showing of abuse of discretion.

Robert W. Kenny, Los Angeles, Victor E. Cappa, San Francisco, Maurice J. Hyman, San Francisco (Jerome Politzer and Hyman & Hyman, San Francisco, Kenny & Morris, Los Angeles, of counsel), for appellants G. W. Thomas Drayage & Rigging Co., W. R. Ballinger & Son, and Minna M. Ballinger.

Earl C. Berger and Park Chamberlain, San Francisco, for intervenor and appellant, Robert L. Johnson Corp.

Thelen, Marrin, Johnson & Bridges, San Francisco, for respondents.

NOURSE, Presiding Justice.

This appeal relates to an action for declaratory relief regarding the rights of subscribers of Industrial Indemnity Exchange, a reciprocal insurance exchange, having as its field workmen's compensation insurance, hereinafter called "Exchange", under an agreement by which the business of said Exchange was transferred as a whole to Industrial Indemnity Company, an insurance corporation, hereinafter called "Company", for a price to be distributed to subscribers, and to cross-actions in behalf of said subscribers claiming mainly that all of

the insurance business transacted by Company belonged in equity to Exchange, from whose business it was alleged to have been disloyally diverted by Industrial Underwriters, a partnership, the attorney-in-fact of said Exchange, hereinafter called the "Attorney" whose partners substantially owned the stock of Company.

A reciprocal insurance exchange, regulated in sections 1280-1530 of the Insurance Code, is an unincorporated business organization of a special character in which the participants, called subscribers (or underwriters) are both insurers and insureds; for their mutual protection, they exchange insurance contracts through the medium of an attorney-in-fact, empowered in each underwriters' agreement not only to exchange insurance contracts for the subscribers, but also to exercise all other functions of an insurer, e. g., to set rates, to settle losses, to compromise claims, to cancel contracts. The subscribers furnish by their premium deposits, the means required for losses and costs, reserves and surpluses of the reciprocal insurance of them all, and therefore are entitled to the equity in the assets of the Exchange subject to the purpose for which they have furnished said means. If the amount of premiums deposited is not fully required for the purposes mentioned the excess, called savings, is returned in whole or in part as dividends. The attorney-in-fact receives a sizable percentage of the premiums deposited in consideration of which he does not only provide his own services, but also has to defray many of the costs of the business. In this case the Attorney, from the 17½% of the premium deposits to which it was contractually entitled, had to provide and to pay for all offices, equipment and personnel required for the business of Exchange. The affairs of a reciprocal insurance exchange are normally supervised to some extent, and they were in this case, by an advisory commission which represents the subscribers and whose powers and formation are regulated in the underwriters' agreements.

The matters now before this court found their origin in objections made in 1947-

1948 by the Insurance Commissioner of the State of California to certain interrelations allegedly existing and certain transactions allegedly having taken place between Exchange, Attorney and Company. After some time the objections were embodied in two unsigned and undated drafts entitled "Accusations", which culminated in the conclusion that the stated acts constituted ground for suspension or revocation of the certificates of authority of the Exchange or of Exchange and Company but which were expressly stated to be meant only as a basis of discussion. The main points raised related to the following alleged facts: The stock interest of the members of the Attorney in Company, a corporation competing with Exchange in the field of workmen's compensation insurance and the existence of interlocking functions between them; the farming out since 1946 by the Attorney to Company of the performance of substantially all of the duties for which Exchange paid the Attorney, whereas the Attorney retained 20% of the compensation received from Exchange; the segregation under the underwriters' agreements in a special surplus fund of all investment income of the Exchange to serve in case of liquidation of Exchange as compensation for the activities and costs of the Attorney in that respect; the reinsurance by Exchange since 1945 of the larger participating insurance policies written by Company and the treatment of said reinsurance business as normal reciprocal business of Exchange; the reinsurance by Company from 1939 until 1941 of possible assessment liability of the subscribers of Exchange at a premium considered excessive by the Commissioner. Long negotiations followed. The Commissioner originally took the position that there should be a complete separation of the interrelation objected to. The Attorney and the Company thought this unacceptable and maintained that all they had done was proper under existing law, agreements and circumstances (their said position was later generally sustained in the findings herein). However, in principle an agreement with the Commissioner was reached on the basis of the following

plan: Company would as of January 1, 1949, take over all assets, assume all liabilities, take over and reinsure all policies of Exchange, and pay in the course of time to subscribers of Exchange an amount in cash which would as closely as possible equal the entire net worth of Exchange. To eliminate the necessity of basing on estimates elements of the net worth, such as liability for claims, unbilled earned premiums, and accrued dividends on policies, the Company would run out the business of Exchange as it existed at the end of 1948 for a maximum of three years and adjust the estimated amounts of such items in accordance with the actual results. The cash amount so obtained would, subject to change in the manner of distribution if a final court decision required a different manner, be distributed to those who were subscribers of Exchange on December 31, 1948, in proportion to the total earned premium of such subscribers with Exchange during the period 1931-1948, each subscriber receiving a minimum of \$50. The Company and the Attorney made the following concessions with respect to some matters stated above as objected to by the Commissioner: The Attorney waived its right to the special surplus fund as compensation for liquidation activities, Company, with certain stated exceptions, to bear the costs of running out the business of Exchange; Company and Exchange agreed to terminate and reverse the reinsurance by Exchange of participating policies of Company from the beginning so that Company would not participate in the distribution to subscribers under the plan; to correct the amount of premium paid for the 1939-1941 reinsurance of assessment liability of subscribers of Exchange, said insurance was made retroactively participating to the extent of 99½% of the premium paid, which percentage would be refunded.

The Commissioner and the Attorney were both of the opinion that an agreement in accordance with the plan needed the consent of the subscribers of Exchange. After a summary of the plan with a letter of the Advisory Commission advising its adoption had been handed to all subscribers, approximately 98% of them both according to num-

ber and premium volume signed written consents. On December 21, 1948, a written Transfer and Assumption Agreement was executed to effectuate the plan stated above; the Commissioner approved it and on January 1, 1949, Company took over in accordance with said agreement.

Following a suggestion of the Commissioner those in favor of the agreement, the Exchange, the Attorney, the Advisory Committee, three consenting subscribers in representative capacity and Company, brought this action for declaratory relief against all non-consenting subscribers by name, praying for a declaration to the effect that past subscribers to the Exchange (no longer subscribers on December 31, 1948) have no interest in the net worth of Exchange, that the plan for distribution contained in the agreement is fair and that non-consenting subscribers have no further rights than those given to them in the agreement. It will not be necessary to detail the pleadings of the several non-consenting subscribers. They resulted in bringing before the court the defenses that the Attorney and the Advisory Committee had no authority to conclude the Transfer and Assumption Agreement, that the consents of the Commissioner and subscribers were invalid because obtained by misrepresentations, that the Transfer and Assumption Agreement was invalid as a fraudulent attempt by the Attorney to eliminate Exchange as a competitor of Company, that the Transfer and Assumption Agreement did not give subscribers all that they were entitled to because it gave them neither the value of the goodwill of Exchange nor of the business of Company which belonged to Exchange on the ground that the Attorney and the Company of which it owned the stock had built up the business of Company in competition with Exchange in violation of the duty of the Attorney, and finally that methods of dissolution and distribution contained in the Agreement were unfair. There was also before the court a cross-complaint of some non-consenting subscribers in representative capacity asking a declaration that the assets and business of Company as built up since May 3, 1939,

belonged to the subscribers of Exchange and further a declaration of rights as to the different points in dispute.

Moreover Robert L. Johnson Corporation, a subscriber which had signed a consent but had served notice of rescission of said consent on the Attorney, had intervened and united as a defendant, assuming the defenses and cross-complaint set out above, urged the invalidity of the consent on the ground of insufficient information and, because of an alleged equivocal position of the Attorney, prayed moreover for an accounting as to all that rightfully belonged to Exchange, and the appointment of a Conservator of the property in dispute and a rescission in full of intervenor's consent. Cross-defendants urged against the cross-complaint of the non-consenting subscribers certain affirmative defenses including the defenses of the statute of limitations and laches and as against intervenor moreover the defense of ratification.

The court found in nearly all respects for the plaintiffs and against the cross-complainants; it found however against the above affirmative defenses of the cross-defendants. The judgment declared in substance that past subscribers had no interest in the Exchange and were not entitled to participate in any distribution; that the Transfer and Assumption Agreement was fair and equitable, validly executed and binding on all past and present subscribers of Exchange, and that they had no right to any net worth or assets of Exchange except as provided in said agreement, that said agreement distributed to the subscribers all they were entitled to in the most equitable, reasonable and practical manner and that subscribers had no interest in the business or assets of Company. Judgment on the cross-complaints was for cross-defendants.

There are two separate main appeals, one from all of the judgment by three non-consenting subscribers and one from all of the judgment except the part overruling cross-defendants' affirmative defenses by intervenor and moreover there is a cross-appeal by cross-defendants as to said overruling of said affirmative defenses only.

Over and above the points mentioned as having been before the trial court it was urged on appeal among other matters that the Transfer and Assumption Agreement was unenforceable as a contract made by a trustee in his own behalf with respect to trust property, that intervenor was erroneously barred from amending its pleadings so as to represent also other consenting subscribers who might desire to rescind their consent and that there were certain inconsistencies in the findings.

[1] We have concluded that the original action for declaratory relief should have been denied because the agreement to which it relates is void as violating section 1101 of the Insurance Code, expressly made applicable to reciprocal exchanges by section 1282 of said code. Section 1101 reads insofar as applicable to this case: "An admitted insurer's officers, directors, trustees and any persons who have authority in the management of the insurer's funds, shall not, unless otherwise provided in this code: * * * (c) Directly or indirectly purchase, or be interested in the purchase of, any of the assets of the insurer." Section 1106, Ins. Code, reads in part: "Any person violating * * * Sections 1101, * * is guilty of a misdemeanor."

[2,3] This exact point was not raised by any of the parties, but was briefed specially at the request of this court. Nevertheless no action could be maintained on this agreement if it actually violated the code. "[A] contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract * * * whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case." *Loving & Evans v. Blick*, 33 Cal.2d 603, 607, 204 P.2d 23, 25. See for the rule that the court should on its own motion refuse to entertain the action when such illegality appears as a matter of law from the whole case before the court: *Union Collection Co. v. Buckman*, 150 Cal. 159, 165, 88 P. 708, 9 L.R.A.,N.S., 568; *Endicott v. Rosenthal*, 216 Cal. 721, 728, 16

P.2d 673; *Fewel & Dawes, Inc. v. Pratt*, 17 Cal.2d 85, 92, 109 P.2d 650. Considering these authorities it can not be denied, and it is not denied by respondents, that if the agreement violates section 1101, Ins. Code, it is void and unenforceable.

Neither is it denied nor could it be denied that the members of the Attorney are persons who have authority in the management of the funds of the Exchange. The interrelation between the Attorney and the Company, which is at the basis of this whole case, leaves no doubt that said partners in the Attorney would be interested in, at least indirectly, any purchase made by the Company. In this respect it will suffice to quote from finding 16 of the court the following passus which is not attacked:

"The stock ownership of Industrial Indemnity Company has at all times been substantially the same as the ownership of Industrial Underwriters, a partnership, the attorney-in-fact of the Exchange."

[4] However respondents contend that the agreement was not a beneficial sale of assets to the Company as prohibited by section 1101 but a transfer for the purpose of liquidating only. We do not agree. The amended complaint in paragraphs XXVII and XXXIII refers to *sale* and *selling* of all assets. The "Transfer and Assumption Agreement" provides among other things:

"Effective 12:01 a. m. January 1, 1949, Exchange will *sell*, assign and transfer and it does hereby *sell*, assign and transfer to Company all of the assets of the Exchange * * *." (Emphasis ours).

"As compensation for the assignment and transfer to it of the assets of the Exchange, Company will pay * * * an amount equal to the 'adjusted net worth' of the Exchange, computed as follows:"

The provisions are then to the effect that first the net worth of the Exchange (including the reserve for contingencies, special surplus and unassigned surplus) is determined according to an audited balance

sheet as of December 31, 1948, on which all assets are valued at market value as of December 31, 1948; thereafter adjustments are made in many items of that balance sheet on the basis of the actual results obtained during the running out of the business of the Exchange during three years. If all items on the balance sheet were adjusted according to the results of the running out, all assets were liquidated during those three years and nothing whatever would remain as advantage to the Company, it could be said that nothing was actually purchased by the Company and that notwithstanding the word "sell" used in the agreement the transaction was actually an agreement to liquidate. However that is not the case. No adjustment is provided for the investments. On the balance sheet as of December 31, 1948, which is in evidence as Plaintiffs' Exhibit 80, there appear United States government obligations for \$3,175,000. They are acquired by the Company at that price without any adjustment or duty to account for their liquidation. Although the purchase takes place at market value it is nevertheless a violation of sec. 1101, Ins. Code, which prohibits any purchase of assets of the insurer by its managing officers and which in that respect differs from section 421a, Civil Code, which governed the subject prior to the enactment of the Insurance Code and which prohibited such purchases only if made "for a less sum than the current market value". Said change must have been deliberate and the provision of section two of the Insurance Code that provisions substantially the same as preexisting provisions will be construed as restatements thereof has no application.

Another circumstance which shows that the Company did not act merely as liquidator is of greater importance from a practical point of view. By taking over all assets, assuming all liabilities, including all outstanding policies of the Exchange and becoming directly liable thereon to the policyholders, the Company acquired the whole business of the Exchange as a going concern and would therefore benefit by the increase of its clientele. Character-

istic in this respect is the following passus from the document sent by the Advisory Committee to subscribers on November 29, 1948, setting out and recommending acceptance of the proposed plan:

"At normal expiration of your policy, in 1949, you will be offered a participating policy by Industrial Indemnity Company, a stock company * * *. (b) Your policy with Industrial Indemnity Company will be serviced by the same personnel, located at the same offices as in the past." That in this manner the Company received an advantage not consistent with the position of a mere liquidator seems obvious. The findings show that the Commissioner was also of this opinion. We find in finding 47 that it was the position of the Insurance Commissioner at the outset of the negotiations, that the amount to which subscribers were entitled should include "an amount representing a reasonable going concern value of the Exchange as measured by the value to the Company of any Exchange business it might take over in the event of consolidation. * * *

"The Insurance Commissioner thereafter concluded that any business taken over by the Company in the event of consolidation of Company and Exchange would not result in any profits to Company greater than the profit then being made by the attorney-in-fact of the Exchange, that the profit being made by the attorney-in-fact of the Exchange did not belong to the subscribers at the Exchange, and thereafter abandoned his position that any amount should be paid or recognized as representing going concern value of the Exchange." If the Attorney would lose as much as the Company would win, there might, considering their identical ownership, be good reason for the Commissioner not to persist in his demand of separate payment for going concern value, but his original demand and the reason given for his desisting show his conviction that the Company would obtain business from the Exchange which would be of value for the Company, and even if the concessions made by the Company and the Attorney, stated hereinbefore, would sufficiently compensate the subscribers for said advantage

received by the Company, that would not alter the fact that the Company was not only liquidator but beneficially acquired at least the investments and the going business. The fact that during the years 1946, 1947 and 1948 more premium was returned to subscribers of Exchange than was in accord with the actual business results of these years (finding 66) does not show that the acquisition of the large going business of Exchange was not valuable to Company.

[5] Respondents urge, however, that even if it were an actual sale, as we consider it, the agreement would come under an exception to sec. 1101 contained in sec. 1105, reading: "This article shall not prevent: (a) The purchase by any person of any asset which the commissioner requires to be sold, at a price approved by the commissioner." The contention is without merit. The Commissioner did not require and had no power to require the sale of the whole business of the Exchange as a going concern. To "require" in this sense means "to demand; to claim as by right and authority; to exact." (Webster) The Commissioner did not demand it and had no authority to demand it. Respondents' contention is based on the fact that the Commissioner threatened suspension or revocation of the certificates of authority of Exchange and Company if his objections to the interrelation of the Attorney and the Company and other matters stated in the "Accusations" would not be remedied to his satisfaction. However, it is not true that the remedy he primarily wanted or which he required was the taking over of the Exchange by the Company. The court found (in finding 47): "The preferred plan of the Commissioner was one of separation." In the Statement of the Exchange of November 29, 1948, outlining principal terms of the plan, it is said that the discussions with the Commissioner revealed "that the problems presented might be solved either by a complete separation of the two organizations, or by a merger of Industrial Indemnity Exchange and Industrial Indemnity Company upon the terms herein set forth. Upon giving thorough consideration to both of these pos-

sibilities, it was found that the first alternative was not acceptable to the attorney-in-fact and the Company. * * * *The representatives of the Insurance Commissioner have stated that, when this plan is formally submitted to the Commissioner, they will be inclined to recommend its approval.*" The above quotations show that the transaction was not authoritatively demanded by the Commissioner but preferred by the Attorney and the Company and approved by the Commissioner. This is also shown by the requirement of approval by subscribers. It is said in respondents' brief (pp. 120-121): "It was the position of the Commissioner of Insurance that it [the agreement] would have to be approved by a majority of the policyholders. * * * On the other hand, respondents felt that the agreement should have the approval of more than a bare majority of the policyholders and the agreement was drawn up on the basis of approval of two-thirds of the policyholders." The necessity of approval of policyholders is inconsistent with a transaction demanded by the Commissioner as of right.

Moreover, the history of section 1105 subd. (a) shows that it was meant to relate to a specific, limited subject matter. Prior to the enactment of the Insurance Code the provisions as to investment of insurance companies were contained in sec. 421, Civil Code, the prohibition of benefits of officers, etc., from such investments or of interest in the sale of assets in sec. 421a of the same code. Among the provisions of sec. 421 was the following: "It shall be the duty of the secretary of any such investing corporation to report in writing during the months of January and July of each year to the insurance commissioner the data above set forth respecting each such investment, and the insurance commissioner may, if any such investment is not approved by him, *require the corporation to sell or dispose of the same.*" (Emphasis ours.) The last sentence of sec. 421a then contained the exception which is now sec. 1105, subd. (a), Ins.Code: "Nothing contained herein, however, shall prevent the purchase by any such person of

any asset which the insurance commissioner may *require to be sold*, at a price approved by him * * *." (Emphasis ours.) There can be no doubt that the above provision of sec. 421a was intended to relate to the quoted provision of the preceding section. At the enactment of the Insurance Code the quoted provision of sec. 421 became with a few changes sec. 1202 Insurance Code, and it was later recast to provide that the Commissioner may in his discretion and after hearing by written order require the disposal of any investment made in violation of the provisions of this article. In 1945 the Commissioner was also given power to demand disposal of specific investments in real estate if he decides that the interest of the insurer so requires. Sec. 1194.9, Ins.Code. We are of the opinion that the present provision of sec. 1105, subd. (a), Ins.Code, relates to the specific provisions of secs. 1202 and 1194.9 in the same manner as formerly the provision of sec. 421a, Civil Code, related to the one in sec. 421, Civil Code. There is in the code no provision which gives the Commissioner power to demand the disposition of all assets of an insurer or of his whole business as a going concern. The exception of sec. 1105, subd. (a) is therefore applicable only to disposition of specific assets demanded by the Commissioner on the basis of specific powers given him in the code and not to the agreement here under review.

In holding that said agreement is void as violative of sec. 1101, subd. (c) of the Insurance Code, we are convinced that we do not extend the application of said provision further than is necessary to effectuate its purpose, which is to prevent all possibility that those who have authority over an insurer might profit or their action might be influenced by the desire to profit from the acquisition of the assets of said insurer. The difficulties in this case were caused by the conduct of the members of the Attorney, who were simultaneously in the insurance business for their own account in corporate form and who interlaced the business of their private corporation and the business of the Exchange which

they managed to such a degree that the Commissioner would not permit the resulting situation to continue. Even if their said conduct was in good faith and proper, as found by the court below, it would create a precedent wholly adverse to the purpose of section 1101, subd. (c) if they were permitted to solve the difficulties so caused by absorbing the going business of the Exchange into their privately owned corporation, even if the price they paid for it would be adequate.

[6] Evidently if the transaction is a sale violating sec. 1101 and sec. 1106, Ins. Code, the Commissioner's approval can not override the law and validate the agreement where the code does not grant him power to do so.

As it will be our decision that the original action for declaratory relief must be dismissed and there will be no new trial the above fully disposes of said action and none of the many points advanced by the parties in that respect require review. However the cross-actions which among other things claim for the Exchange all the business of the Company are in part not dependent on the validity of the agreement merging Exchange and Company and the correctness of the denial of all relief to cross-complainants must therefore be reviewed.

[7-9] The claims of appellants to all the business of Company are governed by a principle developed mainly with respect to the relation between corporations and their directors and officers and there known as the doctrine of corporate opportunities. Since the leading case of *Guth v. Loft*, 23 Del.Ch. 255, 5 A.2d 503 it has been generally accepted that a corporate officer or director may not seize for himself to the detriment of his company business opportunities in the company's line of activities which the company has an interest and prior claim to obtain, and that if he seizes them in violation of his fiduciary duty the corporation may claim for itself all benefits so obtained by him. The doctrine was applied in this state to joint venturers in *MacIsaac v. Pozzo*, 81 Cal.App. 2d 278, 183 P.2d 910 and is equally appli-

cable in all situations in which a person manages or transacts business for another or for others to whom he stands in a fiduciary relation without being trustee of an express trust. The position of the attorney-in-fact of a reciprocal insurance exchange, who manages the business of the exchange under powers of attorney of the subscribers, who provide the means for the reciprocal insurance enterprise, is fiduciary in character to the same extent as that of the management of an incorporated mutual insurance company, although neither is a real trustee, see *Caminetti v. State Mut. Life Ins. Co.*, 52 Cal.App.2d 321, 323, 126 P.2d 165, and the doctrine of corporate opportunities is equally applicable.

[10,11] However this doctrine does not exclude the fiduciary from all business activity of his own in the field in which he works for others. "Generally, it is held that the directors or officers of a corporation are not, by reason of the fiduciary relationship they bear towards the corporation and the stockholders thereof, precluded from entering into and engaging in a business enterprise independent from, though similar to, that conducted by the corporation itself, provided in doing so they act in good faith and do not interfere with the business enjoyed by the corporation * * *. The directors or officers of a going, solvent corporation cannot, however, engage in a competing business to the detriment of the corporation which they represent." 13 Am.Jur. 953, Corporations, § 999. To the same effect 19 C.J.S., Corporations, § 785, p. 160; 3 Fletcher, Corporations (1947 revision) 214-215, § 856; Ballantine on Corporations (1946 ed.) 203 et seq., § 79. The latter points out (p. 205) that the basis of the doctrine must be found "in the unfairness on the particular facts of a fiduciary taking advantage of an opportunity when the interests of the corporation justly call for protection," (to the same effect Prof. Scott in 37 Cal. Law Review, 539, 551) and continues: "This calls for the application of ethical standards of what is fair and equitable to particular sets of facts. The question is indeed often a close one whether the fiduciary duty of loyalty of directors

and officers requires them to offer a particular business opportunity which they discover in connection with the corporate business to the corporation * * * or whether they may take it for themselves. This turns * * * upon various factors as to the needs and situation of the corporation, its financial ability and fair expectation under the circumstances, which cannot be reduced to definite rules." Under these circumstances the decision in each case depends on its particular facts and citation of examples is not useful. The determination of the particular factual circumstances under which a fiduciary takes business opportunities for himself and the application of the ethical standards of fairness and good faith required from a fiduciary to said set of facts is mainly for the trier of facts. Both the issues of good faith and of sufficient performance of contractual obligations are normally questions of fact (53 Am.Jur. p. 192, § 224; p. 231, § 273).

[12] In this case the court below made most elaborate findings as to all circumstances on which it based its holding that the cross-defendants have not breached their fiduciary duty. Before stating their contents, we shall point out some differences between a reciprocal insurance exchange and a normal corporation which may be of importance with respect to the correctness of said holding. Stockholders in a corporation normally participate for the purpose of making profit either in the form of dividends or of increase in the value of their holding. Subscribers in an interinsurance exchange do not participate for that purpose but for the purpose only of obtaining insurance for themselves at a price and in a manner attractive to them. (There was some express testimony to that effect in this case.) Expansion of a lucrative business so far as that is possible on the basis of the capital provided by the stockholders or accrued in prior business will as a rule benefit the stockholders, whereas subscribers of a reciprocal insurance exchange do not necessarily profit from further expansion once a sufficient size is reached to secure adequate spread of risk and stability of rate of loss; the sav-

ings and the policies that share in their distribution may well increase in the same proportion. It is clear that if it were found that further expansion would not benefit existing subscribers, that fact might be considered in deciding whether the attorney-in-fact had violated his fiduciary duty in taking opportunities for further insurance business for himself.

Another distinction to be noted is that the business of a corporation is normally transacted by means of personnel, offices and equipment built up and paid for by the company, so that the company only is entitled to their services and use and directors or officers who use any of them for their private business ventures thereby violate their fiduciary duty. In a reciprocal insurance exchange and at any rate in the exchange here involved, the attorney-in-fact contracts to provide and pay for the whole management and administration of the Exchange including all personnel, offices and equipment required for the transaction of the business of the Exchange in consideration of certain fixed percentages of the net premiums deposited, which consideration is therefore dependent on the size of the business transacted only, not on the costs of providing personnel, offices and equipment. There is therefore not necessarily a requirement that the personnel and plant which the attorney-in-fact builds up and pays in his business of insurance management be used by him for the management of the one enterprise only in relation to which he started it, if the management and administration he provides for that first enterprise remain good.

We now turn to the circumstances found by the court. From the substance of its findings we note the following: the numbers are those of the findings from which the statements preceding them were taken:

Neither before nor after the entry of the Company into business did the Exchange write non-participating policies, the attorney having been advised that such would violate the Insurance Code (10). Company started in workmen's compensation insurance business in 1940 by issuing non-participating policies to supplement the participating insurance offered by the

Exchange and thus to make profit for the Company (18). The Exchange, which had until 1942 mostly sold insurance directly to the insureds, then changed its policy to sell through agents and brokers, who control 75% of the workmen's compensation insurance business in California and whose reluctance to place business with a carrier who sells directly to insureds would have hampered the acquisition of additional business by Exchange (19, 20, 21). In 1943 Company began to write also participating workmen's compensation insurance to supplement the types of insurance offered with participating insurance in a stock company for which there was demand (22). The name "Industrial Indemnity" and certain insignia used by both Company and Exchange were originated by the Attorney and used by Exchange before they were used by Company; the use by Company did not cause confusion or loss of any business by Exchange (11). Since 1939 the Attorney and the Company used the same offices, equipment and personnel. Originally they were those of the Attorney, Company paying Attorney for their use a percentage of Company's net premium income. Since 1946 Company, having taken over offices, equipment and personnel of the Attorney was paid by Attorney 14% of the net premium income of Exchange out of the 17½% of said income which Attorney received for its services as such. The 14% constituted the actual cost to Company of the facilities and services made available to the Attorney. The Attorney retained its own function and responsibility. The contract was to the advantage of Exchange and was reasonable and proper. Company and Attorney at all times maintained separate books and records (31-34). The Attorney and Company always maintained the separate characteristics of Company and Exchange; insurance brokers, agents and insureds were always familiar with their separate entities (17). It was the policy of the Exchange to write policies of larger premium size, policy of the Company to write those of smaller premium size (28). Company paid approximately 2½% more commission than Exchange to compete

with other stock company insurers, Exchange returned approximately 2½% more savings than Company. Insurance buyers utilized Company and Exchange according to their separate characteristics, Exchange for larger risks, Company for smaller and non-participating risks (36). The owners of the Attorney and Company had no interest in procuring new business for Company to the prejudice of Exchange and did not procure any business for Company to the prejudice of Exchange, nor did they cause to be placed in Company any business that could have been placed in Exchange (102, 97). They and their agents made no attempt to attract business to the Company rather than to the Exchange and often placing of insurance in Exchange was more recommended by them than placing in Company (24). No known or appreciable business was lost by Exchange, which would have been placed in it had it not been placed with Company, and substantial business was gained by Exchange as a result of the Company's being in business (23, 25-27). Company has never been operated in competition with Exchange (23, 96, 102). Prior to 1940 Exchange had reached a size sufficient to secure adequate spread of risk and stability of loss ratio. Further acquisition of new business would not result in any advantage to its existing subscribers by reduction of premium, better service, increase of premium returned to them or in any other way. During 1948 and several prior years Exchange wrote the largest volume of premiums of all reciprocal workmen's compensation insurance carriers in California (29, 99). The Company did not at any time in the operation of its business use any funds, facilities or information belonging to, or secured through, the Exchange (104). To engage in workmen's compensation insurance business through the medium of Company was no violation of any duty owed by the Attorney or its members to the subscribers of Exchange (98). The insurance business now being transacted, or at any time transacted, by Company is neither in law nor in equity the property of Exchange or its subscribers (100).

[13-18] As we have held that the establishing of the circumstances under which the Attorney engaged in workmen's compensation insurance business of its own and the weighing of these circumstances in relation to the duty of fairness and good faith incumbent on the Attorney as a fiduciary were matters of fact, the decision of which by the trier of facts is as a rule binding on appeal, it seems evident that the findings stated are fatal to the appeal with respect to the claims of subscribers of Exchange to the business of Company unless appellants have shown that they are not supported by the evidence. This they have failed to do. In their opening briefs they have ignored them. By way of replication it is argued that the findings are based on undisputed facts substantially all presented by respondents and that although the inferences made from these facts in the findings are in dispute, such inferences drawn from undisputed testimony are no more than conclusions of law not binding on a reviewing court. This theory is wholly erroneous, apart from the question whether it is true that there was no conflict in the evidence. This court held in *Spolter v. Four-Wheel Brake Serv. Co.*, 99 Cal.App.2d 690, 693, 222 P.2d 307, quoting in support *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123, that it is settled law that if conflicting inferences may reasonably be drawn from the evidence, even if it is uncontradicted or all facts are admitted, which inference shall be drawn is a question for the trier of facts and its decision cannot be set aside by the appellate court. See also *Hamilton v. Pacific Elec. Ry. Co.*, 12 Cal.2d 598, 603, 86 P.2d 829. Only where there is no conflict in the evidence *and no conflicting inferences can be drawn therefrom* does the finding of the trial court amount to a conclusion of law and is the finding not binding on a reviewing court. *Export Leaf Tobacco Co. v. County of L. A.*, 89 Cal.App.2d 909, 916, 202 P.2d 622. The above rule where findings are based on inferences does not differ in principle from the well known rule governing findings based on direct evidence, to wit, that they are binding on

the reviewing court when supported by any substantial evidence. *Vaccarezza v. Sanguinetti*, 71 Cal.App.2d 687, 691, 163 P.2d 470. It has been repeatedly held that an appellant who contends that findings of fact are not supported by the evidence, must point out the evidence involved and show wherein it does not support said findings. *Sutro Heights Land Co. v. Merced Irr. Dist.*, 211 Cal. 670, 697, et seq., 296 P. 1088; *Metzenbaum v. Metzenbaum*, 96 Cal.App.2d 197, 199, 214 P.2d 603. The latter case justifies said requirement on the ground that it facilitates the disposition of litigation before appellate courts, especially where records are voluminous, and discourages rash appeals. A rule of the same kind must for the same reasons apply when appellant contends that the findings cannot by reasonable inference be derived from the evidence. As we recently said in *Richards v. Plumbe*, 116 Cal. App.2d 132, 253 P.2d 126, 127: " * * * the burden is on the appellant to show such a lack of substantial facts in the record that the reviewing court may say as a matter of law that there is no ground upon which the trial court could have based any reasonable inference in support of its finding, and unless this burden is met, a reversal should not be ordered." The appellants herein can certainly not be absolved from said duty where the evidence before us consists of nearly 3000 pages of reported testimony and 145 exhibits, and the findings alone cover nearly sixty pages. Those evidentiary facts as to which the parties agree do not make it clear at first sight that the inferential findings made by the trial court cannot possibly be correct, and appellants have failed to make the specific and detailed showing required from them as stated above. It is symptomatic in that respect that even in the reply briefs only one finding is specifically mentioned, to wit, the finding that Company has never been operated in competition with Exchange. This finding evidently follows as a reasonable inference from other findings of probative facts succinctly stated by us, but wholly ignored by appellants even in their replication, although these evidentiary facts found clearly tend to destroy all

elements of competition, detriment to the Exchange, and bad faith of the Attorney. Under these circumstances it is not for us to say that the ultimate findings of the court below are necessarily improper inferences nor can we hold as a matter of law, contrary to said findings, that the Attorney breached its fiduciary duty to subscribers when it engaged in the writing of workmen's compensation insurance through the medium of Company or that the business of Company was in equity the property of Exchange.¹ We are the more satisfied that this result is not unjust because the gain by Exchange of all profits of the business of Company without participation in them by any of Company's insureds would have given the subscribers of the Exchange a windfall wholly out of line with the setup of such Exchange.

However it does not follow that cross-complainants are not entitled to any relief. Although we hold that the subscribers of Exchange are not entitled to the business built up by Company in general—and then they are necessarily not entitled either to the business of its wholly owned subsidiary, Industrial Service Company, mentioned separately on appeal—they have a right to the business taken over by Company in consequence of the Transfer and Assumption Agreement, which we have held to be invalid. If they so desire they are entitled to have that matter wound up in these equity proceedings and for that purpose the judgment denying all relief on the cross-complaints will also have to be reversed.

Appellants do not assign as error the failure of the court below to make in the judgment express declarations of right as to other matters stated in the cross-complaints. As said before all findings in that respect were adverse to cross-complainants. None of these findings were attacked in the opening briefs of appellants and even in the reply briefs no sufficient showing of insufficiency of the evidence to support them was made. On the same grounds and authorities as stated with re-

spect to the findings regarding the alleged disloyal diversion of business by the Attorney the findings as to the other criticisms of the action of the Attorney must stand.

[19, 20] The desired decree rescinding intervenor's consent to the Transfer and Assumption agreement and all matters relating to it have lost all materiality by our holding that said agreement is illegal. An illegal contract cannot be ratified, *Fewel & Dawes, Inc. v. Pratt*, 17 Cal.2d 85, 91, 109 P.2d 650. For the same reason consenting subscribers of Exchange can not have been prejudiced by the fact that intervenor was not permitted pending trial to amend its complaint so as to appear in a representative capacity for them, the right of rescission being the only point which its complaint added to the matters already before the court by the cross-complaint of certain defendants acting in representative capacity for all subscribers. The allowance or rejection of the amendment offered at that time was within the discretion of the trial court. The ruling will not be disturbed on appeal as no abuse of discretion, no good reason for the delay and no necessity of the amendment in furtherance of justice is shown. *Westwood Temple v. Emanuel Center*, 98 Cal.App.2d 755, 765, 221 P.2d 146 and cases there cited; *Peterson v. Peterson*, 74 Cal.App.2d 312, 323, 168 P.2d 474.

Defendants in the cross-actions have in the court below taken the position that the cross-actions were barred by the statute of limitations and by laches and have cross-appealed from the trial court's rejection of said defenses. As in the cross-actions relief will be granted only with respect to the consequences of the illegality of the Transfer and Assumption Agreement to which said defenses do not apply, their cross-appeal has lost all materiality and will be dismissed.

Under the special circumstances of this case it seems just that each party bear its own costs on appeal.

1. The contention of intervenor that findings 18, 39 and 85, which are somewhat

connected with the matter here treated, contain inconsistencies is without merit.

The judgment is reversed with directions to the trial court to deny all declaratory relief to plaintiffs on the ground that the agreement as to which it is prayed for is void as contrary to law; if defendants-cross-complainants so desire, to grant them such relief as the court will deem fit to enable them to recover in their representative capacity for subscribers the business and assets obtained by Company in consequence of the agreement herein held to be invalid, and to wind up fully all matters relating thereto; to make, if defendants-

cross-complainants so desire and they have made a showing that financial advantages have been obtained by the subscribers they represent because of their services and the services of their attorneys, such orders as the court will deem fit fixing and allowing compensation for said services and providing for payment thereof out of the funds and assets recovered; the cross-appeal of defendants in the cross-actions is dismissed; the respective parties to bear their own costs.

GOODEL, and DOOLING, JJ., concur.

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JONES v. MARTIN et al.**L. A. 22608.****Supreme Court of California, in Bank.****May 12, 1953.****Rehearing Denied June 4, 1953.**

Action by attorney to recover fee. The Superior Court, Los Angeles County, Allen W. Washburn, J., entered judgment adverse to plaintiff, and he appealed. The Supreme Court, Carter, J., held that where plaintiff, who was retained under contingent fee contract which assigned to him, pro tanto, anything received on claim, and who was discharged by client before settlement of claim, executed affidavits for purpose of attaching funds collected on settlement, in which he stated that his claim to such funds was not secured by any lien, and further indicated by conduct and conversation, that he was not only not insisting on his right to a lien-equitable interest but would make no objection to payment of proceeds of settlement to client, attorney waived any lien or equitable interest he might have had, and was estopped to claim lien against defendants who made settlement, who changed their position to their prejudice in reliance upon attorney's conduct.

Judgment affirmed.

Prior opinion 248 P.2d 952.

1. Attorney and Client ⇨134(2)

An attorney employed under a contingent fee agreement who is wrongfully discharged by his client, is generally entitled to same amount of compensation and under same contingency as if he had completed the services contemplated.

2. Attorney and Client ⇨148(2), 189

A contingent fee agreement vests attorney with equitable interest in that part of client's cause of action which is agreed upon as contingent fee, and the proposition may be given practical effect by imposition of constructive trust for protection of attorney's equitable interest, by acknowledging existence of an express trust created by contingent fee agreement in attorney's favor, or by ruling that neither client nor opposite party, if latter has knowledge of attorney's rights, can so compromise litigated subject matter as to defeat attorney's rights.

256 P.2d—57½

3. Attorney and Client ⇨182(1)

An attorney under a contingent fee agreement has no special or charging lien, unless it has been specifically contracted for.

4. Assignments ⇨93

A debtor will not be discharged from his obligations by performance rendered to assignor after notice of assignment.

5. Attorney and Client ⇨186

Where attorney, who was retained under contingent fee contract which assigned to him, pro tanto, anything received on claim, and who was discharged by client before settlement of claim, executed affidavits for purpose of attaching funds collected on settlement, in which he stated that his claim to such funds was not secured by any lien, and indicated by conversation and conduct that he was not insisting on his right to a lien-equitable interest, and had no objection to payment of settlement proceeds to client, attorney thereby waived any lien he might have had, and was estopped to insist upon lien against defendants who made settlement, who had changed their position to their prejudice in reliance upon attorney's conduct.

6. Estoppel ⇨104**Liens ⇨16**

The waiver of or estoppel to assert a lien or an equitable interest in property does not necessarily mean that obligation secured by lien or giving rise to interest is lost, but such lien or interest may exist without security or other assurance that it will be discharged.

7. Appeal and Error ⇨994(3)

In action by attorney to collect a fee, credibility of defense witness was question for trial court.

8. Appeal and Error ⇨1039(13)

In action by attorney, who was retained under contingent fee contract which assigned to him, pro tanto, anything received or collected on claim against union, and who was discharged by client before settlement of claim, to collect fee, fact that agreement between attorney and union, up-

on which union relied to show attorney's waiver of any claim against it, was alleged in union's answer to have been made upon substitution of attorneys, rather than after settlement had been effected, was not prejudicial to attorney, who was advised of situation which he had to meet.

9. Executors and Administrators Ⓒ431(2)

Attorney who was retained under contingent fee contract which assigned to him, *pro tanto*, anything received or collected on client's claim, could not maintain action for fee against estate of attorney who succeeded him upon his discharge by client and who effectuated a settlement of claim, where no claim for such fee had been filed against successor attorney's estate. Probate Code, §§ 707, 709.

Arthur A. Jones, in *pro. per.*

Belli, Ashe & Pinney, San Francisco, as amici curiae for appellants.

Macbeth & Ford, Vincent J. Blumberg, Patrick H. Ford and David Sokol, Los Angeles, for respondents.

CARTER, Justice.

Plaintiff appeals from a judgment for defendants, except Mrs. Martin, in an action to recover attorney's fees. Defendants in the original complaint were Mrs. Martin, a labor union—an unincorporated association, and some of the members thereof. By amended complaint, Wellins, an attorney at law, was added as a defendant. Later he died and Isabelle Wellins, as the administratrix of his estate, was substituted.

According to the findings (the case was tried by the court without a jury) plaintiff, an attorney at law, was employed by Mrs. Martin by written contract to represent her in prosecuting a claim against the Union for personal injuries arising out of an assault and battery, under which contract he was to receive a contingent fee of 50% of all sums recovered on the claim by action, compromise or otherwise. It was also agreed that plaintiff was to have full charge of the collection of the claim; that

a discharge of plaintiff would not affect his right or interest in the claim and a recovery thereon; that the agreement operates as an assignment and transfer *pro tanto* to plaintiff of the claim and right to recover and anything collected thereon. Plaintiff commenced an action on the claim but before it was tried, and on April 1, 1949, defendant, Mrs. Martin, without just cause, discharged plaintiff as her attorney and had defendant Wellins substituted in his place. The action was tried by Wellins and judgment obtained on November 8, 1950, in favor of Mrs. Martin for \$24,126.29. While that action was pending and before judgment, plaintiff commenced the instant action on September 25, 1950, in which Wellins was not a party defendant. The complaint was entitled one for money due, and alleged that a judgment had been obtained (apparently, however, it had not yet been entered at that time); that plaintiff was entitled to one-half the judgment under the contract; that the judgment debtors were willing to pay and are indebted to plaintiff and should be enjoined from paying to Mrs. Martin; and that plaintiff, by reason of his contract, had a lien on the judgment for one-half thereof. The amended complaint filed in May, 1951, made Wellins a party and charged him with having received and paid out in part, the \$20,000 which was received in settlement of the judgment, knowing of plaintiff's claim and lien, and that he held the \$20,000 as constructive trustee for plaintiff. Wellins knew of the pendency of this action on or about November 15, 1950, and of plaintiff's contract at all times since April 8, 1949. The Union also knew of the contract at all times since April 18, 1949, and there had been served upon them a written notice of lien on April 27, 1949. On August 16, 1950, plaintiff orally agreed with David Sokol, the Union's attorney, that Sokol would notify plaintiff when the Union had paid the judgment or a compromise of the action and plaintiff would then attempt to attach the money. The action was settled for \$20,000 on April 16, 1951, by check to Mrs. Martin and Wellins. On April 17, 1951, Wellins deposited the check to his account and paid \$4,000 to the Union's workmen's

compensation insurance carrier and \$8,000 to himself as attorney fees. On April 20, 1951, he paid the balance of \$8,000 to Mrs. Martin and she left the state. Sokol telephoned plaintiff's office on April 16, 1951, to notify him of the settlement but was unable to contact him. He did notify him on April 17, 1951, at which time plaintiff made no protest or objection to the payment of the settlement amount, or claim that it violated his rights and did not assert any claim of lien.

On September 25, 1950, plaintiff filed in the instant action an affidavit for attachment which stated that the Union and Mrs. Martin were indebted to him for \$12,063.15, on contract and the payment has not been secured by a lien or mortgage on personal property. The sheriff was instructed to levy on the judgment. On April 21, 1951, plaintiff again executed an affidavit for attachment, stating that defendants in the instant action were indebted to him on contract for \$10,000 and that its payment is not secured by any lien upon personal property. The attachment was levied on Wellins' bank account and was not discharged until Wellins' death on June 15, 1951. On April 23, 1951, Wellins told plaintiff of the disbursement of the settlement money as above described. Wellins died on June 15, 1951, and his administratrix was substituted in his place.

Finally it was concluded that plaintiff had waived his claim for an attorney fee lien and defendants ceased to be constructive trustees of the fund upon the waiver; that plaintiff had filed no claim against the estate of Wellins pursuant to § 707 of the Probate Code and hence his action was premature.

It was also concluded that plaintiff have judgment for \$8,000 against Mrs. Martin but that plaintiff waived his attorney lien as to the other defendants and is estopped to assert any lien; that plaintiff take nothing as to those defendants. Judgment was accordingly entered.

Plaintiff contends that even if he lost his "attorney's lien" he did not lose his cause of action against the Union or Wellins, such cause of action being based upon payment by the debtor, the Union, to the as-

signor Mrs. Martin, after notice to the debtor of the *pro tanto* assignment by Mrs. Martin to plaintiff of whatever was recovered on her claim for damages against the Union; that Wellins, and later his administratrix, held the money received from the Union as constructive trustee because he had received it with knowledge of plaintiff's claim under his attorney's fee contract; that there was no estoppel or waiver of either his lien, his cause of action, or right to assert a constructive trust; that because there was a constructive trust it was not necessary to file a claim against Wellins' estate under § 707 of the Probate Code.

[1-4] There is no question that the Union and Wellins were fully advised of plaintiff's contract with Mrs. Martin and any rights he had thereunder and the court so found. No question is raised as to the validity of the "assignment" features of that contract or that a lien could have been thereby created. The contract was not unconscionable and plaintiff was discharged without cause. An attorney employed under a contingent fee agreement who is wrongfully discharged by his client, is generally entitled to the same amount of compensation and under the same contingency as if he had completed the services contemplated. *Salopek v. Schoemann*, 20 Cal. 2d 150, 24 P.2d 21; *Zurich G. A. & L. Ins. Co., Ltd. v. Kinsler*, 12 Cal.2d 98, 81 P.2d 913; *Denio v. City of Huntington Beach*, 22 Cal.2d 580, 140 P.2d 392, 149 A.L.R. 320; see cases collected 6 Cal.Jur.2d, Attorneys at Law, § 197. And "A contingent fee agreement vests the attorney with an equitable interest in that part of the client's cause of action which is agreed upon as the contingent fee. This proposition may be given practical effect by the imposition of a constructive trust for the protection of the attorney's equitable interest, by acknowledging the existence of an express trust created by the contingent fee agreement in favor of the attorney, or by ruling that neither the client nor the opposite party, if the latter has knowledge of the attorney's rights under the contingent fee agreement, can so compromise the litigated subject matter as to defeat the attorney's

rights * * *. However, an attorney under a contingent fee agreement has no special or charging lien, unless it has been specifically contracted for." (6 Cal.Jur.2d, Attorneys at Law, § 192.) It is also true that a debtor will not be discharged from his obligations by performance rendered to the assignor after notice of the assignment. *McCarthy v. Mt. Tecarte Land & Water Co.*, 110 Cal. 687, 43 P. 391; *Greenlee v. Los Angeles Trust etc. Bank*, 171 Cal. 371, 153 P. 383; *H. D. Roosen Co. v. Pacific Radio Pub. Co.*, 123 Cal.App. 525, 11 P.2d 873; *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 P. 627, 44 L.R.A. 632; *Nelson v. Fernando Nelson & Sons*, 5 Cal. 2d 511, 55 P.2d 859, Rest.Contracts, § 170.

It would appear, therefore, under the foregoing rules that neither the Union nor Wellins could pay the money recovered to Mrs. Martin and be relieved of the obligation under the assignment, or "equitable interest," "lien" or constructive trust unless plaintiff waived or was estopped to assert such rights as was found by the court.

[5, 6] In regard to the Union it is clear that plaintiff waived or is estopped to assert any "lien" or "equitable interest." We have the two attachment affidavits in which it was asserted under oath by plaintiff that he had no lien—that the payment of his claim for attorney's fees was not secured by any "lien." That may well be interpreted to include any equitable interest. There is also the oral agreement of August 16, 1950, between Sokol, the Union's attorney, and plaintiff, found by the court, that "Sokol would notify said plaintiff * * * when his clients, the said * * * [Union] had paid any judgment or compromise of said action * * * and that said plaintiff * * * would then try to attach the money by proceeding in this then pending action * * *" from which it is implicit that plaintiff was not only not insisting on his right to a lien-equitable interest but was also waiving any objection he had to the payment to his assignor instead of to him. The waiver of or estoppel to assert a lien or an equitable interest in property does not necessarily mean that the obligation secured by the lien or giving rise

to the interest is lost, as it may exist without the security or other assurance that it will be discharged. But here the court was justified in concluding that not only the lien and equitable interest were lost, but also the obligation, because, implicit in the oral agreement is an authorization by plaintiff (assignee) that the Union (debtor) could pay the assignor (Mrs. Martin) rather than him. Subsequent to the agreement, and on April 16, 1951, Sokol paid to Mrs. Martin and Wellins the \$20,000 settlement, after trying unsuccessfully, but without fault on his part, to notify plaintiff thereof. He notified him on April 17, 1951, and the court found that "At said time of said notice said plaintiff made no protest or objection to said payment, made no claim that it violated any of his rights, and made no assertion of any right to a lien on the fund before said payment."

Plaintiff makes numerous claims with respect to the foregoing, such as asserted negligence and fraud on Sokol's part, no justified reliance on the oral agreement, and further that his action (the instant one) commenced in September, 1950, after the oral agreement, charging the Union with responsibility, prevented reliance on the agreement by the Union. The whole course of events and conduct of plaintiff subsequent to the commencement of his action, and thereafter, showed that he was not relying upon a claim against the Union. These events, supported by adequate evidence, are summarized by the trial court in its memorandum opinion as follows: "The minute order for judgment in the *Schneiderman* case [the personal injury action] was made on August 15, 1950. On the next day Mr. Sokol, attorney for the Union defendants, wrote plaintiff saying 'It is very urgent that you get in touch with me and I shall appreciate hearing from you.' (Exhibit B.) Mr. Sokol previously had been notified in writing of plaintiff's claim of an attorney's lien. Shortly after receipt of this letter plaintiff called at Mr. Sokol's home and was told that the latter was at a loss to know what his, plaintiff's, rights were against Sokol's clients, that he knew of no right to a lien against them and that he would like to know what plaintiff wanted

him to do. Thereupon plaintiff said that all he would ask of Mr. Sokol was to notify him when the defendants had paid the judgment and that he would try to attach. This is all he asked Mr. Sokol to do. When the judgment was entered, Mr. Sokol promptly notified plaintiff of that fact. Thereupon an appeal was taken, followed ultimately by a compromise in April, 1951. The * * * Union sent its \$20,000 check to Mr. Sokol who received it on April 16, 1951. He called plaintiff that same day and before contacting Mr. Wellins concerning receipt of the check. Being unable to reach plaintiff, he told Mr. Alperin, his office associate, that if Mr. Jones should call, to tell him of the fact of the receipt of the money to close the settlement of the judgment. But Mr. Wellins was pressing him for a consummation of the compromise and so on that same day the \$20,000 was paid to him by Mr. Sokol. On the 17th Sokol reached plaintiff by telephone and plaintiff said that his secretary had not been in the office on the 16th. He also said that he would attempt to attach or restrain the payment of the money by Wellins. Mr. Sokol heard no more from Mr. Jones until on the 25th of April. In the meantime the alias writ of attachment was issued on the 23rd, based upon plaintiff's affidavit of the 21st. Although this writ was not levied on any property of the Union defendants, Mr. Sokol was curious and on the 25th called on Mr. Jones, asking him why he was keeping his, Sokol's clients in the case, asserting that no attorney's lien could run against them,—a position he still maintains and in apparent good faith. Plaintiff said he did not know, but he thought he might have something. The significance of this conversation of the 25th,—after the money had been paid over to Wellins,—is that it shows plaintiff had little confidence in his lien and was relying upon other remedies, such as injunction and attachment. Later, when Mr. Sokol reproached him for inserting in the amended complaint herein an allegation that he, Sokol, had promised to deposit the money in court, Mr. Jones replied that he had to put something in there. In fact, plaintiff never made any such request and Mr. Sokol made no such promise. He fully

performed his promise to plaintiff both in letter and in spirit. It is apparent from the foregoing that the court accepts on all points of conflict the testimony of Mr. Sokol rather than that of Mr. Jones, whose credibility has been destroyed in divers ways and respects. The charges of unethical conduct which were hurled at Mr. Sokol by Mr. Jones from the witness stand are untrue.

"Plaintiff's conduct justifiably led Mr. Sokol to believe that he did not and would not stand upon his claim of a lien. The Union defendants have changed their position to their prejudice in reliance upon plaintiff's conduct and he is estopped now to insist upon the lien against them * * *."

[7] Plaintiff's main argument on this point (waiver of lien) seems to center around the alleged incredibility of the Union's witness Sokol. That was a question for the trial court which was resolved against plaintiff and it was justified in drawing reasonable inferences which established a waiver or estoppel rather than those to the contrary.

It is urged that estoppel or waiver cannot apply because there was no misleading conduct or statements by plaintiff as to present facts—only future promises were made. As seen from the oral agreement and other conduct of plaintiff, there was a present intent to abandon the claim against the Union.

[8] Plaintiff claims that the estoppel or waiver was not properly pleaded because it was alleged in the Union's answer that the agreement was made when the substitution of attorneys was filed rather than in August, 1951, as found by the court. It was alleged in the answer that at the time of the substitution plaintiff told Sokol there was nothing he could do "until any money recovered by the plaintiff * * * was paid by these defendants and that plaintiff would appreciate it if David Sokol would advise plaintiff when the matter came to trial and when judgment was entered"; that thereafter at various times Sokol communicated with plaintiff, and after entry of the judgment in the personal injury action

plaintiff again said that all he expected of Sokol was to advise plaintiff when payment was made, and there was nothing else Sokol could do, and plaintiff could do nothing as to the payment until payment had been made. The court found the oral agreement as above mentioned and that the allegations of the answer were true except that it is not true that plaintiff's request to Sokol to keep plaintiff posted was made at the time of substitution, or that plaintiff said Sokol could do nothing until payment, or that Sokol's discussion concerning what action plaintiff wanted from Sokol was shortly after the entry of the judgment or by telephone. But it is true that "plaintiff in said discussion did state that all he wanted said Sokol to do in plaintiff's behalf was to advise plaintiff when payment had been made to defendant Louise Martin or her attorney, Marvin Wellins; and it is not true that plaintiff advised said Sokol that there was nothing else that said Sokol could do, but it is true that plaintiff did advise said Sokol, shortly after August 15, 1950, that there was nothing else said Sokol should do as far as plaintiff's rights were concerned; and it is not true that plaintiff at said time stated to said Sokol that under the law plaintiff could take no action whatsoever until said Sokol or the defendants he represented had paid over the moneys pursuant to the judgment to said Louise Martin." We do not believe that plaintiff was prejudiced. He was advised of the situation he had to meet and the seeming variances as to times was not vital. Indeed, plaintiff admitted the conversation in regard to the agreement:

"Q. By Mr. Sokol: Didn't you tell me in my home when I asked you what I could do, that the only thing—you told me 'Sokol, when you pay the money, let me know and then I will attach it'. Did you or did you not tell me that, in my home? A. That was part of the conversation, but not all of it. You are leaving out other parts that are very important."

[9] In regard to Wellins it appears that recovery against his administratrix was properly denied because of plaintiff's failure to file a claim against the estate. Section 707 of the Probate Code provides that

all claims arising upon contract must be filed or presented within the time required or they are barred. Likewise a claim must be presented or filed where, as here, an action against decedent involving the claim is pending at the time of his death and no recovery may be had unless there is proof of the filing or presentment of a claim. Prob.Code, § 709. Here plaintiff did not present or file any claim.

He endeavors to escape the claim requirement by asserting that none is required where he is, as here, asserting a constructive trust against Wellins, decedent. (See 11a Cal.Jur. 706-7, 711-12.) The theory is that by reason of the trust the beneficiary has an interest in specific property included in the assets of the estate—a claim that such interest belongs to him, not to the estate, as distinguished from a debt or obligation arising out of contract.

That argument will not aid plaintiff because he has waived or is estopped from asserting any equitable interest in any property of Wellins' estate by the following: In his original complaint he did not even include Wellins as a named party, and while he mentioned a lien, he asserted that he was entitled to half the recovery under his contingent fee contract, and that the whole is due and owing, and that defendants are indebted to plaintiff under said contract. In his amended complaint filed on May 24, 1951, when he named Wellins as a defendant, he does allege that Wellins held the \$20,000 proceeds of the settlement as constructive trustee, and he also alleged that Wellins was indebted to him in the sum of \$10,000. In his first affidavit for attachment on the original complaint, he asserted that defendants (Union and members) were indebted to him on a contract for the direct payment of money and it was not secured by any lien. The same statements were made in his second affidavit for attachment which was filed on April 23, 1951, and an attachment was issued and levied on Wellins' bank account and not released until after Wellins died on June 15, 1951. We think, from the foregoing, it is clear that plaintiff had lost any claim to an interest in any property of Wellins' estate, and when the latter died, plaintiff's only

claim was for money arising from contract, and hence required the presentment or filing of a claim. In *Steiner v. Rowley*, 35 Cal.2d 713, 221 P.2d 9, the complaint had counts on contract and tort involving the same transaction. Plaintiff attached and it was held that he was estopped to rely upon the action in tort. Similarly, here plaintiff attached the bank account of Wellins indicating reliance upon a contract debt rather than a claim to specific property as the beneficiary of a constructive trust.

The judgment is affirmed.

SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.



40 Cal.2d 876

PEOPLE v. DAUGHERTY.

Cr. 5366.

Supreme Court of California, in Bank.

May 5, 1953.

Rehearing Denied May 28, 1953.

Homicide prosecution. The Superior Court, Sonoma County, Donald Geary, J., rendered judgment. The case came to the Supreme Court by automatic appeal from judgment of conviction of first degree murder imposing the death penalty, finding defendant sane, and from an order denying a new trial. The Supreme Court, Carter, J., held that the evidence was sufficient to establish intentional, premeditated and deliberate murder.

Judgment and order affirmed.

1. Homicide ⇨253(3)

Evidence relating to defendant's threats and statements, his illness, his consumption of alcoholic beverages, surrounding circumstances at time of killing, wounds inflicted on deceased and intent of deceased established intentional premeditated and deliberate murder or murder in the first degree. Pen.Code, § 189.

2. Criminal Law ⇨254, 260(11), 1159(5)

The rule that where evidence is open to two equally reasonable constructions, one of which points to guilt of defendant

of higher degree of crime and the other to his guilt of lesser degree, the court must adopt the theory pointing to guilt of lesser degree applies to trier of fact only, be it jury or trial court, and does not apply to appellate court. Pen.Code, § 1097.

3. Criminal Law ⇨1159(2)

Test on appeal is whether there is substantial evidence to support conclusion of trier of fact and it is not whether guilt is established beyond reasonable doubt. Pen.Code, § 1097.

4. Criminal Law ⇨1159(5)

In determining whether evidence does or does not support a conviction of a higher degree of a crime, appellate court cannot reduce degree if there is substantial evidence to support finding of higher degree. Pen.Code, § 1097.

5. Homicide ⇨253(4)

Evidence warranted finding that murder was perpetrated by torture so as to make the offense murder in the first degree. Pen.Code, § 189.

6. Homicide ⇨22(1)

While the manner of killing does not necessarily establish such torture as will make the offense murder in first degree, murder is perpetrated by "torture" when assailant's intent was to cause cruel suffering on part of object of attack, either for purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. Pen.Code, § 189.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Torture".

7. Criminal Law ⇨1166½(6)

Where juror stated on voir dire examination that juror had had no contact with defendant's counsel and juror gave her sworn statement that she would be impartial and made affidavit on motion for new trial that she had formed no opinion on merits of case until it was finally submitted to jury, defendant was not prejudiced by letters having been sent by another member of law firm of defendant's counsel respecting visitation privileges of juror as grandmother of child of member's client.

8. Criminal Law ⇨1158(3)

Trial court's resolution of conflict created by juror's affidavit on new trial motion that she had formed no opinion about merits of case until case was finally submitted to jury and affidavit detailing conversation which was had between affiant and juror in courthouse corridor after jury reached verdict and from which it might be inferred that jury had prejudged the case was binding on reviewing court.

9. Criminal Law ⇨956(10)

Affidavit on new trial motion disclosing that juror stated to affiant in courthouse corridor after jury reached verdict, in response to question asked as to how jury arrived at verdict so quickly, that "we already knew it", did not necessarily indicate prejudgment of case inasmuch as juror may merely have meant that a short time after case was submitted to the jury it knew how it felt about the matter.

10. Jury ⇨103(14)

A juror who testified on voir dire that he had an opinion based on what he had read in newspaper as to guilt or innocence of defendant was not disqualified where juror further stated that he would cast aside his impression gained by reading newspaper and determine case on evidence. Pen.Code, § 1076.

11. Criminal Law ⇨1158(3)

Trial court's resolution of conflict in juror's testimony with respect to whether juror will act impartially and fairly notwithstanding that juror has formed an opinion founded on public rumor, statements in public journals, circulars, or other literature or common notoriety is binding on appellate court. Pen.Code, § 1076.

12. Criminal Law ⇨857(1)

Where defendant's only defense at trial of homicide prosecution was that defendant was so befuddled by alcohol and illness that he could not form an intent and was incapable of premeditation or deliberation, and there was no question that defendant killed decedent, and evidence of torture and premeditation and that his mind was not so affected was ade-

quate, and there were no eyewitnesses to killing so that most of record of 1,274 pages consisted of people's structure of case based on circumstantial evidence, the hour and a quarter consumed by jury in reaching verdict after trial on not guilty plea was not so short as to indicate a failure to consider evidence or of bias or prejudice or denial of fair trial.

13. Criminal Law ⇨1166½(12)

Any error in trial court's comment when jury returned verdict after trial of not guilty plea that jury had discharged duty as evidence in case warranted was not so prejudicial as to deprive defendant of fair trial by same jury on issue of sanity, in view of adequacy of evidence to support jury's determination of sanity, trial court's strong admonitions to disregard comment, casual nature of comment which was buried in common laudatory statement regarding performance by jury, and power of court to comment on credibility of testimony provided he tells jury it is exclusive judge of all questions of fact and credibility of witnesses. Const. art. 6, § 19.

14. Homicide ⇨9

Question of capacity of defendant accused of homicide to form an intent, presented in the not guilty trial, involved an issue entirely different from that presented at trial of sanity issue.

15. Constitutional Law ⇨257**Criminal Law** ⇨270, 623

The statutes providing for double plea of not guilty and not guilty by reason of insanity and a bifurcated trial on the issues do not violate due process clauses of State and Federal Constitutions. Pen. Code, §§ 1016, 1026.

16. Criminal Law ⇨48

Under the "right or wrong test of insanity," commission of overt act is conceded but criminal guilt or mental capacity to commit criminal act is denied on sole ground that at time overt act was committed defendant was suffering such a defect of reason from disease of mind as not to know nature and quality of act he

was doing or if he did know it that he did not know he was doing what was wrong.

See publication Words and Phrases, for other judicial constructions and definitions of "Right or Wrong Test of Insanity".

17. Criminal Law $\S$ 1213

The statute providing that penalty of death shall be inflicted by administration of lethal gas is not invalid for uncertainty in that it permits imposition of cruel and unusual punishment contrary to Federal Constitution in that executioner could use lethal gas which would cause long and cruel suffering. Pen.Code, $\S$ 3604.

18. Criminal Law $\S$ 789(4)

In first-degree murder prosecution, instruction in not guilty trial stating that defendant must be proved guilty beyond reasonable doubt of every fact constituting crime, that specific intent was an element required and that jury must find beyond reasonable doubt that defendant had mental capacity to form intent specifically instructed that intent must be proved beyond a reasonable doubt. Pen.Code, $\S\S$ 20, 26, 1096.

19. Criminal Law $\S$ 808½

The court may couch its instructions defining elements of offense in language of code where no instructions in elaboration or exposition of principles of statutory definitions are requested by defendant.

20. Criminal Law $\S$ 570(2)

In insanity stage of trial, burden of proof rests on defendant to prove his insanity by preponderance of evidence. Pen. Code, $\S\S$ 1016, 1026.

21. Criminal Law $\S$ 782(14), 823(10)

An instruction in insanity stage of murder trial that prosecution's burden of proving sanity beyond reasonable doubt is met by presumption of sanity and burden of establishing defense of insanity is on defendant to establish such insanity at time of commission of crime by preponderance of evidence was confusing and should not have been given, but was not prejudicial error as it was subject to construction placing it in harmony with other instructions

that defendant need only produce a preponderance of evidence.

22. Criminal Law $\S$ 778(7)

The appropriate instruction as to who carries burden of proof in insanity stage of trial is that defendant has burden of proving insanity by preponderance of evidence.

23. Homicide $\S$ 22(1)

Where unlawful killing is accompanied with deliberate and clear intention to take life and intent to kill is result of deliberate premeditation and is formed on pre-existing reflection and not upon sudden heat of passion sufficient to preclude idea of deliberation and act of killing is preceded by a concurrence of will and deliberation and premeditation on part of slayer, the killing is murder in the first degree. Pen. Code, $\S\S$ 187, 189.

Mancuso, Herron & Winn and John Wynne Herron, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Leo V. McInnis, Deputy Attys. Gen., and Joseph Maddux, Dist. Atty., Santa Rosa, for respondent.

CARTER, Justice.

This case comes to us by automatic appeal from a judgment of conviction of first degree murder imposing the death penalty, finding defendant sane, and from an order denying a new trial. Defendant made the twofold plea of not guilty and not guilty by reason of insanity.

[1] Defendant is a man about 50 years of age. He married Florena Daugherty, the victim of the homicide, in 1933, and they had five children, Barbara, Michael, Wanda, Margaret, and Jerry. The killing occurred in the early morning hours of February 28, 1952. Defendant did not testify at the trial and there was little dispute that he killed his wife Florena, the main contention being that his mind had so deteriorated from illness and the consumption of alcoholic beverages that he

was incapable of premeditation or of forming the intent to commit murder.

The homicide took place at the Daugherty family home on the outskirts of Santa Rosa, California. Defendant had not been living at the home for about a month before the time of the crime, having moved to an apartment in town. Prior to the homicide the relation between defendant and Florena had been strained. Barbara, the 17 year old daughter of the couple, testified that for several years prior thereto they had engaged in constant quarrels and arguments with the defendant accusing Florena of infidelity. On one occasion in 1951, defendant struck Barbara and was arrested therefor. He had made threats against Florena, stating that "he would come back and get us." In December, 1951, defendant had been drinking heavily. He seemed to think his wife was disloyal to him, and while armed with a gun, went looking for her at the house of a tenant nearby his own home. He then fired some shots in the air. Early in 1952, defendant commenced a divorce action against Florena and on the morning of February 27, 1952, the day before the night of the crime, obtained an interlocutory decree by default. He attended to his business, seeming normal, and left a beauty shop owned by him at 4:30 p. m. From about 6:30 to 10:00 p. m. he was with Mrs. Case, an employee, and a friend, Oliver, at either Mrs. Case's apartment or his own, where he consumed considerable whiskey but appeared to be rational. Several witnesses saw defendant between 10:00 and 11:30 p. m., and they testified that he had consumed whiskey, some of them said he was drunk, others said that he was not drunk but was in high spirits. Between 11:00 and 11:30 p. m. he called a taxi driver by the name of Bickel from a cafe in Santa Rosa. Bickel drove him to the Daugherty home. Bickel testified that defendant was in good spirits and happy drunk but acted rationally. While he waited for defendant outside the Daugherty home, he saw the defendant and Florena in the dining room. Defendant waved a white piece of paper at her (inferentially the interlocutory divorce decree) and she tried to push him out of

the house. Defendant left and on returning to the cab stated: "The God damned dirty bitch, she thinks she is smart but I will show her" that he had gotten his "clinch" today and he "just went out there to show her my clincher." Bickel returned the defendant to his apartment at about 11:30 p. m. Between 1:30 and 2:30 a. m. defendant was observed endeavoring to back his car out of his garage and the observer said he was drunk. Defendant called on Mrs. Case and she also considered him drunk. From the testimony of various witnesses and the permissible inferences therefrom, defendant then drove to the Daugherty home and parked his car. Florena, and all the children with the exception of Barbara, were at home. Defendant severed the telephone line on the outside of the house and forced an entry. Florena locked herself in the bedroom but at his insistence let him in. Defendant was holding a hunting knife in his upraised hand, evidently having come to the house armed with it, but put it in his belt at her request. She fled from the house to the yard and he followed her. While there were no eyewitnesses to the crime, he was observed kicking her while she was lying in the yard and he was standing over her. Defendant left and the children, at Florena's request, went to summon help. A neighbor responded, and saw Florena lying on her back in the yard, nude. She was alive and conscious. He drove to town for the police and on their arrival she was still alive, lying nude, her body having blood on it. An ambulance was summoned, and she was taken away. There was blood at various places in the yard and at the door of the house. There were abrasions on her thigh with particles of dirt therein, indicating she had been dragged. Her body contained numerous stab wounds, including some on the upper part of her arm, shoulder, near hip joint, abdomen and forearm. The cartilage of her nose was broken. The fatal wound was on the side of the left breast and was 3 inches wide and 6 inches deep. The evidence showed that the wound had penetrated the heart and would cause death from internal hemorrhage. In addition to the blood in the yard,

which covered a considerable area, a blood-stained hunting knife and her torn night-dress were found. A knife scabbard whose inside configuration fit the knife was found at defendant's apartment.

Just prior to his arrest (about 3:00 a.m. on the day of the crime), defendant made telephone calls to several different persons to whom he stated that he had killed his wife. At the time of his arrest in his office, there was blood on his shirt and pants and about his office and car. Although defendant refused to make a formal statement to the peace officers, when he was asked what had happened at the home place, he stopped, gritted his teeth, and shook his fist at the ground, and said: "I stood there and watched the dirty son of a bitch die; I couldn't take it any longer." When taken to the sheriff's office and examined, he had the divorce decree on his person. He did not appear drunk and while there he told an officer, "I told her not to push me too far; I told her not to push me too far or I would fix her and I did." "The slut, I fixed her."

The foregoing summary of the evidence is clearly sufficient to establish intentional, premeditated and deliberate murder, or murder in the first degree.

As before stated, the main defense at the trial was that defendant was so deranged by alcohol and illness, that he was incapable of forming an intent or of premeditation. There was evidence, as above seen, that he was intoxicated on the night in question and evidence to the contrary. He had witnesses in his defense who testified to his intoxication then, and overindulgence in alcohol for a considerable period of time prior thereto, coupled with his suffering from Buerger's Disease and other ailments; that defendant had changed and was sullen and morose. His personal physician testified that defendant was suffering from heart disease, ulcers, bladder trouble, Buerger's Disease and chronic alcoholism and, because of those things, that when he committed the offense he did not have the capacity to form the intent to commit murder. However, on rebuttal, the prosecution called Dr. Toller, a psychiatrist, who testified that he did have such

capacity as shown by his activities on the night in question.

[2-4] Defendant relies on recent cases by this Court in support of his contention that there was insufficient evidence to establish premeditation as lately defined by this Court. The facts in those cases are not comparable to the one here presented. Defendant stresses the language in *People v. Howard*, 211 Cal. 322, 295 P. 333, 71 A. L.R. 1385, that there was no evidence of the surrounding circumstances at the time of the killing. Here, as above outlined, we have such evidence and, together with the inferences to be drawn therefrom, it is sufficient. In *People v. Holt*, 25 Cal.2d 59, 153 P.2d 21, a previous threat to kill was held insufficient but that was in the background of defendant's testimony that the deceased was advancing upon him when he shot him and he fired but one shot which was not immediately fatal. Here many wounds were inflicted and defendant had pursued Florena. Reliance is also placed on *People v. Thomas*, 25 Cal.2d 880, 156 P. 2d 7, but there the Court held the evidence sufficient. Evidence such as exists here was not present in *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8, 17, where the only "rationale" was a "tempestuous quarrel, hot anger, and a violent killing." Special reliance is placed upon *People v. Jiminez*, 95 Cal.App.2d 840, 214 P.2d 15. In that case there was not all the evidence of threats and statements made by defendant, as well as evidence of torture, shown by the record here. The statement therein that courts are bound by the rule that where evidence is open to two equally reasonable constructions, one of which points to the guilt of defendant of a higher degree of crime, and the other to his guilt of a lesser degree, the court must adopt the theory pointing to guilt of the lesser degree, is not a correct statement of law when applied to the consideration of a case by an appellate court. That rule applies to the trier of fact only, be it jury or trial court, the same as does section 1096 which deals with reasonable doubt. The court in the *Jiminez* case cites section 1097 of the Penal Code which reads: "When it appears that the defendant has committed a public

offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only." But that section is in a chapter of the Code dealing with the *trial* of a case. Also cited in the Jiminez case are *People v. Golembiewski*, 25 Cal. App.2d 115, 76 P.2d 717 and *People v. Daniel*, 65 Cal.App.2d 622, 151 P.2d 275. In the Golembiewski case there was no evidence of the higher offense and the court was speaking of the duty of the trier of fact. The Daniel case relied on the rule in connection with the power of the trial court to reduce the degree of the crime under section 1181, subd. 6, of the Penal Code, but we held the rule was the same under that section, 1181, subd. 6, as it was under section 1260 of the Penal Code and in neither case may the Court reduce the degree of the crime unless the evidence is legally insufficient to support the higher degree of which defendant was convicted, and in determining that question, the evidence, even if circumstantial, is not weighed. *People v. Odle*, 37 Cal.2d 52, 230 P.2d 345. The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt. *People v. Stephens*, 66 Cal. App.2d 755, 152 P.2d 1019; *People v. Wright*, 94 Cal.App.2d 70, 210 P.2d 263. The rule is stated in *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, rejecting a contrary statement in *People v. Lamson*, 1 Cal.2d 648, 36 P.2d 361 and *People v. Staples*, 149 Cal. 405, 86 P. 886: "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been ap-

proved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. *People v. Perkins*, 8 Cal.2d 502, 66 P.2d 631, 635; * * *. In the Perkins case this court expressly rejected the application of the statement from the Staples case to a situation which involved only circumstantial evidence. As pointed out by the court the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not the rule for the guidance of the court on review. It said: 'The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury.'" [15 Cal.2d 678, 104 P.2d 779.] That rule has been consistently followed. *People v. Reed*, 38 Cal.2d 423, 240 P.2d 590; *People v. Cullen*, 37 Cal.2d 614, 234 P.2d 1; *People v. Jones*, 36 Cal.2d 373, 224 P.2d 353; see cases collected and discussion, 4 Cal.Jur. 10 Yr.Supp., pp. 967-971. Without doubt the same rule applies in determining whether the evidence does or

does not support a conviction of a higher degree of a crime, and an appellate court cannot reduce the degree if there is substantial evidence to support the finding of a higher degree. The same comments are applicable to the other cases relied upon by defendant.

[5,6] In connection with the claimed insufficiency of the evidence, defendant asserts there was no evidence of torture. (Murder committed by torture is first degree. Pen.Code, § 189.) There was sufficient evidence from which the jury could find torture. Murder is perpetrated by torture "when 'the assailant's intent was to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity.' People v. Tubby, 34 Cal.2d 72, 77, 207 P.2d 51, 54; People v. Bender, 27 Cal.2d 164, 177, 163 P.2d 8." People v. Martinez, 38 Cal.2d 556, 561, 241 P.2d 224, 227. The manner of the killing does not necessarily establish torture. See People v. Tubby, 34 Cal.2d 72, 207 P.2d 51. However, here the defendant husband threatened to do things to the wife because he considered she had been, and was, unfaithful to him although there was no evidence to that effect. His remarks to Bickel, the taxi driver, before the killing indicate as well as an intent to kill, a wish to seek vengeance on her so as to cause her to suffer. The same is true of his remarks after the killing. At the time of the killing he was armed with a knife and pursued her from the house into the yard and from the size of the area where blood was found, his pursuit and the stabbing of her must have covered an appreciable time. He tore her nightgown from her, stabbed her several times and, from the dirt-filled abrasions on her thigh, must have dragged her along the ground. He evidently struck her in the face. And finally, when she was lying on the ground but still alive, he stood over her and kicked her. The evidence was sufficient to permit the jury to conclude that the murder was perpetrated by torture. See People v. Martinez, *supra*, 38 Cal.2d 556, 241 P.2d 224.

[7] On voir dire examination, juror Mickelsen stated that although she had read about the case she had formed no opinion concerning it; had no conscientious scruples against the death penalty, the use of intoxicating liquors, or the defense of insanity; that she did not know Charles DeMeo, one of the defendant's counsel, or Sullivan, defendant's other counsel, who conducted the trial, or the district attorney and had had no contact with any of them. In support of his motion for a new trial, defendant produced affidavits from which it appears that Charles DeMeo is a member of a law firm of which J. N. DeMeo is also a member. Prior to the trial, the firm, through J. N. DeMeo, represented one Grundstrom as plaintiff in a divorce action. Concerning that representation and the action taken therein, Charles DeMeo had no actual knowledge until investigation after the trial. Grundstrom was granted a divorce and custody of the children with right of visitation in the defendant therein. In connection with that case, J. N. DeMeo had written two letters to a Mrs. Peter Michelsen, Route 4, Box 135, Petaluma, California. (The Mrs. Mickelsen who was on the jury appears under the name of Mrs. Leda F. Mickelsen, Bodega Highway, Route 4, Box 199, Petaluma.) In the first letter (July 16, 1950), J. N. DeMeo wrote her that Grundstrom had complained that she had endeavored to entice one of the children away from him and that if she did not desist, Grundstrom would have to forbid her seeing the child. In the second letter (March 26, 1952) J. N. DeMeo stated that Grundstrom had again complained; that she had ignored the former letter, and that the child could visit her once a week for two and one-half hours; that she was to stop the above mentioned activities, or legal action would be taken. Apparently the Mrs. Mickelsen to whom the letters were addressed was the maternal grandmother of the child. No answers to the letters were received. It was further stated in the affidavits that had counsel known of the situation they would have pursued an inquiry as a basis for challenge for cause or would have exercised a per-

emptory challenge against Mrs. Mickelsen. Defendant claims that the letters would cause Mrs. Mickelsen to be unfriendly toward the DeMeo's and that a fair trial was denied because of Mrs. Mickelsen's false testimony on the voir dire that she did not know and had no contact with any of the attorneys in the case. There may have been some doubt as to whether juror Mickelsen and the one to whom the letters were sent were the same person for the names and address are to some extent different. Aside from that, however, we do not believe defendant suffered prejudice. Mrs. Mickelsen was technically truthful in her answer that she had no contact with any of the attorneys in the case for she had had none with Charles DeMeo who was in court assisting with defendant's defense. The letters were written by J. N. DeMeo, and as far as appears, she had never seen either of them and had no reason to believe they were partners. It is very doubtful if she realized that there was any connection between Charles DeMeo and the incident of the letters. If anything, Charles DeMeo, as a partner, might have J. N. DeMeo's knowledge imputed to him. The letters do not necessarily indicate that Mrs. Mickelsen would be angered with J. N. DeMeo. At least not to the extent that she would carry it over to Charles. In addition, she had given her sworn statement that she would be impartial. Moreover, she made affidavit on the motion for a new trial, "That before being selected as a trial juror in said cause, and while being questioned on voir dire examination, affiant stated under oath that she had no fixed opinion regarding the merits of the case which would prevent her from trying the case solely upon the evidence adduced at the trial. That during the course of the said trial affiant frequently heard the admonition of the trial judge that the jurors should not form or express any opinion about the merits of the case until it was finally submitted to them, and affiant hereby states that she faithfully observed said admonition. That during the trial of the said case and before it was finally submitted to the jury affiant did not form or

express any opinion about the merits of the case.

"That during the trial, before it was submitted, affiant did not, at any time, express any opinion regarding the merits of the case, nor did affiant overhear any other member of the jury state any such opinion."

Further in connection with Mrs. Mickelsen, the affidavit of one Graham was filed in which he stated that he was in the corridor of the court house after the jury had reached its verdict and had stated to Mrs. Mickelsen who was there, "It seems phoney that they could get a verdict that quick on as large a trial as that."

"* * * [Mrs. Mickelsen] responded: 'Why?'"

"Affiant answered: 'Because he is a sick man.'"

"* * * [Mrs. Mickelsen] responded: 'I am one of the jurors, I'm sick too. I have hemorrhoids and I haven't killed anybody.'"

"Affiant then said: 'How did you arrive at a verdict that quick?'"

"* * * [Mrs. Mickelsen] responded: 'Well, we already knew it,' and then walked away."

[8,9] Mrs. Mickelsen's affidavit creates a conflict with any inference from that conversation that she had prejudged the case for she said she had formed no opinion and the trial court's resolution of that conflict against defendant is binding on this Court. *People v. Henderson*, 79 Cal. App.2d 94, 179 P.2d 406. Moreover, her statement does not necessarily indicate a prejudgment of the case for she may merely have meant that a short time after the case was submitted to the jury it knew how it felt about the matter. Nothing in *People v. Galloway*, 202 Cal. 81, 259 P. 332, requires a holding of error here. There the Court was concerned with the question of whether bias on the part of a juror could be shown when it was evinced by statements made before and during the trial, but had been concealed by the juror on voir dire. Whether bias was in fact shown or what its effect may have been was not involved.

Complaint is made by the defendant in regard to juror Schmidt. Schmidt testified on voir dire that there was nothing in his present state of mind that would prevent him from being an impartial juror except what he had read in the newspaper; that he had an opinion based solely on what he had read in the newspaper as to the guilt or innocence of defendant, but he had an open mind and could put it aside and be guided in his verdict solely by the evidence. On examination by defendant's counsel he said he still had the opinion he had formed and it would continue unless he heard evidence that removed it; that unless he did hear evidence to remove his opinion and some feeling of prejudice he would still have it at the end of the trial. Defendant's challenge for cause of Schmidt was denied, the court remarking that it did so on the ground that the juror had said he would cast aside his impression gained from reading the paper and determine the case on the evidence. The court then asked Schmidt whether he could act fairly and impartially in the light of the evidence received, to which an affirmative reply was given.

[10,11] The rule is stated: “* * * but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; provided, it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him.” Pen.Code, § 1076. That test was met here. See *People v. Collins*, 105 Cal. 504, 39 P. 16; *People v. Warner*, 147 Cal. 546, 82 P. 196; *People v. Wolff*, 182 Cal. 728, 190 P. 22. There is nothing in *People v. Helm*, 152 Cal. 532, 93 P. 99, that requires a different result. Moreover, even if the juror's testimony with respect to the test is conflicting, the trial court's resolution of that conflict is binding on the appellate court. *People v. Eudy*, 12 Cal.2d 41, 82 P.2d 359.

The trial was not fair, urges defendant, because the jury and judge were dominated by mob psychology and were prejudiced; that the jury reached a verdict in so short a time that it must have been prejudiced. So far as the first contention is concerned, there is nothing in the record to substantiate the charge and this is the first time the claim has been made. Indeed, an examination of the record reveals the opposite of defendant's contention.

[12] On the second point it may be noted that the jury took an hour and a quarter to reach its verdict on the first phase of the trial. While the record consists of some 1,274 pages, the defendant's only defense at the trial was, as above stated, that defendant was so befuddled by alcohol and illness that he could not form an intent and was incapable of premeditation or deliberation. There was no question that defendant killed Florena and the evidence of torture and premeditation and that his mind was not so affected is adequate. Inasmuch, however, as there were no eyewitnesses to the killing, most of the record consists of the people's structure of a case based on circumstantial evidence. On the record we do not believe the time consumed in reaching the verdict was so short as to indicate a failure to consider the evidence or of bias or prejudice or the denial of a fair trial.

[13,14] It is contended that the court was guilty of misconduct which deprived the defendant of a fair trial on the issue of sanity. The same jury tried both sections of the trial. Immediately after the jury returned its verdict to the court, the latter remarked: “Ladies and gentlemen of the jury, this has been a most unpleasant and a most difficult duty. You have discharged that duty conscientiously and, *in my opinion, as the evidence in the case warranted.*” (Emphasis added.) Defendant moved for a mistrial and that the jury be discharged and another impanelled to try the sanity issue. The motion was denied. It is asserted that the italicized comment was particularly prejudicial because the last witness on the stand to testify on the issue of defendant's guilt

was a Doctor Toller, the people's rebuttal witness, who testified that defendant did have the mental capacity to form an intent and was capable of premeditation and that the comment, in effect, told the jury that his testimony, which was fresh in the jury's mind, was properly believed; that the same doctor testified for the people that defendant was sane at the trial of the sanity issue.

In addition to the foregoing, it should be mentioned that at the beginning of the sanity trial, the court told the jury that in considering the evidence, they were "the sole judges of the evidence and of the credibility of the witnesses and [of] the weight to be given to the evidence and testimony, and you are to determine the issues presented upon this phase * * * without regard to any intimation,—reputed intimation, that may have been made heretofore concerning the determination of the issues presented upon the first phase of the case. The defendant is entitled to your calm, unbiased and unprejudiced judgment upon the issue upon which we are now to receive testimony. You understand that do you, ladies and gentlemen? (Jurors answer in affirmative)." At the end of that trial, the court again admonished the jury, saying, "The Court has nothing to do with the determination of questions of fact. Whatever the Court may have said during the progress of the trial, and particularly what the Court may have said at the conclusion of the first phase of this trial, or may intimate, or have intimated, in its instructions, with respect to the evidence, its weight, effect [sic] or sufficiency, must in no way influence your verdict, and if there be any such intimation the same must be wholly and completely disregarded by you. If, in stating to you any proposition of law the Court has inadvertently indicated any material fact, or facts, to have been proved, you will disregard such intimation and draw your own conclusions from the evidence herein. That is a duty resting solely upon you, ladies and gentlemen, without intimation or guidance in any shape or manner from the Court." It should also be pointed out that on the sanity issue the prosecution

presented, in addition to Dr. Toller, two other doctors appointed by the court, who twice examined defendant, and who testified he was sane. Defendant called several relatives and intimate friends, his personal doctor, a psychologist, and a psychiatrist, who testified that defendant was insane. While there was a sharp conflict in the evidence, there was ample evidence to support the determination that defendant was sane.

It is doubtful that the error, if any, in the court's comment was prejudicial in view of the adequacy of the evidence, his strong admonitions to them, and the casual nature of the remark buried as it was in the common laudatory statement regarding the performance by the jury of its duty and the fact that it was made before the sanity hearing began. When we consider those circumstances together with the power of the court to comment on the credibility of testimony provided he tells the jury it is the exclusive judge of all questions of fact and credibility of the witnesses, Cal.Const. art. VI, § 19, we find no prejudicial error. See *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193; *People v. Patumbo*, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303; *People v. Gosden*, 6 Cal.2d 14, 56 P.2d 211; *People v. De Moss*, 4 Cal.2d 469, 50 P.2d 1031; *People v. Eudy*, supra, 12 Cal.2d 41, 82 P.2d 359. At most the court said that in his opinion evidence was sufficient and the credibility of the prosecution witnesses on mental ability was satisfactory. The trial of the sanity issue involved an issue entirely different from the question of the capacity to form an intent in the not guilty trial, *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53, and the jury was so instructed (as later discussed). Additional witnesses were offered by both sides at the sanity hearing.

Defendant relies upon *People v. Pokrajac*, 206 Cal. 259, 274 P. 63, where the court's remark, after the trial on the not guilty plea but before the sanity trial, that the jury's verdict was "undoubtedly" a correct one was held prejudicial error which had not been cured by the admonition to the jury. The remarks there made were far stronger than those here involved

and, too, that case was decided prior to the amendment to the Constitution in 1934, authorizing comment on the evidence. This was pointed out in *People v. Busby*, 40 Cal.App.2d 193, 202, 104 P.2d 531, 535, where, between the sections of the trial, the court told the jury it had acted intelligently:

"Appellant contends that the language of the court expressed approval of the jury's verdict and had a tendency to minimize the importance of the insanity issue. As authority they cited *People v. Pokrajac*, 206 Cal. 259, 274 P. 63, where somewhat similar comment made by the trial judge was held to be reversible error.

"* * * since the *Pokrajac* case was reported, the amendment to the California Constitution, permitting the trial judge to comment upon the evidence, has gone into effect. Cal.Const. art. VI, sec. 19. It has been held that this right of comment even permits a trial judge, in proper cases, to express an opinion as to the guilt of the defendant. *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193.

"The fact that the trial judge's remarks were made before the trial on the insanity issue rather than during its progress, gives rise to no distinction as the trial on the substantive charges and the insanity issue constitute but a single trial. *People v. Troche*, 206 Cal. 35, 273 P. 767.

"The jurors were fully and correctly instructed as to the effect that they were the sole and exclusive judges of the effect and value of evidence and of credibility of witnesses. The remarks of the trial judge did not constitute reversible error."

[15] Defendant contends that sections 1016 and 1026 of the Penal Code, providing for a double plea of not guilty and not guilty by reason of insanity and a bifurcated trial on the issues, violate the due process clauses of the Constitutions of the United States and the State of California and that the cases beginning with *People v. Troche*, 206 Cal. 35, 273 P. 767

and *People v. Leong Fook*, 206 Cal. 64, 273 P. 779, to the contrary should be overruled. See also *In re Slayback*, 209 Cal. 480, 288 P. 769; *People v. Dias*, 210 Cal. 495, 292 P. 459; *People v. D'Angelo*, 13 Cal.2d 203, 88 P.2d 708; *People v. Cordova*, 14 Cal.2d 308, 94 P.2d 40; *People v. Ming*, 27 Cal.2d 443, 164 P.2d 487; *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53. We see no occasion for reconsidering our decisions in those cases. No new grounds are advanced.

[16] The right and wrong test of insanity is criticized as cruel and unscientific, that it is not the common or statutory law of this state and the cases declaring it to be the test should be overruled. The most recent reaffirmation of the test was made by this Court in *People v. Wells*, supra, 33 Cal.2d 330, 349, 202 P.2d 53, 65:

"Commission of the overt act is conceded but criminal guilt (the mental capacity to commit a criminal act) is denied *upon the sole ground* that at the time the overt act was committed the defendant was suffering such 'a defect of reason, from disease of the mind * * * as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.' (7 Cal.Jur. 862, § 21; *People v. Troche* (1928), supra, 206 Cal. 35 46, 273 P. 767.)

"* * * The standard by which the trial judge must appraise the admissibility of evidence in every case is, of course, the familiar 'right or wrong' standard hereinabove quoted, by which legal insanity as a defense is gauged.

"* * * Legal sanity, in a criminal case, under our court declared law, means 'reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment.' (*People v. Sloper* (1926), 198 Cal. 238, 245, 244 P. 362, 365, and cases there cited.)"

That has been the rule since the first decision in this state, *People v. M'Donnell*, 47 Cal. 134, and has been followed consistently, see cases collected 7 Cal.Jur. 862-863, despite voluminous critical writings on the subject. It is the generally accepted rule. 41 Am.Jur., Criminal Law, §§ 33, 40; *Commonwealth v. Stewart*, 255 Mass. 9, 151 N.E. 74, 44 A.L.R. 584; 22 C.J.S., Criminal Law, § 59; *Wharton's Criminal Law*, §§ 50-52; *Warren on Homicide*, § 61. Defendant has not offered a more workable test and if it is to be changed his argument should be addressed to the Legislature. Indeed, such attempts have been made without avail. We find no valid reason, therefore, for adopting a different test.

[17] Section 3604 of the Penal Code provides that punishment of death shall be inflicted by the administration of "a lethal gas." Defendant contends that the provision is invalid because of uncertainty in that it permits the imposition of cruel and unusual punishment contrary to the Federal Constitution in that the executioner could use a lethal gas which would cause long and cruel suffering. It is doubtful that this question is properly raised on this appeal since ordinarily we are not concerned with the execution of the judgment and there is no showing that such a gas has ever been used or will be used in this case. In any event, the contention is satisfactorily answered in *State v. Gee Jon*, 46 Nev. 418, 211 P. 676, 681, 217 P. 587, 30 A.L.R. 1443, where similar contentions and a similar statute were involved. The court said:

"But we are not prepared to say that the infliction of the death penalty by the administration of lethal gas would of itself subject the victim to either pain or torture. Counsel say we must take judicial notice of facts and conclusions reached as the result of scientific research, and it is insisted that from the knowledge thus acquired we must declare that the law in question provides a cruel and inhuman method of enforcing the death penalty. Without undertaking to state the limitations of the rule invoked, we may say that if we are controlled by our scientific knowledge of the subject we must reject counsel's contention. For many

years animals have been put to death painlessly by the administration of poisonous gas. Gas has been used for years by dental surgeons for the purpose of extracting teeth painlessly. No doubt gas may be administered so as to produce intense suffering. It is also true that one may be executed by hanging, shooting, or electrocution in such a bungling fashion as to produce the same result. But this is no argument against execution by either method.

"The revulsion on the part of many to the idea of execution by the administration of gas is due to an erroneous impression. The average person looks upon the use of gas with horror, because of the experiences incident to the late war. They forget that there are many kinds of gas, ranging from the harmless nonpoisonous tear gas, which may be used for the quelling of a mob, and the ordinary illuminating gas, which may produce painless death, to the highly poisonous gas which sears and destroys everything with which it comes in contact. It may be said to be a scientific fact that a painless death may be caused by the administration of lethal gas. That suffering and torture may be inflicted by its administration is no argument against it. We must presume that the officials intrusted with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they may not do so is no argument against the law.

"We think it fair to assume that our Legislature, in enacting the law in question, sought to provide a method of inflicting the death penalty in the most humane manner known to modern science. If the argument made in behalf of the unconstitutionality of the act is sound, the Legislature can provide no method of inflicting the death penalty other than that now in vogue. In other words, science and progress must halt when face to face with a long-established usage. Such was not the spirit which prompted the incorporation into our organic law of the provision now invoked. Every enactment of our Legislature must be deemed in harmony with our constitutional provisions until the contrary clearly ap-

pears. The Legislature has determined that the infliction of the death penalty by the administration of lethal gas is humane, and it would indeed be not only presumptuous but boldness on our part, to substitute our judgment for theirs, even if we thought differently upon the matter.

"We can find no ground upon which to sustain appellants' contention. * * * Nor do we find any merit in the contention that the act is indefinite and uncertain. It is certainly no more so than the act which it purports to amend. Rev.Laws 1912, § 7281. That statute simply said that the punishment of death should be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. The present statute provides that the judgment of death shall be inflicted by the administration of lethal gas, and that a suitable and efficient inclosure and proper means for the administration of such gas for the purpose shall be provided. We cannot see that any useful purpose would be served by requiring greater detail. Certainly, the statute infringes no provision of the Constitution."

Finally, the defendant questions the jury instructions. First, it is asserted that the instructions on reasonable doubt at the not guilty stage of the trial were insufficient; that the jury was not advised that each fact necessary for the crime must be proven beyond a reasonable doubt and particularly it was not told that intent must be so proven.

[18] The jury was instructed that the burden of proof was on the prosecution; that all presumptions are in favor of the accused; that if there is a reasonable doubt as to whether the circumstances point to defendant's guilt he should be given the benefit of that doubt and a verdict of acquittal reached. The court quoted section 1096 of the Penal Code which states that the accused is presumed to be innocent, that if there is a reasonable doubt of his guilt he is entitled to an acquittal, and defines reasonable doubt. The jury was instructed that the plea of not guilty is a denial by him of each and every element of the offense charged; that the duty is on the prosecution

to prove every fact necessary to constitute the crime; that in a criminal, as distinguished from a civil case, guilt must be established beyond a reasonable doubt; that defendant's plea of not guilty puts in issue every fact alleged in the indictment and every material element of the crime; that he may rest on that denial and if the evidence did not satisfy it of defendant's guilt beyond a reasonable doubt he should be acquitted; that in every crime there must exist a union, or joint operation of act and intent, Pen.Code, § 20, and that a person has no capacity to commit a crime if it was through accident and without evil design or intent, Pen.Code, § 26; that "Specific intent is an element of the offense charged here, and this presents a question of fact which must be proved like any other fact in the case"; that "It is the law of this state that an act done in the absence of the will is not any more the behavior of the actor than is an act done contrary to his will. If you believe beyond a reasonable doubt and to a moral certainty that the defendant committed the act charged in the indictment, and if you further believe from the evidence that he was not conscious thereof and was not acting while in full possession of his will and that he could not formulate or hold the specific intent to commit the act charged, or if, from the evidence herein, you entertain a reasonable doubt that defendant was conscious at said time and was not acting in full possession of his will and could not formulate or hold the specific intent to commit the act charged, then you should find him not guilty as to said indictment." We think the jury was adequately instructed that defendant must be proven guilty beyond a reasonable doubt of every fact constituting the crime; the specific intent was an element required and, specifically, that they must find beyond a reasonable doubt that he had the mental capacity to form an intent. There were, therefore, instructions that intent must be proven beyond a reasonable doubt.

[19] Moreover, under the statute no instruction on reasonable doubt other than that specified in the Penal Code, section

1096 need be given, Pen.Code, § 1096a, and as said in *People v. Reed*, 38 Cal.2d 423, 430, 240 P.2d 590, 594:

"The court may couch its instructions defining the elements of the offense in the language of the code where no instructions in elaboration or exposition of the principles of the statutory definitions are requested by the defendant. *People v. Treschenko*, 159 Cal. 456, 458, 114 P. 578. Even if such an instruction 'cannot be commended as a full or clear exposition of the meaning of the section of the Code, still it cannot be said that it was error for the court, in giving the law, to have conformed to the language of the Code, and to have omitted what that Code itself omits.' *People v. Dobbins*, 138 Cal. 694, 698, 72 P. 339, 341. The defendant will not be heard to complain where he has failed to request an amplification of an instruction in that form. *People v. Laird*, 69 Cal.App. 511, 514, 231 P. 596.

"The court's instruction on the presumption of innocence and defining reasonable doubt followed the language of section 1096 of the Penal Code. By additional instructions, the court explained the effect of the presumption of innocence and stated the doctrine of reasonable doubt.

"These instructions, *Reed* complains, are only general. No instruction was given to the effect that each element of the crime must be proved beyond a reasonable doubt. But the law expressly specifies that the court may read section 1096 of the Penal Code and need not give any other instruction on the presumption of innocence or reasonable doubt. Pen.Code; § 1096a. Considering all of the instructions, it appears that the jury was fully and fairly instructed as to all of the rules of law applicable to the evidence."

Second, it is claimed that the instructions on torture were in error. The instructions given were in the language defining torture in *People v. Martinez*, *supra*, 38 Cal.2d 556, 561, 241 P.2d 224, and there is, therefore, no error.

[20] Third, complaint is made of instructions in the insanity stage of the trial. The court refused to give defendant's in-

struction that he need not prove his insanity beyond a reasonable doubt but need only prove it by a preponderance of the evidence, defining the latter clause. In the insanity stage of the trial the burden of proof rests on defendant to prove his insanity by a preponderance of the evidence. *People v. Hardy*, 33 Cal.2d 52, 198 P.2d 865 and cases there cited. Hence defendant's offered instruction was correct. In connection with the court's refusal to give this instruction, defendant particularly complains of the instruction hereafter to be mentioned.

The jury was instructed that it was not to rely upon any particular instruction but to take them as a whole; that defendant was entitled to the full benefit of the defense of insanity if it believed that the defense had been established by a "preponderance of the evidence"; that it was the sole judge of the evidence and credibility of witnesses; that it was to give defendant the benefit of every reasonable doubt (this should probably not have been given); that "To the charge of murder made against the defendant he has interposed the plea of 'not guilty' and 'not guilty by reason of insanity'. The law requires that where such pleas are entered, the defendant must first be tried under the general issue of 'not guilty', during which trial he is conclusively presumed to have been legally sane at the time the offense is alleged to have been committed; all evidence relating to the question of legal sanity of the accused being excluded, and, at the conclusion of such trial the defendant shall be tried upon the issue of legal insanity. Accordingly, in the present case, during the first phase of this trial under the general issue of 'not guilty', the defendant was conclusively presumed to be sane, and any evidence bearing upon the question of his legal sanity was not relevant to that issue and you were precluded by the law from considering the question of the legal sanity of the defendant on the first phase of this trial. The first phase of this trial having resulted in a verdict of guilty, the defendant is entitled under his plea of 'not guilty by reason of legal insanity' to a trial upon that issue and to introduce any

legal evidence tending to establish such plea.

"The defendant in this case heretofore has been charged with the crime of murder and has been found guilty of that offense, except in this respect: That defendant has entered a plea of 'not guilty by reason of insanity', thereby alleging that he was insane at the time of the commission of the offense. * * * The issue raised by that plea of insanity now must be determined, because the law does not hold a person criminally accountable for his conduct if at the time thereof he was insane." Insanity was defined for the jury and it was told that if it believed from a "preponderance" of the evidence that defendant was insane it should so find; that "The burden of proving insanity is on the defendant; that is to say, it is incumbent upon him to establish by a preponderance of evidence that he was insane. * * *

"The law presumes that the defendant was sane. That presumption may be rebutted but is controlling until overcome by a preponderance of evidence. * * *

"The rule requiring the defendant, where insanity is interposed as a defense, to prove it by a preponderance of the evidence does not affect the other rule that the burden of proving sanity is on the prosecution. The burden has always been on the prosecution and is met in the first instance by the presumption of sanity which the law raises and which must prevail until it is overcome. The rule relating to the defense of insanity does not shift the burden of proof from the People to the defendant, but only shifts the burden of introducing evidence and declares the amount or quantum of evidence which he must produce to overcome the presumption and show his insanity. The present status does not take away the defense of insanity, and the procedure followed has in no way changed or affected the rule respecting the burden which rests on the prosecution and on the defense in this case.

"It follows, therefore, that the burden on the prosecution of proving the sanity of the defendant at the time of the commission of the crime of which he has been found guilty, namely, murder of the first degree, *beyond a reasonable doubt, is met by the*

presumption of sanity, and the burden of establishing the defense of insanity of the defendant is upon him, to establish such insanity at the time of the commission of the crime of which he has been convicted, by a preponderance of the evidence." (Emphasis added.) Other instructions referred to preponderance of the evidence and gave more detailed definitions of insanity.

[21] The italicized portion of the instructions, supra, is prejudicially erroneous, asserts defendant because it in effect told the jury that the prosecution had to prove sanity beyond a reasonable doubt and that it had done so by the presumption of sanity; that, therefore, in effect, defendant would have to overcome a presumption of sanity beyond a reasonable doubt and that means more than by a preponderance of the evidence.

There is no doubt that the instruction is confusing and should not have been given. However, it may reasonably be interpreted to mean that even though the prosecution was relieved of proving sanity beyond a reasonable doubt yet the defendant could establish his insanity by a preponderance of the evidence and that construction is clearly in harmony with the other instructions on the subject that a preponderance of the evidence, was all defendant needed to produce.

[22] There has been considerable discussion with reference to the correct rule in regard to who carries the burden in the sanity stage of the trial. See 26 Cal.L. Rev. 543; 2 So. Cal.L. Rev. 53; 3 Ibid. 1; 21 Cal.L. Rev. 65; 26 Cal.L. Rev. 544. It was held in *People v. Hickman*, 204 Cal. 470, 268 P. 909, 270 P. 1117, that the rule is the same now as it was before the bifurcated trial provision which was enacted in the 1927 amendment to section 1026 of the Penal Code. In the *Hickman* case, supra, it was held that a person is presumed to be sane and "The rule requiring the defendant, where insanity is interposed as a defense, to prove it by a preponderance of the evidence, does not affect the other rule that the burden of proving sanity is on the prosecution. That burden has always been on it and is met in the first instance by the presumption of

sanity which the law raises and which must prevail until it is overcome. The rule relating to the defense of insanity does not shift the burden of proof from the people to the defendant, but only shifts the burden of introducing evidence and declares the amount or *quantum* of evidence which he must produce to overcome the presumption and show his insanity. *People v. Harris*, 169 Cal. 53, 68, 145 P. 520." *People v. Hickman*, supra, 204 Cal. 470, 477, 268 P. 909, 912, 270 P. 1117. But the cases also have stated that the burden is on the defendant to prove insanity by a preponderance of the evidence. "There are statements in a number of cases to the effect that in a separate trial on the issue of sanity the defendant has the burden of proving insanity by a preponderance of the evidence. *People v. McLachlan*, 13 Cal.2d 45, 55, 87 P.2d 825; *People v. French*, 12 Cal.2d 720, 734, 87 P.2d 1014; *People v. Troche*, 206 Cal. 35, 49, 273 P. 767; *People v. Hickman*, 204 Cal. 470, 477, 268 P. 909, 270 P. 1117." *People v. Hardy*, 33 Cal.2d 52, 65, 198 P.2d 865, 872. That is the more appropriate way to instruct the jury.

[23] Defendant contends that the instructions on deliberation and intent were improper. The jury was instructed in the language of sections 187-189 of the Penal Code, as to manslaughter and the degrees of murder, and as to murder of the first degree. It was told that to constitute first degree murder the killing must be by torture as defined, or wilful act accompanied by malice together with a clear and deliberate intent to take life. It was told that the intent must be the result of deliberation and must be formed on pre-existing reflection and not under heat of passion or such other condition as to preclude deliberation. "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the

extent of the reflection. Thoughts may follow each other with great rapidity and a cold, calculated judgment and decision may be arrived at quickly. However, the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides not specifically enumerated in the statutes. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death. * * *

"The adjective 'deliberate' means formed, arrived at or determined upon as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, according to a preconceived design; given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; unhurried; characterized by reflection; dispassionate; not rash. The word 'deliberate' is an antonym of 'hasty, impetuous, rash, impulsive.'

"The verb 'premeditate' means 'to think on, and revolve in the mind, beforehand; to contrive and design previously.'

"Thus, to find the defendant guilty of murder of the first degree, you must be satisfied beyond a reasonable doubt and to a moral certainty that the unlawful killing was accompanied with a deliberate and clear intention to take life. The intent to kill must be the result of deliberate premeditation; it must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. It is necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer." Those instructions satisfy the requirements of the law as most recently stated by this Court. *People v. Carmen*, 36 Cal.2d 768, 777-778, 228 P.2d 281.

The judgment and order denying a motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



41 Cal.2d 81

**MANDRACIO v. BARTENDERS UNION,
LOCAL 41 et al.
S. F. 18399.**

Supreme Court of California, in Bank.
May 19, 1953.

Action by union member against local union and others, for damages for loss of wages during time member was refused membership in local union. The Superior Court, San Francisco County, entered judgment adverse to plaintiff, and he appealed. The Supreme Court, Gibson, C. J., held that where provision in constitution of international union requires local union to grant admission to a member in good standing from another city who presents a traveling card, local could not deny plaintiff, upon his presentation of traveling card, admission to membership in order to protect job rights of its members, including those in armed forces.

Judgment reversed.

Prior opinion, 245 P.2d 43.

1. Labor Relations ◀92

Constitution of International Bartenders Union is a part of contract between union and its members, and governs local union.

2. Labor Relations ◀99

Where provision in constitution of International Bartenders Union requires local union to grant admission to a member in good standing from another city, who presents a traveling card, local could not deny holder of traveling card admission to membership in order to protect job rights of its members, including those in armed forces.

3. Labor Relations ◀90

An unreasonable construction of constitution of international union by interna-

tional's general president would not be binding on union members and would not be recognized by the courts.

4. Action ◀63

Defense of laches is not available in an action at law for damages.

5. Appeal and Error ◀1169(7)

Supreme Court will not affirm judgment on basis of estoppel unless all elements of that defense are established.

6. Labor Relations ◀102

Where local union wrongfully refused membership to union member from another city who presented a traveling card, member's statement on being subsequently admitted that he was satisfied with the way his traveling card had been handled, and member's subsequent acceptance of benefits of membership, did not operate to estop him from asserting any rights which may have accrued before his admission.

Allan L. Sapiro, San Francisco, Aaron Sapiro, Los Angeles, and G. C. Ringole, San Francisco, for appellant.

Charles P. Scully, San Francisco, for respondents.

GIBSON, Chief Justice.

This appeal was taken by plaintiff from a judgment against him in an action which he brought to recover damages for loss of wages during the time he was refused membership by defendant union.

Plaintiff, a member of a local bartenders union in San Diego which was affiliated with the Hotel and Restaurant Employees and Bartenders International Union, obtained a traveling card from his local union and moved to San Francisco. He presented the card to defendant Local 41, another affiliate of the International Union, on December 29, 1945, and was told to return the following Friday when the executive board would take in traveling cards. Plaintiff returned on January 4, but his traveling card was not accepted, and he was not admitted to membership; instead, his name was placed on a registration list, and he was given a priority number. It had theretofore been the practice of Local 41 to admit mem-

bers of other locals, as required by section 60 of the constitution of the International Union,¹ upon presentation of proper credentials. However, at or about the time plaintiff presented his card, the officers of Local 41 determined to put into effect a policy which was designed to protect the job rights of its members, about 700 of whom were in the armed forces. Under this plan the holder of a traveling card would not be admitted until all members, including those returning from military service, had been placed in jobs, and he had been assigned work in accordance with the rules of the local union.

It appears that a system of registration and work assignment had been suggested to Local 41 by a vice-president of the International Union sometime in 1945, and in February 1946 officials of Local 41 discussed with the executive board of the International Union the procedure which might be followed in assigning work to persons transferring to the local on a traveling card. No formal or written interpretation of section 60 of the International constitution was given at that time, but in 1949 the general president of the International wrote the secretary of Local 41 as follows:

"You have asked me to advise you by letter concerning the action taken by the General Executive Board during its February, 1946 meetings with reference to the precedents to be followed in registering travel cards.

"The problem was first considered on February 15, 1946 when a committee composed of Bruno Mannori, President, yourself, and several others representing other local unions, appeared before the Board for advice concerning the procedure to be followed in assigning work to persons coming into the Union on a travel card. The local unions wished to know in what order

persons transferring into their unions should be assigned work.

"The matter was discussed with our then General Counsel, Judge Joseph A. Padway, who advised us that under Section 60 of our constitution, local unions could make holders of traveling cards subject to their local work rules. I then advised Brother McDonough to inform your committee that it was our interpretation of the constitution that the following procedure could be followed:

"1. When a traveling card was produced by a member from another local, such incoming member should be given a place at the bottom of the work list. That is, his name should be added to those who are waiting for assignment to jobs; that such member be given a number entitling him to a job assignment when his number is called in accordance with the uniform work rules of the local union.

"2. As soon as such incoming member was assigned to a job he should be admitted to full membership privileges.

"3. In the event that a member was able to secure employment on his own initiative, but in accordance with the local union's rules, he should then be admitted to full membership.

"It was my feeling at the time that some members transfer into local unions without ever intending to work at the trade, and that such transfer is a violation of Section 6-C of the constitution which requires a member to be employed at the trade in order to be eligible for membership. It was also my feeling that the procedure outlined above would give such member the best opportunity of indicating his sin-

1. Section 60 of the International's constitution provided in part: "Local Unions shall be compelled to recognize and admit members who travel from one city to another, provided such members bring a traveling card and membership book from a Local Union in good standing and the card and book is properly signed and seal attached, and members so ad-

mitted shall be allowed to participate in all of the work coming under the jurisdiction of the Local Union subject to the rules for employment prevailing in the Local accepting the traveling card. All such rules for employment must be approved by the General President."

cerity in seeking work before membership was extended to him.

"This procedure has been the policy of the International Union, and locals concerned with the problems involved were informed to this effect."

With respect to the procedure followed by Local 41, its secretary testified that the holder of a transfer card would not be admitted to membership even if he found a job on his own initiative and that he would not be allowed to solicit work until he had been a member of the local for 90 days. According to the secretary this procedure was adopted in order to prevent holders of transfer cards from displacing members of the local union who had jobs.

Plaintiff testified that he had opportunities to obtain employment in five places but was refused work because he was not a member of Local 41 and that in each of these places he was told he would be employed after he had been admitted. He made repeated requests for admission but was not granted membership until August 10, 1948, over 32 months after he presented his traveling card, and in the meantime he was unable to obtain work in San Francisco as a union bartender.

The trial court found and concluded that the local union was governed by the constitution of the International Union, that the procedure outlined in the letter of the International's president interpreting section 60 of the constitution was complied with by Local 41, and that the action taken by the local with respect to the manner in which plaintiff's traveling card was handled was in accordance with the provisions of the constitution.

It should be noted at the outset that if, as plaintiff claims, he is entitled to damages based upon a breach of a contractual right given him by the constitution of the International Union, it is unnecessary to consider the possible application of the rules of law pertaining to arbitrary denial of membership in a union which holds closed shop contracts with the employers in the area. Cf. Dotson v. International Alliance etc. Employes, 34 Cal.2d 362, 210 P.2d 5; James v. Marinship Corp., 25 Cal.

2d 721, 155 P.2d 329, 160 A.L.R. 900. It should likewise be noted that although plaintiff has prayed for declaratory relief, his complaint is in fact one for damages. See Standard Brands of California v. Bryce, 1 Cal.2d 718, 721, 37 P.2d 446.

[1-3] The constitution of the International is a part of the contract between the union and its members and governs Local 41. The provisions of section 60 are plain and unambiguous, and they clearly require a local union to grant admission to a member from another city who tenders properly authenticated credentials. There is no claim that there was any necessity for checking on plaintiff's credentials or qualifications or that his admission was delayed for that purpose. Nor are we confronted here with the question of what rules the local union could make with respect to work assignments after admission of the holder of a traveling card or whether the local union could by such rules have protected the job rights of its members, including those in the armed forces. Instead, the question is whether the local could deny the holder of a traveling card admission to membership in order to accomplish this purpose. Under the plain terms of section 60 of the constitution the local could not do so. It follows that if, as defendants contend, the general president interpreted the constitution as permitting the procedure followed in this case, then his construction was not a reasonable one, was not binding on the members of the union and will not be recognized by the courts. See DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 147, 187 P.2d 769, 175 A.L.R. 382; Riviello v. Journeymen Barbers etc. Union, 109 Cal. App.2d 123, 128-129, 240 P.2d 361. In view of this conclusion it is unnecessary for us to determine whether the evidence supports the finding that defendants complied with the procedure set forth in the president's letter.

[4-6] The judgment cannot be affirmed on the theory that plaintiff was barred by laches or estoppel. The defense of laches is not available in an action at law for damages. Bagdasarian v. Gragnon, 31 Cal.

2d 744, 752, 192 P.2d 935. In support of their claim that plaintiff is estopped defendants assert that he failed to initiate any charges within the local or the International union after he was refused admission, that when admitted plaintiff said he was satisfied with the way his traveling card had been handled, and that he thereafter accepted the benefits of membership. The defense of estoppel was pleaded, but no findings were made thereon, and this court should not affirm the judgment on the basis of that defense unless all the elements of estoppel are established. Defendants have not called our attention to any procedure which plaintiff might have followed within the framework of the union in order to compel Local 41 to admit him to membership upon presentation of a traveling card, nor have they shown that they changed their position or relied upon plaintiff's conduct to their injury.

Plaintiff's statement on being admitted that he was satisfied with the way his traveling card had been handled and his subsequent acceptance of the benefits of membership did not operate to estop him from asserting any rights which may have accrued before his admission.

The judgment is reversed.

SHENK, EDMONDS, CARTER,
SCHAUER and SPENCE, JJ., concur.



41 Cal.2d 17

REED v. NORMAN et al.

L. A. 22561.

Supreme Court of California, in Bank.

May 12, 1953.

Action to void shares of stock issued by corporation to defendant shareholders, to contest validity of election of corporate directors, and to obtain accounting of corporate funds. The Superior Court of Los Angeles County rendered judgment for defendants and plaintiff appealed. The Supreme Court, Gibson, C. J., held permit issued by

Corporation Commissioner authorizing corporation to issue 500 shares of stock for cash did not permit issuance of stock to shareholder in exchange for cancellation of corporation's indebtedness to him or as reimbursement for permitting corporation to use credit of shareholder's separately owned store.

Judgment reversed.

Prior opinion 234 P.2d 240.

1. Corporations ⇨98

Corporation stock must be sold and disposed of in strict compliance with provisions of permit authorizing its issuance. Corporations Code, § 26100.

2. Corporations ⇨99(1)

Permit issued by Corporation Commissioner authorizing corporation to issue 500 shares of stock for cash did not permit issuance of stock to shareholder in exchange for cancellation of corporation's indebtedness to him or as reimbursement by corporation to shareholder for use of credit of shareholder's separately owned store. Corporations Code, § 26100.

3. Estoppel ⇨110

Pleading ⇨78

Where defendants failed to plead facts giving rise to defenses of estoppel or laches and there was nothing on face of complaint to indicate any such facts existed, defendants could not rely on claims of estoppel or laches.

Hy Schwartz, Beverly Hills, for appellant.

John Earl Haskins, in pro. per.

Alfred Jay Luke, Los Angeles, for respondents.

GIBSON, Chief Justice.

Hoyt Reed, a shareholder of Norman Decorating Co., Inc., brought this action to contest the validity of an election of corporate directors, to void shares of stock issued by the corporation to defendant Carl Norman, and to obtain an accounting of corporate funds. The trial court found and concluded that the shares were properly issued to Norman and that the election was valid. It also took an accounting and

made certain findings with respect thereto. Judgment was entered accordingly, and Reed has taken this appeal.

The Norman Decorating Co., Inc., was organized in California in January 1949 by Norman and two other men for the purpose of engaging in the paint contracting business. Sometime in March 1949 Norman's associates withdrew, and Reed took their place. The offices of the corporation were located on the premises of Carl's Paint Store, a business which was separately owned by Norman. Reed worked in the field supervising painting jobs, and Norman worked in the office. Paints and materials used by the corporation were purchased from manufacturers and delivered by them directly to the jobs but were billed to the corporation through the paint store.

In April 1949 the Norman Decorating Co., Inc. applied to the Commissioner of Corporations "for a permit to issue 500 shares of stock to Norman and Reed, or to either of them, at \$10 par value, for cash." Pursuant to the application a permit was granted for the issuance of the 500 shares "for cash." In the following September 245 shares were issued to Reed and 255 to Norman. Reed paid \$2,450 for his shares. Norman paid \$1,500 cash, and the books show that the sum of \$1,050 remaining due for the stock was charged against Norman's account. At that time the corporation was indebted to Carl's Paint Store which, as we have seen, was owned by Norman, in a sum in excess of the amount charged against his account.

Differences arose between the parties with respect to the manner in which the business was being conducted and the amount charged the corporation by Carl's Paint Store for materials. At a shareholders' meeting on April 27, 1950, when the question of electing a new board of directors arose, Reed challenged Norman's right to vote his 255 shares on the ground that they were void because not paid for with cash as required by the stock permit. Norman nevertheless voted all of his shares and elected a slate of directors which was composed of himself, Reed and one John Haskins.

The first question which must be determined is whether Norman paid cash for his shares in compliance with the terms of the permit. It is clear that he paid \$1,500 cash for 150 of his shares. With respect to the remaining shares the books of the corporation show under the heading "Capital Account," the following entry: "8/31/49 1050. Journal Entry, charged to Norman's Advance account 'to set up liability for stock.'" Under the heading "Withdrawals Norman," the following entry appears: "8/31/49 Advance (Journal Entry) \$1050. (Liab. for stock)." At the time the foregoing entries were made the books did not show any charges by Norman or Carl's Paint Store against the Norman Decorating Co., but there was evidence which supports a finding that the corporation then owed the store more than \$1,050 for paints and materials. The trial court concluded that at the time the stock was issued to Norman he was entitled to \$1,050 from the corporation and "that by crediting the same amount to the Capital Stock Account that the corporation actually benefited in cash in the amount paid for said stock, to wit, \$1050.00."

[1] Section 26100 of the Corporations Code provides that securities issued in non-conformity with the terms of a stock permit are void, and it is well settled that stock must be sold and disposed of in strict compliance with the provisions of the permit authorizing its issuance. *Mannion v. Baldwin*, 217 Cal. 600, 603, 20 P.2d 678. Shares have been held void for non-compliance with a cash requirement where they were, in fact, issued in exchange for real property, *Holmquist v. Kent*, 219 Cal. 231, 25 P.2d 977; *People v. Stewart*, 115 Cal. App. 681, 2 P.2d 195, for personal property, *Mannion v. Baldwin*, supra (partnership interest); *Herkner v. Rubin*, 126 Cal. App. 677, 14 P.2d 1043 (merchandise), for promissory notes, see *Imperial Live Stock & Mtg. Co. v. Tracy*, 208 Cal. 205, 281 P. 50; *Gridley v. Tilson*, 202 Cal. 748, 753, 262 P. 322, or for personal services. See *Barton v. El Encanto Apartments, Inc.*, 216 Cal. 500, 502, 14 P.2d 501. There was no evidence of an agreement that the sum of \$1,050 due from Norman for the stock

was to be applied in reduction of the amount owed him for merchandise, and the trial court did not so find. Nor did the court find that the books showed that the indebtedness to Norman for merchandise was reduced by the amount due from Norman for stock. It is not clear that the record in this case would support a finding that the shares in question were paid for by means of a cancellation of an indebtedness due Norman. But if we assume that the record supports such a finding, it is obvious that the transaction amounts to nothing more than an exchange of stock for merchandise. If the cancelling of debts were to be held the equivalent of cash, a corporation could circumvent the rule of the cases cited above by purchasing property or accepting services on credit and then issuing shares in satisfaction of the debt.

[2] Cancellation of indebtedness is, of course, a proper form of consideration for stock, Corp.Code, § 1109(d), and the Norman Decorating Co. might have obtained a permit authorizing it to issue shares in exchange therefor had it made an appropriate application to the Commissioner of Corporations. It chose, instead, to apply for a permit requiring cash, and if it subsequently desired to issue shares for any other kind of consideration it should have applied to the commissioner for an amendment of the existing permit. See Corp. Code, §§ 25502, 25513, 26009.

In seeking to excuse his failure to pay cash for his shares, Norman relies on the findings that at the time the shares were issued the corporation had advanced Reed the sum of \$2,050 and that Norman was then entitled to withdraw an equal amount. The fact, however, that Norman could have obtained advances in a sum equal to the amount which Reed had received, and thereby acquired money with which to pay cash for his stock, does not justify his failure to comply with the terms of the permit. Similarly, the fact, as found by the trial court, that Norman had lent the credit of Carl's Paint Store to the corporation without receiving compensation therefor does not excuse his failure to pay cash for the stock. There is no evidence of any agree-

ment that he was to be reimbursed in any amount for permitting the corporation to use the store's credit, and no valuation was placed upon its use. Moreover, even if it be assumed that the corporation were indebted to him in some amount for that reason, cancellation of such a debt in exchange for the shares would amount to an exchange of stock for a consideration akin to services or intangible property and would be invalid under the principles discussed above.

Christy v. Oakland Title I. & G. Co., 132 Cal.App. 315, 22 P.2d 737, upon which Norman relies, is clearly distinguishable. In that case the owner of a piece of real property conveyed it to a title company in trust and directed the trustee to issue and sell certificates of ownership in the property and pay the proceeds of the sales to him immediately. A permit to sell the certificates was granted by the Corporation Commissioner which provided that the sales were to be for cash. The title company, as trustee, transferred several of the certificates to the trustor without requiring him to pay for them. The court held that this transaction did not violate the permit because it would have been an idle act for the trustor to pay the trustee money which the trustee would have been under an immediate duty to repay to him. This reasoning is not applicable to the facts of the present case. The proceeds of the sale of shares of stock belonged to the corporation, not to Norman. Moreover, the fact that the corporation was indebted to Norman for paints and materials would not make payment by him of cash for his shares an idle or useless act. The purpose of selling the shares was to create a capital fund, not to pay the corporation's debts to him, and, as we have seen, excusing his failure to comply with the cash requirement of the permit would amount to approving an invalid exchange of stock for property or services.

[3] Defendants cannot rely on claims of estoppel or laches inasmuch as they failed to plead facts giving rise to those defenses, and there is nothing on the face of the complaint to indicate that any such facts

existed. See Phoenix Mutual L. Ins. Co. v. Birkelund, 29 Cal.2d 352, 363, 175 P.2d 5.

It follows from the foregoing that 105 of Norman's shares were void for noncompliance with the cash requirement of the stock permit, that he was not entitled to vote them in electing his slate of directors on April 27, 1950, and that the election of directors was illegal.

Reed also challenges the correctness of certain findings relating to the accounting, but since our decision concerning the validity of stock issued to Norman affects the accounting, we need not pass on contentions made in connection with this phase of the case. It seems appropriate, however, to call attention to the fact that Reed's rights with respect to the accounting may be derivative in nature and that the record indicates that he has not met the requirements of section 834 of the Corporations Code. See Hogan v. Ingold, 38 Cal.2d 802, 243 P.2d 1; Anderson v. Derrick, 220 Cal. 770, 773-774, 32 P.2d 1078; Whitten v. Dabney, 171 Cal. 621, 624, 154 P. 312; Shenberg v. DeGarmo, 61 Cal.App.2d 326, 331, 143 P.2d 74; note (1952) 40 Cal.L. Rev. 127.

The judgment is reversed.

SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



41 Cal.2d 901

Hoyt REED, Plaintiff and Appellant, v. Carl O. NORMAN and John E. Haskins, Directors and Officers of the Norman Decorating Co., Inc., a California corporation, Defendants and Respondents.

L. A. 21698.

Supreme Court of California, in Bank.
May 12, 1953.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Prior opinion 234 P.2d 240.

Hy Schwartz, Beverly Hills, for appellant.

John Earl Haskins, in pro. per.

Howard W. Hunter, Los Angeles, for respondents.

PER CURIAM.

This appeal presents the same issues as those decided in Reed v. Norman, Cal.Sup., 256 P.2d 930 filed this day, and that decision is controlling herein.

The judgment is reversed.



40 Cal.2d 823

BURTIS v. UNIVERSAL PICTURES CO., Inc. et al.
L. A. 22215.

Supreme Court of California, in Bank.

April 29, 1953.

Rehearing Denied May 28, 1953.

Action for infringement by medium of a motion picture of a common law copyright in an unpublished manuscript of plaintiff. The Superior Court of Los Angeles County rendered judgment for plaintiff, and defendants adversely affected appealed. The Supreme Court, Edmonds, J., held that evidence was insufficient to sustain finding of substantial similarity, without an unnecessary dissecting of the basic dramatic core of each work.

Judgment reversed, with directions.
Carter, J., dissented.

Prior opinion, 237 P.2d 41.

I. Appeal and Error 898, 1001(1)

On appeal involving infringement of common law copyright of literary property, appellate court may determine whether evidence of originality, protectibility, access, similarity and copying is sufficient to support the verdict, and if there is sufficient evidence to establish such elements of the tort, verdict upon questions of fact raised by evidence will not be disturbed, but the question of the sufficiency of the evidence is, in the final analysis, one of law.

2. Literary Property ¶9

Under provision of Civil Code, as it existed prior to 1947 amendment, declaring that author of any product of the mind has an exclusive ownership therein, and in the representation or expression thereof, the "theme" or "idea" embodied in a writing was protectible, and plaintiff whose cause of action for common law copyright infringement arose prior to 1947 amendment limiting protection to the representation or expression of a composition, had a protectible interest in his theme or idea. Civ. Code, § 980.

3. Literary Property ¶9

In action for infringement by motion picture of common law copyright of literary property, wherein it appeared that cause of action had arisen prior to 1947 amendment limiting protection to the representation or expression of a composition, instruction in language of previously applicable statute affording protection to the "theme" or "idea" of a composition was not erroneous. Civ. Code, § 980.

4. Literary Property ¶9

Under statute relating to protection afforded to literary compositions, as that statute existed prior to 1947 amendment limiting protection to the representation or expression of the composition, the original combination of unoriginal ideas into a dramatic theme could create a protectible property interest in the combination, although the separate ideas were not themselves protectible. Civ. Code, § 980.

5. Literary Property ¶9

Although the court will dissect a literary production to determine what portion thereof is protectible, it will not dissect the protectible portion to discover isolated similarities as to each segment of the whole, but the standard of the ordinary observer should be applied upon the issue of similarity, and the comparison of the protectible portions should be made without dissection and without expert or elaborate analysis. Civ. Code, § 980.

6. Literary Property ¶9

In order for the evidence in an action for infringement of common law copyright of literary property to be sufficient

to support a finding of similarity, and thus of copying, the two works must present a substantial similarity in so far as the plaintiff's property in his work is concerned. Civ. Code, § 980.

7. Literary Property ¶9

In action for infringement by moving picture of common law copyright in unpublished manuscript, wherein it was conceded that there was some similarity between the productions as to a portion of the basic theme, evidence was insufficient, without unnecessarily dissecting the basic dramatic core of each work, to show a substantial similarity which could justify finding of jury, as the "average reasonable man", that there was copying. Civ. Code, § 980.

8. Copyrights ¶36**Literary Property** ¶1

Although it might be possible that an author could so carefully delineate a character as to secure a protectible property interest in that character, it is the general rule that a character is not included within the monopoly of copyright. Civ. Code, § 980.

9. Literary Property ¶9

In action for infringement by moving picture of common law copyright in unpublished manuscript, evidence was insufficient to show such a delineation of characters in plaintiff's work as could give him a protectible property interest therein.

Loeb & Loeb, Herman F. Selvin and Harry L. Gershon, Los Angeles, for appellants.

Fendler, Weber & Lerner, Harold A. Fendler, Robert W. Lerner and Jacques Leslie, Beverly Hills, for respondent.

EDMONDS, Justice.

Thomson Burtis, the author of an assertedly plagiarized screen play, was awarded damages for the unauthorized use of his literary property. The principal question presented for decision upon the appeal from the judgment concerns the sufficiency of the evidence to support the verdict of the jury.

In 1938, Burtis, an established professional writer, submitted an untitled story synopsis to Universal Pictures Company, Inc. The synopsis interested Universal to the extent that it entered into a written agreement with Burtis providing that, for \$250, he would write an original story of not less than 10,000 words "suitable for a Danielle Darrieux photoplay" to be tentatively entitled "Manhattan Masquerade". He gave Universal an option, to be exercised within two weeks following delivery of the story, to purchase it for \$3,250. In the event Universal did not exercise the option, it was to obtain no right, title or interest in the story.

Subsequently, Burtis wrote a story of about 20,000 words, which he delivered to Universal. The company did not exercise its option but retained both the untitled synopsis and the screen script in its files until this action was filed. A review of the synopsis, in mimeographed form, prepared by an employee of Universal, was available to all writers and producers on the lot in several bound volumes of story materials.

In lieu of developing the personalities of characters in "Manhattan Masquerade", Burtis, in most instances, utilized the device of naming well known motion picture stars "to aid the reader in visualizing the characters" which he had in mind. The story may be summarized as follows:

Adolph Menjou is an impecunious bon vivant whose current economic objective is to marry Spring Byington, "the wealthiest widow in America". He is the author of "At Twenty—I Have Lived", a risqué novel written under the pen-name of "Nanette". Andy Devine, a gardener formerly in Menjou's employ, has stayed with him in the capacity of valet while he awaits payment of wages now five years past due. Menjou's publisher is Horatio Livermore, a hypocritical and ruthless businessman who invents artistic excuses to justify the publication of sexy novels. Lionel Stander, Livermore's press agent, is a frustrated writer who conceals his sensitivity with a sardonic, jeering attitude.

Despite Menjou's protests that he does not want to write any more of that "rot",

Livermore insists upon a sequel to Nanette's first book, telling of her girlhood experiences in European boarding schools. To secure background material, Livermore sends Menjou to Paris. Before his departure, Menjou discovers that Prince Mischa Auer of Wetsalia has moved into the Byington menage as a permanent, and unscrupulous, house guest.

In Paris, Menjou meets Gabrielle Roulet, a teacher of English in a finishing school. Although at heart a mischievous, if naive, flirt, at school she wears horn-rimmed spectacles and draws her hair "severely around her face". At home, with her hair down, she is charming. Her housekeeper is Vera Gordon, a Russian with an earthy sense of humor who delights in stuffing guests with her cooking. In between bouts of indigestion induced by Vera's culinary efforts, Menjou subtly secures from Gabrielle the information which he desires without disclosing his purposes.

Menjou returns to New York and, shortly thereafter, "At Eighteen—I Had Also Lived" is published. It becomes an immediate best-seller, and the identity of Nanette becomes a question of public interest. The press clamors for information and Walter Winchell serves an ultimatum upon Livermore that he will discover Nanette if her identity is not revealed exclusively to him. Menjou, Livermore and Stander are desperate. Disclosure of Menjou as Nanette, it is feared, will ruin his plans to marry Mrs. Byington and also destroy the market for the books. They decide to bring Gabrielle to New York to act the role of Nanette.

Despite the instructions of Rene Petain, Livermore's exuberant Parisian agent, that she is not to leave her cabin during the trip, Gabrielle ventures forth and is seen by John Castle, young career diplomat. Castle manages to become acquainted with her by impersonating the steward serving her cabin. In a comedy sequence, Vera and Gabrielle discover his pretense. However, they keep their mission secret.

By the time Gabrielle reaches New York, the publicity concerning the mysterious Nanette has reached a crescendo. Stander

has caused a Boston bookseller to be arrested for selling one of the books. When Gabrielle arrives, she and Vera are secretly installed in a swank apartment and coached as to their roles. Suitable wardrobes and beauty treatments are provided. In a coup designed for the dual purpose of providing authenticity to the act and ridding himself of competition, Menjou employs Prince Mischa to pretend to have been one of Nanette's European lovers.

For the first time, Gabrielle reads the books which she is to pretend to have written. She is shocked and angered, but Vera, revelling in the story, persuades her to continue with the deception. Prince Mischa already has undertaken his role with vigor, running up fantastic bills to outfit himself and a growing host of fellow princes and blackmailing Menjou into meeting the overhead.

Once during her tutelage for the role she is to play, Gabrielle has slipped away from Andy Devine, now functioning as her bodyguard, to see young Castle, with whom she is in love. She still has not disclosed her dual identity to him.

As Nanette, Gabrielle is introduced to the press and society with a lavish, all day program. She captivates the reporters, while Vera stuffs them with her cooking. Society is pleased, albeit somewhat shocked, by this vivacious siren with the naive manner. Alexander Wolcott is completely captivated by her frankness.

Disaster overtakes Gabrielle at a dinner party given by Mrs. Byington. There she is introduced to Castle's aristocratic parents and prospective fiancée as the notorious Nanette. Silently, she pleads with her eyes for Castle to understand her plight. He reacts with scorn and contempt.

Thereafter, the mad social whirl continues in an ever mounting frenzy of publicity. Stander, realizing Gabrielle loves Castle, hides his own love for her and urges even more publicity. The Immigration Department begins an investigation of Nanette's entry into the country. Meanwhile, the FBI has taken an interest in her reputed activities as an espionage agent and her close association with Prince

Mischa, a known foreign spy. Pretending a reconciliation, John Castle tricks Gabrielle into coming to Washington, where she is subjected to interrogation by J. Edgar Hoover. Gabrielle flees to the French Embassy for sanctuary.

There the story reaches its climax and conclusion as the principals gather and the full truth of the hoax is revealed. At Castle's request, Hoover threatens Gabrielle with deportation unless she marries an American citizen. Castle offers to marry Gabrielle, and a happy reconciliation is effected. Mrs. Byington is delighted to discover that Menjou has written the books. Wolcott broadcasts the entire story and comments that the books have true literary quality. Prince Mischa, suddenly discovering himself again unemployed, promptly recoups his financial position by offering to marry Vera, who will receive 50,000 francs as payment for her part in the hoax. All ends happily in the marriages of the three couples.

On cross-examination, Burtis testified that the idea of a book being written under an assumed name was not original and that he had done the same thing himself many times during his career. The idea of attributing authorship of a risqué book to a woman when, in fact, it had been written by a man was, he said, a reverse twist upon actual occurrences in the literary lives of French authoresses Colette and George Sand. The climax of the story, possible deportation for moral turpitude, Burtis testified, was suggested by the true incident of Countess Cathcart who was refused admission to this country upon similar grounds.

According to Burtis, certain characters in his story had been suggested to him by various previously issued motion pictures. As he said: "All that a professional writer can do is take elements of recognizable characters, recognizable to anybody, and combine them in a new form, like a new chemical combination makes a new material, until boy meets girl becomes an original story because of the way that all the common elements are combined."

Almost eight years after Burtis had presented his story to Universal, it produced

and released the motion picture "She Wrote The Book". The picture, which is a part of the evidence in the case, has been viewed by the Justices of this court.

As the picture opens, "Always Lulu" has become a best seller of such magnitude and questionable repute that it is banned in all of the important cities of the world. George Dixon, publisher, and Jerry Marlowe, his breezy, confident advertising manager, are worried because they know neither who, nor where, Miss Lulu Winters, the authoress, is. The press is demanding information. Unexpectedly, they receive a telephone call from Lulu announcing that she is coming to New York to pick up her royalty checks, amounting to more than \$80,000. At her insistence, they promise no publicity.

Actually, Lulu is Phyllis Fowler, wife of the Dean of Croyden College, a small and financially foundering school in Great Falls, Indiana. She has kept her secret for fear of ruining her husband and the college. The faculty, ignorant of the situation, has banned "Always Lulu" and threatened to expel any students found reading it, of whom there have been a number. However, Mrs. Fowler believes that the royalty checks awaiting her must be secured to benefit the college.

Professor Jane Featherstone (played by Joan Davis), a prissy, mid-Victorian and apparently sexless female, is about to leave for New York to deliver a lecture to a scientific convention upon the "Featherstone Theory of Molecular Agglutination". Mrs. Fowler requests Jane to impersonate Lulu long enough to pick up the royalty checks while she is in New York. Jane is horrified by the revelation of authorship and revolts at the suggested impersonation, but finally agrees to the proposition for the good of the college.

On the train to New York, Jane meets Eddie Caldwell, a studious young engineer with whom she carries on a learned discussion concerning the mathematics of bridge construction. Upon arrival in New York, she agrees to meet him for dinner and Eddie gives her a snapshot of himself. However, neither of them learned the other's name.

Meanwhile, Jerry has arranged a parade with police escort, a press reception, and a round of social gatherings for Lulu when she arrives. These grandiose arrangements suddenly are discarded when Dixon and Jerry get their first agonized look at the prim Professor, posing as Lulu. While they are attempting to decide how to handle this unexpected situation, Jane learns from Dixon's secretary of the elaborate arrangements made for Lulu's reception. In panic, she bolts from the building, pursued by Jerry. Jane jumps into a taxicab to effect her escape, losing her purse and all means of identification in the process. Jerry follows with motorcycle patrolmen, sirens wailing. Hearing the police, the taxi driver slams his cab to a stop, throwing Jane to the floor and rendering her unconscious.

When Jane awakens, she is suffering from amnesia. Jerry, sincerely believing that she is Lulu, tries to bring back her memory by reading "Always Lulu" to her. Having no reason to believe that she is not Lulu, Jane enters into the spirit of her supposed character with relish and soon is making advances toward Jerry.

After she has been properly outfitted, Jane is introduced to the press as Lulu. During the interview, she announces that there will be no sequel to her book. Dixon and Jerry determine that, if they are to have another story to publish, they must part Lulu and her money with rapidity. For this purpose, they persuade a friendly bartender, Joe (played by Mischa Auer), to impersonate Count Boris Pototski, one of the many lovers mentioned in "Always Lulu". In the book, Boris had been an expert at spending Lulu's money and Joe promises to be equally adept at this pastime. Without further ado, Joe moves in as Jane's constant, and costliest, companion. However, Joe's task soon is complicated by Horace Van Cleve, a middle-aged tycoon and would-be playboy who begins throwing money at Jane almost faster than the imaginative Joe can spend it. Jerry decides to end this problem by arousing Mrs. Van Cleve's jealousy.

As Jane's social life becomes more and more hectic, news of her role reaches Croyden College by way of "Vanity" maga-

zine, which features a cover picture of Lulu. The shock is profound, and the faculty decide to have nothing more to do with her. Meanwhile, Jane has met Eddie again at the Van Cleve shipyard and asks him to dinner. Her only recollection of him is the picture, all that had remained of her possessions after the taxi accident. A companion informs Eddie of Lulu's identity and Eddie, after reading "Always Lulu", reacts with disgust.

That evening, the situation reaches a climax with almost the entire cast gathered in Jane's suite. Joe, the first to arrive, retires diplomatically to the bedroom as Eddie enters, kisses Jane violently, and then berates her for her supposed deception. Just as Eddie finishes telling Jane how contemptible he thinks she is, Mrs. Van Cleve appears brandishing a revolver, of which Eddie has the thoughtfulness to relieve her. Van Cleve walks into the melee dangling a diamond necklace for Jane, which he quickly transfers to his wife. Joe, his dignity unruffled, is discovered reclining in the bedroom. Jerry bursts upon the scene and, in attempting to defend Jane against Eddie's accusations, receives a punch on the jaw. Soon all are gone but Joe, who proposes marriage to Jane. She accepts, but unfortunately mentions that she now has no money left. Joe politely, but hastily, departs, reporting to Jerry that his job is completed.

But Jerry's task is far from over. If he is to get another book for Dixon, he must help Jane recover her memory. Because Eddie has said he met her on a train from Great Falls, Jerry decides to take her there. On the Croyden campus, they accidentally walk into a faculty meeting, where Jane is greeted with bitter accusations. She does not understand what is happening, and Jerry explains her illness to the faculty members, who do not relent. As Jerry and Jane are leaving the campus, Jane happens to wander into her former classroom. Absent-mindedly, she corrects a mathematical error in a problem on the blackboard, and suddenly her memory returns.

Mrs. Fowler confesses to her husband that she is the author of "Always Lulu".

But the disclosure means little now; Croyden College is about to close for lack of funds. Jane decides to return to New York to ask Van Cleve to provide money for the school. Her first approach as Professor Featherstone is a complete flop. But, with Jerry's help, she tries again as the flamboyant Lulu. Disrupting a very formal party at Van Cleve's estate, she literally blackmails him into buying her off by providing money for the school. At the height of the confusion, Eddie arrives with important blueprints for Van Cleve. In short order, he is fired, slugs Jerry, and turns Jane over his knee and spansks her, all without allowing anyone an opportunity to explain the situation to him.

Everything ends happily with Jane back on the Croyden campus. Eddie follows her to Great Falls. Van Cleve's money staves off immediate disaster. Jerry's release of the full story to the newspapers creates a sudden influx of students anxious to study literature under Lulu, promising continued prosperity for the school.

The jury found in favor of Burtis. The motion of the defendants for a new trial was denied and their appeal is from the judgment entered upon the verdict.

The defendants contend that the evidence is insufficient to sustain the implied finding of plagiarism because there are no substantial similarities between their production and protectible portions of Burtis' story. The determination of the extent to which a literary work is entitled to protection is, they say, a question of law which may be determined by the appellate court regardless of any implied finding by the jury. They also complain that the trial court erroneously instructed the jury upon the elements of plagiarism, protectible property, and damages. In addition, it is contended that the award of damages is excessive and that counsel for Burtis committed prejudicial misconduct. For the purposes of this appeal, it is conceded that some similarity exists between the productions as to a portion of the basic theme. Another concession is that the originality of Burtis' story, and the defendants' access to it, have been adequately proved.

Burtis disputes each of the contentions of the defendants. He argues that the questions of originality, protectibility, access, similarity and copying are for the trier of fact, and may not be determined as a matter of law. A plot, or theme, he says, is protectible. Furthermore, he claims that the evidence shows misappropriation of his major characters, characterizations, motivation, treatment, and a substantial sequence of scenes and events.

[1] The appellate court may determine whether the evidence of originality, protectibility, access, similarity and copying is sufficient to support the verdict. *Golding v. R. K. O. Pictures, Inc.*, 35 Cal.2d 690, 695, 698-699, 221 P.2d 95; *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 662-663, 221 P.2d 73, 23 A.L.R.2d 216; *Universal Pictures Co. v. Harold Lloyd Corporation*, 9 Cir., 162 F.2d 354, 357; cf. *Weitzenkorn v. Lesser*, Cal.Sup., 256 P.2d 947; *Kurlan v. Columbia Broadcasting System*, Cal.Sup., 256 P.2d 962. If there is sufficient evidence to establish these elements of the tort, the verdict of the jury upon the questions of fact raised by the evidence will not be disturbed. However, in the final analysis, the sufficiency of the evidence is a question of law.

[2] The defendants contend that a "theme", "idea", or "subsection of a plot" is not protectible and that the monopoly of common law copyright extends only to the treatment and manner of expression. However, at the time this cause of action arose, section 980 of the Civil Code provided that, "The author of any product of the mind, * * * has an exclusive ownership therein, and in the representation or expression thereof". Relying upon this former wording of the statute, the court held, in the *Golding* case, that the "product of the writer's creative mind", 35 Cal.2d at page 695, 221 P.2d at page 97, is protectible and extended protection to his idea, "the basic dramatic core", 35 Cal.2d at page 697, 221 P.2d at page 99, of his play. Thus, under the earlier form of the statute, a "theme" or "idea" was protectible, although at common law and under the 1947 amendment to the statute protection is extended only to "the representation or expression"

of a composition. Cf. *Weitzenkorn v. Lesser*, supra.

[3] One of the instructions of which the defendants complain was given in the language of the statute as it read at the time this cause of action arose. As applied to the facts of this case, the instruction is not erroneous.

A careful comparison of Burtis' story and the defendants' motion picture shows no similarity between them as to form and manner of expression. The motivation, characterizations, and sequence of events is essentially different in each. However, the defendants concede that there is some similarity between the productions as to a portion of the basic theme. This consists of a risqué book written under a pseudonym by an author who, for personal reasons, does not wish to be identified. The public, naturally, is interested in the author's identity. A female school teacher is requested to impersonate the author, and a succession of events occurs, including the inevitable "boy meets girl" routine. The boy is disillusioned and disgusted when he is led to believe that the girl has a lurid past. All finally ends happily when "girl gets boy".

These similarities between parts of the basic dramatic core of each story are the only similarities discoverable from a comparison of the productions. Therefore, the question is whether they are sufficient, by themselves, to sustain the implied finding of copying of a substantial portion of Burtis' protectible property.

[4] In holding the "basic dramatic core" of a literary production protectible in the *Golding* case, the court looked to the entire theme of the story. It said: "Literary property in the fruits of a writer's creative endeavor extend to the full scope of his inventiveness. This may well include, in the case of a stage play or moving picture scenario, the entire plot, the unique dialogue, the fundamental emotional appeal or theme of the story, or merely certain novel sequences or combinations of otherwise hackneyed elements." 35 Cal.2d at pages 694-695, 221 P.2d at page 97. In other words, under the statute as it formerly read, the original combination of unoriginal ideas into a dramatic theme might

create a protectible property interest in the combination, although the separate ideas were not themselves protectible. As stated in the Stanley case, the isolated ideas may not be original, "But when all of these elements are joined to make one idea for a radio program, it is the *combination* which is new and novel." 35 Cal.2d at pages 663-664, 221 P.2d at page 79.

Here, it is conceded that the combination of ideas is original. Therefore, the basic dramatic core of Burtis' story was protectible under the former wording of the statute. But it is not conceded that each of the ideas in the combination was original and, in fact, Burtis' testimony shows the opposite. He admitted that the idea of a risque book written under a pseudonym by an author who, for personal reasons, does not wish to be identified, was not original. Nor is there anything original in public interest in the identity of a notorious author. What was original, and thus protectible, was the combination of these and other ideas into a basic theme for a story.

[5] Although the court will dissect a literary production to determine what portion thereof is protectible, *Golding v. R. K. O. Pictures, Inc.*, supra, 35 Cal.2d at page 700, 221 P.2d 95, it will not dissect the protectible portion to discover isolated similarities as to each segment of the whole. *Stanley v. Columbia Broadcasting System*, supra, 35 Cal.2d at page 662, 221 P.2d 73. Instead, as was held in the *Golding* case, upon the issue of similarity the standard of the ordinary observer should be applied and comparison of the protectible portions should be made without dissection and without expert or elaborate analysis. 35 Cal.2d at pages 699-700, 221 P.2d 95. In that case, the basic dramatic core, the psychological situation, in each production was similar to the other in its entirety.

The only similarities which here appear may be found only as the result of dissection of the basic dramatic core of each story. Given only the elements of each story which are similar, and subtracting therefrom those which are admittedly unoriginal, there is no basic dramatic core. No framework is created by these elements

alone which requires only body and filling to expand the central situation into a recognizable story. There is, in fact, no central situation. From these isolated elements, almost any basic dramatic core could be created and virtually any plot developed.

[6, 7] For the evidence to be sufficient to support a finding of similarity, and thus of copying, the two works must present a substantial similarity insofar as the plaintiff's property in his work is concerned. *Golding v. R. K. O. Pictures, Inc.*, supra, 35 Cal.2d at page 699, 221 P.2d 95; *Stanley v. Columbia Broadcasting System*, supra, 35 Cal.2d at page 663, 221 P.2d 73; cf. *Weitzenkorn v. Lesser*, supra. "In determining whether the similarity which exists between a copyrighted literary, dramatic or musical work and an alleged infringing publication is due to copying, the common knowledge of the average reader, observer, spectator or listener is the standard of judgment which must be used." *Stanley v. Columbia Broadcasting System*, supra, 35 Cal.2d at page 662, 221 P.2d 78. Here, without unnecessarily dissecting the basic dramatic core of each work, there is no substantial similarity between them to justify the finding of the jury, as the "average, reasonable man", that there was copying.

To have anything of value, Burtis had to add to the ideas above discussed certain vital ingredients which would create a dramatic situation. These included a deliberate hoax to be perpetrated upon the public by the male author and his publisher acting together. A reason for the hoax was essential, and Burtis supplied it in the form of economic necessity, sale of the book and marriage of a wealthy widow. It was also essential for his dramatic purpose that the hoax be discovered under spectacular circumstances, so the deportation investigation is included. These elements, added to the others, establish a recognizable framework upon which to build a story.

However, none of the latter elements appear in the defendants' motion picture. No one perpetrates a deliberate hoax upon the public; the one attempted is upon the unsuspecting publisher. The essential ingre-

dient is a victim of amnesia who honestly believes that she is the author of the lurid novel and that it accurately depicts her past. By this device, the motion picture is made essentially humorous, whereas Burtis' story is serious drama with some comedy relief. In the motion picture, the central problem is to assist the principal character in recovering her true identity; in Burtis' work it is how to hide identity. Thus, in the picture, there is no necessity for a spectacular explosion of a myth. Here, again, is a basic dramatic core when these elements are added to the others, but there is no similarity between it and the framework of Burtis' story.

Burtis also contends that five major characters in both productions are substantially the same in characterization, motivation and treatment. The very fact that Burtis failed to develop in detail any of the characters in his story weakens his contention considerably. Any similarities are only of the most general nature. Gabrielle and Jane both are school teachers, naive, and possessed of the common trademarks of fictionalized female teachers. But Gabrielle is a vivacious and mischievous flirt; Jane is so strait-laced that she finds it necessary to screen a partially undraped statuette and can strike up an acquaintance with a strange man only by discussing mathematical formulae. John and Eddie both possess morally correct ideas of conduct and are dismayed at the supposed identities of their respective girl friends. However, John is the thoroughly trained, unruffled, gentle-mannered socialite sophisticate. Eddie, on the other hand, is a rough-and-tumble engineer who engages in public brawls and thinks nothing of crushing a girl in his arms and then berating her lack of morals or of administering a public spanking to a woman. Livermore and Dixon are both publishers of a notorious book, but the former is a confirmed hypocrite, the latter solely a business man. The press agents are vastly different, Stander being a hard-bitten cynic who refuses to permit even love to stand in the way of his duty while Jerry is a sympathetic soul anxious to assist Jane in every possible way. Mischa Auer, of course, remains Mischa Auer,

portraying his usual role. Certainly it cannot be said that an author may forever prevent an actor from earning his living by the simple device of casting him as a character in an unpublished story.

[8, 9] Although it might be possible that an author could so carefully delineate a character as to secure a protectible property interest in that character, generally it is held that a character is not included within the monopoly of copyright. *Warner Bros. Pictures v. Columbia Broadcasting System, D.C., 102 F.Supp. 141, 147*; *Detective Comics v. Bruns Publications, 2 Cir., 111 F.2d 432, 434*. Here there has been no such careful development of characterizations. Only the barest outlines have been drawn, leaving the remainder to the talents of the particular actors chosen to fill the roles. "It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly." *Nichols v. Universal Pictures Corporation, 45 F.2d 119, 121, certiorari denied 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795*.

These conclusions make it unnecessary to consider the contentions concerning the propriety of certain instructions, the award of damages, and the conduct of counsel for Burtis. In this case, all of the possible evidence bearing upon the issue of similarity has been presented to the court in the form of the productions themselves. There being no evidence of substantial similarity between the motion picture and protectible portions of Burtis' production, the implied finding of copying of Burtis' property has no support in the record. Under these circumstances, this court may direct entry of a proper judgment. *Code Civ.Proc. § 53*; cf. *Pollitz v. Wickersham, 150 Cal. 238, 251, 88 P. 911*; *Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft, 60 Cal. 467, 471-472*.

The judgment is reversed with directions to the superior court to enter a judgment for Universal Pictures Company, Inc., Warren Wilson, Oscar Brodney and Joseph Gershenson and denying relief to Thomson Burtis.

GIBSON, C. J., and SHENK, J., concur.

TRAYNOR and SPENCE, JJ., concur in the judgment.

SCHAUER, Justice.

I concur in the judgment and in what is hereinafter specified as being what I understand Justice EDMONDS' opinion actually holds; I further agree that "A careful comparison of Burtis' story and the defendants' motion picture shows no similarity * * * as to form and manner of expression." I do not agree with what is said in Justice EDMONDS' opinion in attempting to distinguish this case from *Golding v. RKO Pictures, Inc.* (1950), 35 Cal.2d 690, 710-712, 221 P.2d 95.

This case, it appears to me, is controlled by exactly the same principles which should have controlled in the *Golding* case. The plot (or, as Justice EDMONDS denominated it, the "basic dramatic core") used by the plaintiff and the defendants in this case, is, as was true in the *Golding* case, in the public domain. It is to the credit of both the intelligence and the integrity of Mr. Burtis, the plaintiff here, that he testified "All that a professional writer can do is take elements of recognizable characters, recognizable to anybody, and combine them in a new form, like a new chemical combination makes a new material, until boy meets girl becomes an original story because of the way that all the common elements are combined." There being nothing new or novel in the plot it is not, as such, protectible. Hence, unless the author's combination, embellishment and treatment of the common materials of the public domain do in truth create what Burtis likens to "a new material" made by "a new chemical combination" of the old elements, there is, at least generally speaking, no protectible product of the mind.

The basic holding here, essential to the judgment, appears to me to be irreconcilably inconsistent with the *Golding* holding. The suggestion is made that the *Golding* decision was based on the "former wording

of the statute" (section 980 of the Civil Code) and that because of the subsequent amendment of the statute this case can be distinguished from and is not controlled by the *Golding* case. Justice EDMONDS here says "Thus, under the earlier form of the statute, a 'theme' or 'idea' was protectible, although at common law and under the 1947 amendment to the statute protection is extended only to 'the representation or expression' of a composition." But in the *Golding* case the majority said (page 694-695 of 35 Cal.2d, page 97 of 221 P.2d): "The rights asserted in this case are not based upon statutory copyright but stem from the so-called common-law copyright. * * * It is * * * only the product of the writer's creative mind which is protectible. * * * The question as to whether the claimed original or novel idea has been reduced to concrete form is an issue of law. * * * Certainly, if the only product of the writer's creative mind is not something which the law recognizes as protectible, that is, an idea not reduced to concrete form * * *, no right of action for infringement of literary property will lie * * *."

For the reasons indicated above and more fully developed in my dissent in the *Golding* case, (at pages 710 et seq. of 35 Cal.2d, 221 P.2d 95) and concurring opinion in *Stanley v. Columbia Broadcasting System* (1950), 35 Cal.2d 653, 668 et seq., 221 P.2d 73, I would hold that a plot as such, being in the public domain and neither new nor novel, is not protectible and that only the original and (except in special circumstances not here pertinent) novel treatment of a plot,¹ which treatment (as so aptly described in the above set forth quotation from Mr. Burtis' testimony) is the creation and product of the author, can be protectible. This holding, it seems to me, appears upon analysis to be the holding now actually made by this court; it is inherent in its judgment. I would clearly declare it to be such and expressly overrule the *Golding* case.

1. I am, of course, not here dealing with, or suggesting that there cannot be, an orig-

inal and novel idea, or treatment of an idea, which does not involve a plot.

CARTER, Justice.

I dissent.

The majority opinion in this case goes one step farther than that in *Weitzenkorn v. Lesser*, Cal.Sup., 256 P.2d 947 and *Kurlan v. Columbia Broadcasting System*, Cal.Sup., 256 P.2d 962. Here, after a trial by jury, this Court holds that there was no similarity between the infringed and infringing productions. The effect of this opinion is to deprive an author of a cause of action for plagiarism in this State.

In the *Kurlan* and *Weitzenkorn* cases, the majority states that an author may protect his idea, etc., by an express contract. Here, plaintiff did exactly that. "In 1938, Burtis, an established professional writer, submitted an untitled story synopsis to Universal Pictures Company, Inc. The synopsis interested Universal to the extent that it entered into a written agreement with Burtis providing that, for \$250, he would write an original story of not less than 10,000 words 'suitable for a Danielle Darrieux photoplay' to be tentatively entitled 'Manhattan Masquerade'. He gave Universal an option, to be exercised within two weeks following delivery of the story, to purchase it for \$3,250. In the event Universal did not exercise the option, it was *to obtain no right, title or interest in the story*."

"Subsequently, Burtis wrote a story of about 20,000 words, which he delivered to Universal. The company did not exercise its option but retained both the untitled synopsis and the screen script in its files until this action was filed. A review of the synopsis, in mimeographed form, prepared by an employee of Universal, was available to all writers and producers on the lot in several bound volumes of story materials."

The majority points out that "the originality of Burtis' story, and the defendants' access to it, have been adequately proved." And that "some similarity exists between the productions as to a portion of the basic theme." In order to prevent recovery by plaintiff, this Court determines for itself that no similarity exists between the two productions. This conclusion is reached despite the fact that the trial judge in the first instance, as provided for by § 426(3)

of the Code of Civil Procedure, first determined on demurrer that there was similarity between the two, as it did on defendants' motion for a directed verdict at the close of plaintiff's case, as did a jury, as did the trial court again on a motion for a new trial, and as did three members of the District Court of Appeal, Cal.App., 237 P.2d 41, in affirming the judgment.

In *Weitzenkorn v. Lesser*, supra, it is said that "The question of *protectibility* need not be considered in determining the sufficiency of the allegations of the first count of the complaint, based upon express contract" and that "An 'idea if valuable, may be the subject of contract. While the idea disclosed may be common or even open to public knowledge, yet such disclosure if protected by contract, is sufficient consideration for the promise to pay' (citations)." Here, it is said that "The only similarities which here appear may be found only as the result of dissection of the basic dramatic core of each story. Given only the elements of each story which are similar, *and subtracting therefrom those which are admittedly unoriginal*, there is no basic dramatic core. No framework is created by these elements alone which requires only body and filling to expand the central situation into a recognizable story. There is, in fact, no central situation. From these isolated elements, almost any basic dramatic core could be created and virtually any plot developed." So far as an express contract is concerned, there is no need for all portions of the production to be original, see *Weitzenkorn v. Lesser*, supra. Therefore, it is not necessary to "subtract" the admittedly unoriginal elements from Burtis' story in comparing the two for the purpose of determining similarity.

Further, there is a basic core, or central theme, to Burtis' story. He has an author of a risqué book who wishes to remain anonymous. The sex of the author is different in the motion picture but the book is also a risqué one. There is a hoax perpetrated on the public. In each case the hoax is developed differently but nevertheless perpetrated for the same reason—that the real author wishes to remain anonymous. In both cases, a school teacher is the

person chosen to impersonate the author. In both cases, there is a "phony" member of the nobility to add a comedy touch, although the theme is developed differently in the two. In both cases there is an upright and moral young man who is horrified to find that his girl has written such "trash". Again, the two love stories are developed differently. In both productions there is a pecuniary necessity for money, and here, too, the idea is developed differently in the two.

This statement is found in the majority opinion: "Although the court will dissect a literary production to determine what portion thereof is protectible, *Golding v. R. K. O. Pictures, Inc.*, supra, 35 Cal.2d at page 700, 221 P.2d 95, it will not dissect the protectible portion to discover isolated similarities as to each segment of the whole." It is admitted that the so-called protectible portion here is the basic dramatic core of *Burtis'* story (held so because of the former wording of § 980 of the Civil Code). In "dissecting" it is apparent to the average observer (as has been proved by the judicial background in this case) that the central theme, as set forth above, is similar to that found in defendant's motion picture. Whether or not that central theme is original in its entirety is, under the pleading and proof in this case, not important because here, there was an express contract and agreement by defendants to pay for plaintiff's story if they used it. The contract provided that plaintiff was to write a "complete original story" for which defendants would pay if it was used by them. While the ideas are not individually original, it is conceded that "the combination of ideas is original." A plot is defined as a number of incidents which together form the action of a play or novel (*Amdur, Copyright Law and Practice*, 3, 703); "A plot is a connected series of motived events or situations, *forming the pattern, outline or skeleton of the story action*. It is a statement of the problems or obstacles that confront certain characters, their reactions to those problems or obstacles and the result". Ball, *The Law of Copyright and Literary Property*, § 171, p. 366; *Shipman v. R. K. O. Radio Pictures*, 2 Cir., 100 F.2d 533;

Roe-Lawton v. Hal E. Roach Studios, D.C., 18 F.2d 126; *Nichols v. Universal Pictures Corporation*, 2 Cir., 45 F.2d 119; *Harold Lloyd Corporation v. Witwer*, 9 Cir., 65 F.2d 1. (Emphasis added.)

It is true that there are differences in the minor characters and the development of each one, but as Mr. Justice Edmonds said in *Golding v. R. K. O. Pictures, Inc.*, 35 Cal.2d 690, 699, 221 P.2d 95, 100, "The basic factors of the play and the moving picture show strong similarity in their respective plots although superficially there is considerable difference. *But such differences go to the quality of the plagiarism, and not to its existence or nonexistence.*" (Emphasis added.)

The majority, after admitting that the verdict of the jury upon questions of fact will not be disturbed if there is evidence to support it, states that "in the final analysis, the sufficiency of the evidence is a question of law." It is a question of law, but to no greater extent in plagiarism cases than in any other type of case where there has been a jury verdict. When a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury, and when two or more inferences can be reasonably deduced from the facts, *the reviewing court is without power to substitute its deductions for those of the trial court*. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183; *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 106 P.2d 886; *Richter v. Walker*, 36 Cal.2d 634, 226 P.2d 593; *Alexander v. Angel*, 37 Cal.2d 856, 236 P.2d 561. Here, contrary to the well settled rule, this Court has made a determination, *de novo*, on the question of similarity which had been, prior to this decision, determined favorably to plaintiff three times by the trial court, once by the jury, and once by the District Court of Appeal.

There has always been decided and strong opposition toward any change in the jury system. It is argued that to have all issues tried by the court, sitting without a jury, would add greatly to the labors of the court,

tend to cause inaccuracy in and hostile criticism of its decisions of fact, and would expose the judiciary to attempts at bribery or charges of corruption which would lower its standing in popular estimation.

In Yeaman, Study of Government (Chapter XIII, 177, 178), it is said that "when men talk gravely of substituting the learning and experience of the court for the good sense, practical experience and unbiased instincts of an impartial jury, they do violence to history, and injustice to the cause of personal liberty and right. And while I would not let a jury trench a hair's breadth upon the province of the court, I have no hesitation in saying that, for trying and settling disputed questions of fact, through the instrumentality of human testimony, where men and their motives are to be weighed and scrutinized, and balances are to be struck between conflicting witnesses, I had rather trust to the verdict of twelve fair-minded men of average shrewdness and intelligence in a jury-box, than the judgment of any one man trained to the habits of judicial investigation and accustomed to measure his conclusions by the scale and standard of the law. I had rather trust to the honest instincts of a juror, than the learning of a judge. Nor do I believe that * * * there are more instances of mistaken verdicts than of mistaken rulings of law. The most we can expect from either jurors or judge, is an approximation to accuracy in the respective spheres in which they act."

Whatever the origin of the jury system may have been (whether derived from Scandinavian or Roman sources) it is well established that it was not until the reign of Edward III, about 1352, that trial by jury, such as we now understand it, came into existence. From then on, however, there has persisted a strong popular conviction among English-speaking peoples, that no person should be deprived of his life, liberty or property except by the concurrent judgment of twelve of his peers. As early as 1215, there was incorporated into the Magna Charta a provision which guaranteed the people this right: "No free man shall be taken or imprisoned, nor be disseized of his freehold or liberties * * *

nor shall we pass upon him or condemn him, but by the lawful judgment of his peers."

During the Middle Ages, the jurymen were chosen because of their knowledge of the facts and performed the duties of the present day jury as well as those of witnesses; early in the 15th century in England, the system changed so that the jury made its decisions founded upon evidence supplied by witnesses; and changes in rules of evidence, as well as the right to challenge jurymen, together with improved methods of impanelling the jury, led to our modern jury system. Then, when we consider that our American law and legal institutions had their origin in the judicial system of England, as it had been developed over centuries of human experience prior to the time of our colonization, it is not surprising that this heritage, so zealously guarded by the British in by-gone generations, is looked upon today by American citizens as one of the most precious rights secured to our forefathers. And whereas a century and a half of development has produced great changes in many of our political institutions, the fundamental principles of trial by jury have continued the same in most essential respects.

The jury system, constituting as it does, an integral part in the administration of justice, is emphatically a political institution, for the administration of justice in a democracy, such as ours, constitutes the basis of free government. As Joseph H. Choate once clearly stated "The jury system as it has existed for ages is fixed as an essential part of our political institutions, and it is appreciated as the best and perhaps the only means of admitting the people to a share, and maintaining their wholesome interest in the administration of justice."

It is therefore of greatest consequence that justice should be dispensed, not only with the utmost purity, but in a manner calculated to merit the confidence and satisfaction of the public. *It should stand for the love of "fair play," and abhorrence of injustice. In fact, the very essence of the jury trial is its principle of fairness. The right of being tried, or having his civil controversies tried, by his equals—his fellow*

citizens—taken indiscriminately from the mass; who bear him neither malice nor favor, but simply decide according to what in their conscience they believe to be the truth, should instill in every man a confidence that he will be dealt with impartially, and inspire him with the wish to mete out to others the same measure of equity he would wish and expect to be meted out to himself—each man in judging his neighbor realizing that he also may be judged in turn. ("Judge not, that ye be not judged.") Jury service places the people themselves, or at least a representative group of them, upon the seat of judgment; and to this extent actually places the direction and control of society in their hands. In fact, the "trial by jury," is the only instance of judicial power, which the people have reserved unto themselves.

"And when twelve impartial men, chosen at random from the neighborhood of the controversy, aided by the experience and authority of a judge, shall have declared under the sanction of an oath, what is the truth upon disputed facts, the verdicts they render, assuming the jury to be representative of the citizenry of the community, may be deemed to represent the state of public feeling and spirit, and a tolerably correct index of the opinion entertained by society, on the rights and obligations in issue." "Twelve Men in a Box," by Stanley F. Brewster, Member of the New York and District of Columbia Bars.

The Seventh Amendment to the Constitution of the United States provides: Sec. 1. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Proposed Sept. 25, 1789; ratified Dec. 15, 1791.

Article I, Section 7 of the California Constitution provides: "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. * * *"

That the jury trial has always been considered to be one of the greatest rights of free men can be seen from the fact that the

Charter of 1681, granting to William Penn what came to be called Pennsylvania, extended full power to make all necessary laws (subject to royal veto) and included a "Bill of Rights" in which was an express provision of the right of trial by jury. The "Frame of Government" of the Province of Pennsylvania, confirmed by its First Provincial Council (1682) provided that "all trials shall be by 12 men, and as near as may be peers or equals of the neighborhood and men without just exception."

The case of Plymouth Colony is typical. One of the first laws passed after the settlement declared "that all criminal facts, and also all manner of trespasses and debts between man and man shall be tried by the verdict of twelve honest men to be empaneled by authority in the form of a jury upon their oath."

It should also be noted that The Declaration of Independence lists as one of the "repeated injuries and usurpations" of the English King, "depriving us in many cases, of the benefits of Trial by Jury".

A general constitutional provision guaranteeing inviolability of the right of trial by jury forbids any substantial infringement of that right. What is this Court doing but infringing this constitutional right to a trial by jury when, as in this case, it overturns the result reached not only by a jury, but by the trial court on the motion for a directed verdict and a motion for a new trial? It appears to me that this Court is doing indirectly what it is forbidden to do directly—that it is abrogating the right of an individual to have his case tried by a jury of his peers. It has done essentially the same thing in many recent cases and the list is an ever-growing one. Yet the members of this Court, who join in the majority opinion, avidly take loyalty oaths although not required to do so. All of these oaths contain a solemn vow to support the Constitution of the United States and the Constitution of the State of California. Does not the nullification of the constitutional provisions here involved violate these oaths?

There can be no doubt that this Court, by its decision here, has usurped the func-

tions of the trial court, the jury, and the District Court of Appeal, and, in the future, such cases may as well be brought here in the first instance, since the well settled and established rule set forth has been abrogated. By its decision here it also puts a premium on theft which I had always understood was a crime in this state.

I would affirm the judgment.

Rehearing denied; CARTER, J., dissenting.



40 Cal.2d 778

WEITZENKORN v. LESSER et al.

L. A. 22045.

Supreme Court of California, in Bank.

April 29, 1953.

Rehearing Denied May 28, 1953.

Action on complaint stating three causes of action for misappropriation of plaintiff's literary composition through production of movie by defendants. The Superior Court of Los Angeles County sustained demurrers to each of three counts of complaint, and plaintiff appealed. The Supreme Court, Edmonds, J., held that complaint stated good cause of action in first count on express contract and in second count on contract implied in fact.

Judgment affirmed as to third cause of action, and reversed as to first and second causes of action, with directions.

Carter, J., dissented.

Prior opinion, 231 P.2d 889.

1. Copyrights ⚡51

Literary Property ⚡8

The word "infringement" has no technical legal meaning when disassociated from the phrase "infringement of a copyright", or "patent", or "trademark", or the like, and consequently an action based upon infringement, or breach, of contract would fall within the terms of a statute relating to infringement of rights which might be contractual, and only where the statute refers to a term of art such "infringement of copyright", will the action for breach of contract be excluded from its operation. Code Civ.Proc. § 426, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Infringement".

2. Copyrights ⚡82

Literary Property ⚡9

Provision of Code of Civil Procedure that if the demand be for relief on account of the alleged infringement of plaintiff's rights in and to a literary, artistic or intellectual production, there must be attached to complaint a copy of production as to which infringement claimed and copy of alleged infringing production, by absence of limitation to "infringement of copyright", and inclusion of infringement of any "rights in and to a literary, artistic or intellectual production", applied not only to cause of action for infringement of copyright, but also to companion causes of action for infringement of related contract rights. Code Civ.Proc. § 426, subd. 3.

3. Pleading ⚡35, 214(2), 310

Well pleaded facts of the complaint must be taken as true for the purposes of demurrer, but in an action for infringement by motion picture of a literary composition, the facts pleaded include the allegedly infringed and infringing productions incorporated in accordance with statutory requirement, with result that general rule that when instrument in writing is foundation of cause of action or defense, and such is attached to pleading as an exhibit and incorporated by proper reference, court may, upon demurrer, examine exhibit and treat pleader's allegations of its legal effect as surplusage, is applicable. Code Civ.Proc. § 426, subd. 3.

4. Literary Property ⚡9

Where allegedly infringed literary composition, attached to complaint as required by statute, shows no evidence of originality, the plaintiff has no protectible interest therein, and there is no question for submission to jury. Code Civ.Proc. § 426, subd. 3.

5. Literary Property ⚡9

The question of originality or novelty of an allegedly infringed literary composition, which is attached to complaint as re-

quired by statute, is in the first instance one of law. Code Civ.Proc. § 426, subd. 3.

6. Evidence ⚡52

Issue of law of originality of allegedly infringed literary composition which is attached, in accordance with statute, to complaint charging infringement, cannot be determined by taking by court of judicial notice of contents of published books, since fact of which court may take judicial notice must be matter of common and general knowledge, well established and authoritatively settled, and not doubtful or uncertain. Code Civ.Proc. § 426, subd. 3.

7. Evidence ⚡5(1)

Before a court will take judicial notice of any fact, that fact must be a matter of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain, and test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof.

8. Literary Property ⚡9

Notwithstanding fact that judicial notice disclosed that basic characters and locale of literary composition of plaintiff, attached to complaint charging infringement by moving picture, lacked originality as to such features, combination of such characters and locale with other characters in a certain style and manner of expression could not be held, upon demurrer, to lack originality as a matter of law. Code Civ. Proc. § 426, subd. 3.

9. Literary Property ⚡2

Amendment of 1947 to statute pertaining to character of ownership of author of any product of the mind, limited protection afforded to only a protection in the representation or expression of a composition, and abrogated the rule of protectibility of an idea by acceptance of the traditional theory of protectible property under the common-law copyright. Civ.Code, § 980.

10. Pleading ⚡189

Where demurrer to complaint charging infringement by moving picture of literary composition admitted fact of access, if some substantial similarity between the compositions could reasonably be found, the issues

of similarity and of copying were to be determined by the trier of fact. Code Civ. Proc. § 426, subd. 3; Civ.Code, § 980.

11. Appeal and Error ⚡989

An appellate court may determine, as a matter of law, whether the evidence is insufficient to support the judgment, and, whether there is any question to present the trier of fact is, in the first instance, a question of law.

12. Pleading ⚡216(1), 218(1)

On demurrer to complaint charging infringement of literary composition by moving picture, the court, which has both productions before it in accordance with statute providing for attachment of compositions to the complaint, or viewing of production if attachment is not feasible, may determine whether there is substantial similarity between the compositions, and, if, as a matter of law, there is no such similarity, no question of fact is in issue, but if similarity might reasonably be found, that issue and the question as to copying, should be submitted to jury. Code Civ.Proc. § 426, subd. 3.

13. Literary Property ⚡9

Examination, on appeal from sustaining of demurrer to count of complaint charging infringement by motion picture of literary composition, of the relative compositions, disclosed merely a similarity in the basic dramatic core, without similarity as to protectible portions of form and manner of expression, and demurrer to such count was properly sustained. Code Civ. Proc. § 426, subd. 3; Civ.Code, § 980.

14. Literary Property ⚡7

An idea, if valuable, may be the subject of contract.

15. Literary Property ⚡9

Question of protectibility of a literary composition is immaterial on complaint based upon an express contract by which defendant has promised to pay the reasonable value thereof if composition, or any part of it, is used.

16. Literary Property ⚡9

Count of complaint by owner of literary composition for breach of express contract by which defendants had promised to pay

reasonable value thereof, if any part thereof was used in motion picture, and which charged that certain motion picture was patterned upon the composition, stated no cause of action unless there was a similarity between the composition and the motion picture, but similarity, even if non-protectible portions of composition, and defendants' production, will suffice under such theory.

17. Literary Property ☞9

Complaint by owner of literary composition stating that composition was submitted to defendants at their request, pursuant to express oral understanding that plaintiff would be paid the reasonable value thereof and given customary screen credit if defendants should use all or any part of the composition, and that defendants thereafter produced motion picture which was patterned upon, copied and used plaintiff's composition, was sufficient to state cause of action for breach of express contract, since requisite similarity might have been present even in absence of protectibility of portions copied.

18. Pleading ☞192(2)

The common count of quantum valebant for the reasonable value of goods sold and delivered is not subject to attack by general demurrer or by a special demurrer for uncertainty, or on ground of ambiguity or unintelligibility.

19. Assumpsit, Action of ☞19

Although an allegation of promise to pay was essential to an action of assumpsit in common-law pleading, it is unnecessary as a part of the common count under the code system of pleading.

20. Assumpsit, Action of ☞19

Where first count of complaint was sufficient to state a cause of action, and facts relied upon in second count were identical, with exception that no express promise to pay was alleged, making latter count in essence, the common count of quantum valebant for reasonable value of goods sold and delivered, fact that third count, alleging facts substantially similar to those in common count, did not state a cause of action, did not defeat the common count, when it

did not clearly appear to be based upon the insufficient, rather than the sufficient specific allegations.

21. Assumpsit, Action of ☞19

Under the code system of pleading, as at common law, the common counts are sufficient to state a cause of action upon either a contract implied in fact or a contract implied in law, and it is not necessary for the pleader to indicate what kind of implied contract he relies upon.

22. Assumpsit, Action of ☞5

The common count will not lie where the obligation of the defendant on an implied contract is something other than the payment of money.

23. Contracts ☞4

A contract implied in fact and an express contract differ in that the promise in the former is not expressed in words but is implied from the promisor's conduct, and the proof for either is essentially the same, except that in case of contract implied in fact, the conduct from which the promise may be implied must be shown.

24. Literary Property ☞9

Count of complaint which alleged that plaintiff was sole owner of literary and dramatic composition and that such composition was submitted at special request of defendants for purpose of sale to or use by defendant upon payment to plaintiff of reasonable value therefor, and that defendants thereafter patterned motion picture after such composition and produced and exhibited same to plaintiff's damage, asserted good cause of action on the common count of quantum valebant for reasonable value of goods sold and delivered, but recovery thereunder was limited to the reasonable value of the composition, to the exclusion of claim for damages for loss of screen credit.

25. Contracts ☞5

Quasi contracts, or "contracts implied in law" are not in reality contracts, but are obligations created by law for reasons of justice.

See publication Words and Phrases, for other judicial constructions and definitions of "Contracts Implied In Law".

26. Assumpsit, Action of Ⓒ7**Literary Property** Ⓒ9

The existence of a contract implied in law under a quantum valebant count depends upon whether defendant has used for its benefit any property of plaintiff in such manner and under such circumstances that the law will impose a duty of compensation therefor, and consequently recovery can be had under such count for alleged wrongful use by defendant of plaintiff's literary composition in motion picture, only if the material used is protectible property.

27. Literary Property Ⓒ9

Owner of literary composition was not entitled to recover on a contract implied in law because of alleged similarity of defendants' motion picture, when there was no similarity between the productions, as to the form and manner of expression, since defendants had not used any protected property of owner of literary composition. Civ. Code, § 980.

28. Pleading Ⓒ225(2)

In view of fact that only evidence of similarity adducible in action for infringement of literary composition by motion picture was the productions themselves, when examination of productions disclosed no similarity between them as to protectible portions of literary composition, sustaining of demurrer to complaint, without leave to amend, was not an abuse of discretion.

Fendler, Weber & Lerner, Harold A. Fendler, Daniel A. Weber and Robert W. Lerner, Beverly Hills, for appellant.

Aubrey I. Finn, Hollywood, Pacht, Tannenbaum & Ross, Clore Warne, Gordon Stulberg and Maxwell E. Greenberg, Los Angeles, amici curiæ on behalf of appellant.

Mitchell, Silberberg & Knupp and Arthur Groman, Los Angeles, for respondents.

Thelen, Marrin, Johnson & Bridges, Loeb & Loeb, Herman F. Selvin and Harry L. Gershon, Los Angeles, amici curiæ on behalf of respondents.

EDMONDS, Justice.

Ilse Lahn Weitzenkorn has sued Sol Lesser, Sol Lesser Productions, Inc., and RKO Radio Pictures, Inc., charging that they have unlawfully used literary property of which she is the owner. Her appeal is from a judgment of dismissal which followed an order sustaining the demurrers of the defendants without leave to amend.

In the first cause of action, against Lesser and Lesser Productions only, Weitzenkorn alleges that she originated, created and wrote a literary composition entitled, "Tarzan in the Land of Eternal Youth", of which she is the exclusive owner. A copy of the composition is attached to the complaint. This composition was submitted to Lesser and the corporation at their special request, "pursuant to an express oral understanding and agreement" that, in consideration of such submission, she would be paid the reasonable value thereof and given the customary screen credit as author if they should use all or any part of it. Lesser and Lesser Productions accepted submission of the document, she states, retained it in their possession for several months, and "became fully familiar with the contents".

Thereafter, according to the complaint, Lesser and Lesser Productions produced a motion picture, entitled "Tarzan's Magic Fountain", which they distributed and exhibited in conjunction with RKO Pictures. This motion picture, Weitzenkorn alleges, "is patterned upon and copies and uses" her composition. By reason of its nature and bulk, and because it is in the possession of the defendants, a copy of the motion picture film is not attached to the complaint. Damages of \$50,000 are claimed as the reasonable value of her composition, and the same amount for the reasonable value of the screen credit which she did not receive.

The second count, also against Lesser and Lesser Productions only, incorporates by reference all of the allegations of the first except the averments with respect to an express agreement. In addition, it alleges that Weitzenkorn submitted the composition to Lesser and Lesser Productions at their request for the purpose of sale to, or use by,

them, upon payment to her of its reasonable value.

The third count, against all of the defendants, incorporates by reference the material allegations of the first, with the exception of those relating to an express agreement and damages. Weitzenkorn then alleges that, without her knowledge, authority or consent, the defendants produced and distributed "Tarzan's Magic Fountain", substantially copying and misappropriating her composition. General damages of \$100,000 are alleged to have been sustained.

Lesser and Lesser Productions demurred to the complaint upon the grounds that each count fails to state facts sufficient to constitute a cause of action and that, in certain particulars, each of them is ambiguous, unintelligible or uncertain. RKO demurred to the third count upon the same grounds. At the request of the defendants, pursuant to section 426 of the Code of Civil Procedure, the court made an order for a viewing of the motion picture prior to and in connection with its ruling on the demurrers. The order also directed "that the contents of such production be deemed a part of the complaint to the same extent and with the same force as though such production had been attached to the complaint".

The composition or synopsis which is the basis of the controversy may be summarized as follows:

Tarzan, Jane, Boy and Cheta are interrupted by the arrival of an airplane "breaking the peace of their jungle idyl". The visitors are Jane's British cousin, Peter Selton, and his manservant, Gus. Peter is an "aging dandy". Gus provides comic relief, aided and abetted by the monkey, Cheta. Tarzan is not too happy to have guests; the travelers appear to be prepared for an indefinite stay.

Peter is "rather cagey about the reason" for his visit and Tarzan "senses there is more to Peter's expedition" than Peter is willing to reveal. Peter flies about the countryside seeking, and eventually finding, the Fountain of Youth located in the "Land Between Dusk and Sunrise", of which he has a map. Boy, without Tarzan's permission, accompanies Peter and Gus on the day they fly to the mysterious

land. The three are captured by warriors of the beautiful but cruel Queen Lilith who rules the land of eternal youth. Queen Lilith offers them the choice of eternal youth or death. No one can leave her land.

Tarzan, meanwhile, worried by the absence of Boy, sets off with Jane and Cheta to rescue him. Tarzan and Jane themselves are captured by Lilith's warriors. Tarzan escapes with Jane and Boy and, after getting them to safety, attempts to free Peter and Gus. In the ensuing battle, Peter dies a hero. Tarzan destroys the land and its inhabitants by throwing a flame into the fountain of youth. The queen and her subjects wither into extreme old age, shrink, disintegrate and vanish.

The motion picture has been viewed by the Justices of this court. It also features Tarzan, Jane and Cheta, but has no character corresponding to Boy. Tarzan freely enters and leaves Blue Valley, the land of eternal youth. The kindly king of the land is his friend. Tarzan's first visit is upon a mission of mercy. He is seeking Gloria James, an aviatrix missing for twenty years, whose testimony is needed to free a man from prison. Gloria leaves the valley with Tarzan, goes to England and marries. Having aged rapidly after leaving the valley, she comes back to Africa with her husband to seek Tarzan's help in returning to the land of eternal youth.

Tarzan refuses Gloria's request, but in his absence Jane offers to lead them to Blue Valley. Tarzan follows the party to teach Jane a lesson, rescues them from a flood, and secretly conveys Gloria and her husband to the land of eternal youth, leaving Jane to return home. The king of the valley permits Tarzan to leave in friendship, but rebel warriors capture and attempt to blind him.

Tarzan escapes to discover Jane in peril. Dodd and Trask, the villains of the picture who are seeking the land of eternal youth for profit, have forced Jane to show them the way. Tarzan rescues Jane. Dodd and Trask die at the hands of valley guards.

Weitzenkorn contends that her complaint tenders issues of fact with respect to originality, similarity and copying which are questions of fact requiring a trial on the

merits. These issues, she says, should not have been determined on demurrer as questions of law. In addition, she argues that the first and second counts, based upon express and implied contracts, tender issues of fact as to whether Lesser and Lesser Productions promised to pay for the use of her composition regardless of whether it was original.

It is also argued that section 426 of the Code of Civil Procedure, as amended in 1947, does not authorize the determination upon demurrer of factual issues such as originality, similarity, access and copying. The section is said to apply only to "infringement" cases, not to those concerning breach of express or implied contract.

The defendants take the position that section 426 was amended to create a statutory method for determining upon demurrer whether a complaint for plagiarism and related contract theories states facts sufficient to constitute a cause of action. Originality and similarity, they say, are questions of law to be determined by the court in the first instance. Upon the issue of originality, they contend, the court should apply the doctrine of judicial notice.

Section 426(3), Code of Civil Procedure, as amended in 1947, in part provides: "If the demand be for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion or other proceedings in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such pro-

duction had been capable of being and had been attached to the complaint."

The effective date of the statute was subsequent to the filing of the complaints in *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 221 P.2d 73, 23 A.L.R. 216, and *Golding v. R.K.O. Pictures, Inc.*, 35 Cal.2d 690, 221 P.2d 95. The question as to the effect of the enactment here arises for the first time.

Weitzenkorn asserts that the code section is not applicable to her first and second causes of action. As she construes the statute, it is limited to the tort action for "infringement". The defendants claim its benefits as to both the tort action and related contract actions.

The statute is similar to Rule 2 of the Supreme Court Rules for Practice and Procedure under section 101 of the Copyright Act. 17 U.S.C.A. following § 101, formerly § 25. That rule provides in part: "A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; * * *." Form 17 of the Federal Rules of Civil Procedure also provides for attachment of infringed and infringing compositions to a complaint for infringement of copyright. Fed.Rules Civ.Proc. form 17, 28 U.S.C.A.

The federal courts consistently have held that failure to attach copies of the infringed and infringing compositions, or to explain such failure, renders a complaint for infringement of copyright defective. *Buck v. Liederkranz*, D.C., 34 F.Supp. 1006, 1007; *Cole v. Allen*, D.C., 3 F.R.D. 236, 237. However, Rule 2 makes no provision for the court to order a view of the production if physical attachment is not feasible. There is also an essential difference in language between Rule 2 and our statute. Rule 2 is limited to "infringement of copyright"; section 426(3) extends to "infringement of * * * rights in and to a literary, artistic or intellectual production". Thus, Rule 2 clearly applies only to a cause of action for infringement of copyright, and its provisions are not applicable to a cause of action based upon breach of contract or quasi contract.

Weitzenkorn argues that, without exception, the word "infringement" has been defined by the state and federal courts as referring to a tort. The statute, she says, cannot be construed as applying "infringement" to an action for breach of express or implied contract or for quasi contract. She relies upon the rule that: "When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction." *Perry v. Jordan*, 34 Cal.2d 87, 93, 207 P.2d 47, 50; *City of Long Beach v. Payne*, 3 Cal.2d 184, 191, 44 P.2d 305.

However, the courts have not defined the word "infringement", standing by itself, as referring only to a tort. Rather, the definition consistently has been that the phrase "infringement of copyright" connotes a tort. *Frankel v. Irwin, D.C.*, 34 F.2d 142, 143; *McCaleb v. Fox Film Corporation*, 5 Cir., 299 F. 48, 50. In like manner, an action to recover damages arising out of alleged plagiarism has been classified as a tort action, *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal.App.2d 464, 466-467, 114 P.2d 370, and the defendant in such an action referred to as a tort-feasor. *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal.App. 2d 556, 559, 90 P.2d 371.

Although the word "infringement" is most commonly applied to actions for unlawful appropriation of copyright, trademark, or patent, see, generally, 21 Words and Phrases, Infringe; Infringement, 315 et seq., its usage is not limited solely to such actions. *Black's Law Dictionary*, 4th Ed., p. 920, defines "infringement" as: "A breaking into; a trespass or encroachment upon; a violation of a law, regulation, contract, or right. Used especially of invasions of the rights secured by patents, copyrights, and trademarks." This definition of infringement as applying to both tortious and contractual wrongs is in accord with the definitions in Webster's New International Dictionary, 2d Ed. "Infringe" is there defined: "To commit a breach of; to violate; to neglect to fulfill or obey; to commit an infringement of; as, to *infringe* a law, contract, or patent."

Webster's definition of "infringement" is: "1. Act of infringing; esp., breach; violation; nonfulfillment; as, the *infringement* of a treaty, compact, law, or constitution. 2. An encroachment or trespass on a right or privilege; a trespass; * *."

[1] It is clear, therefore, that the word "infringement" has no technical meaning when disassociated from the phrase "infringement of copyright (patent, trademark)". Thus, an action based upon infringement, or breach, of contract would fall within the terms of a statute relating to infringement of rights which may be contractual. Only where the statute refers to a term of art such as "infringement of copyright" would the action for breach of contract be excluded from its operation.

[2] The Legislature has not limited section 426(3) to "infringement of copyright" alone, but has included within its operation infringement of any "rights in and to a literary, artistic or intellectual production". These rights may be entirely contractual, as in *Stanley v. Columbia Broadcasting System*, supra, where there was no copyright. Construed in accordance with these definitions, the statute applies not only to the third alleged cause of action for infringement of copyright, but also to the first and second causes of action for infringement of related contract rights. Accordingly, the order of the superior court making the motion picture a part of the complaint affects all three alleged causes of action.

Concerning the scope of the code section, Weitzenkorn contends that all of the issues presented are questions of fact which cannot be decided upon demurrer. She argues that the statute cannot deprive her of her right to a trial by jury. The only purpose of the statute, she says, is to protect the defendant in such an action from an attempt to prove a fraudulent claim by presenting upon the trial a production created after the action was commenced.

The statute is neither so limited as she contends, nor so broad as to destroy the right to a jury trial. The Legislature has required that the alleged infringed and infringing productions be made a part of the

complaint. If this be impractical, by a different procedure they are a part of the pleading to the same extent as if they had been attached to it.

[3] Weitzenkorn correctly argues that the well pleaded facts of her complaint must be taken as true for the purposes of demurrer. However, the facts pleaded include the productions incorporated in accordance with the statute. "The general rule is that when a written instrument which is the foundation of a cause of action or defense is attached to a pleading as an exhibit and incorporated into it by proper reference, the court may, upon demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage." *Washer v. Bank of America*, 21 Cal.2d 822, 829-830, 136 P.2d 297, 302, 155 A.L.R. 1338; *Gosewisch v. Doran*, 161 Cal. 511, 515-516, 119 P. 656; *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 263, 48 P. 65. The same rule is as applicable to an action for the taking of literary property as to other types of actions to which it has been applied. *Shipman v. R.K.O. Radio Pictures, D.C.*, 20 F.Supp. 249, affirmed 2 Cir., 100 F. 533; *Lowenfels v. Nathan, D. C.*, 2 F.Supp. 73, 74.

The vital question, therefore, is: What matters properly come within the scope of the court's inquiry upon these demurrers? Weitzenkorn argues that the issues concerning originality, similarity and copying are questions of fact which cannot be determined upon demurrer. The defendants contend that these are questions of law to be determined by the court in the first instance. The issue of access is not here involved because the allegation thereof in the complaint must be taken as true for the purpose of ruling upon the demurrers.

Although the precise question here is of first impression in this state, it has been foreshadowed by the *Stanley* and *Golding* cases, *supra*. As stated in the *Golding* case, "It is, however, only the product of the writer's creative mind which is protectible. * * * The plaintiff must establish, as the subject of the cause of action, a right in the nature of property which is capable of ownership. * * * It is essential from the nature of the inquiry

as to originality to first dissect the play to determine wherein, if at all, plaintiffs have any protectible property right. Assuming this is established, then comparison may be made between the two works *as to the original and protectible portion only*." *Supra*, 35 Cal.2d at pages 695, 700, 221 P. 2d at pages 97, 100.

[4] Weitzenkorn would limit the holding of the *Golding* case to the single proposition that only the "question as to whether the claimed original or novel idea has been reduced to concrete form is an issue of law". 35 Cal.2d at page 695, 221 P.2d at page 97. She construes the decision as holding that the issues of originality, similarity, and copying are questions of fact only for the jury. However, from a reading of *Golding's* play, the court determined that there was sufficient evidence of originality to sustain the implied finding of the jury. Accordingly, if the production attached to Weitzenkorn's complaint shows no evidence of originality, she has no protectible property therein and there is no question to submit to the jury.

[5] The *Stanley* case, *supra*, 35 Cal.2d at page 665, 221 P.2d 73, and *Yadkoe v. Fields*, 66 Cal.App.2d 150, 159, 151 P.2d 906, state that the originality of the plaintiff's program is not a question of law to be determined by the court but is one of fact for the jury. Implicit in both opinions, however, is the acknowledgment that, in the first instance, the question of originality or novelty is one of law. After determining the issue of similarity in the *Stanley* case, the court stated: "The next question to be discussed is whether or not plaintiff's idea as such was so new and novel as to be worthy of protection." 35 Cal.2d at page 663, 221 P.2d at page 79. Obviously, without proof of originality, the judgment would not have been affirmed. Likewise in *Yadkoe v. Fields*, the court held that: "Sufficient evidence was presented on behalf of respondent for consideration by the jury of the issues raised by the pleadings; * * *" *Supra*, 66 Cal. App.2d at page 161, 151 P.2d at page 912.

[6,7] The next question is what method the court may use to determine the issue

of originality as raised by the demurrers. The defendants urge that the court may take judicial notice of the contents of published books in deciding whether Weitzenkorn's claim of originality has merit.

This would carry the doctrine of judicial notice far beyond its proper bounds. *Dezendorf v. Twentieth Century-Fox Film Corp.*, 9 Cir., 99 F.2d 850, 851. "The doctrine of judicial notice was adopted as a judicial short-cut to avoid necessity for the formal introduction of evidence in certain cases where there is no real need for such evidence. Before a court will take judicial notice of any fact, however, that fact must be a matter of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof." *Communist Party v. Peek*, 20 Cal.2d 536, 546, 127 P.2d 889, 895. "It is truly said that the power of judicial notice is, as to matters claimed to be matters of general knowledge, one to be used with caution. If there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required". *Varcoe v. Lee*, 180 Cal. 338, 345, 181 P. 223, 226.

The court may take judicial notice of the fact that there exist in the realm of fiction certain well-known characters called Tarzan, Jane and Cheta who live in Africa, and that the myth of a fountain of eternal youth is one of the oldest known to man. These are facts of common and general knowledge. However, common and general knowledge may not be said to include the fact that, in previously published works, these characters and myth have been combined with the same treatment and manner of expression which Weitzenkorn has used. Nor by judicial notice may a court find that Weitzenkorn's composition has been copied, as to plot or details, from previously published books. These are matters which are properly the subject of proof.

[8] Even though, by applying the rule of judicial notice, the basic characters and locale of Weitzenkorn's composition might be held to be unoriginal, the combination of these characters and locale with other char-

acters in a certain style and manner of expression cannot be held, upon demurrer, to lack originality as a matter of law. For these reasons, insofar as the question of a lack of originality may be involved in each cause of action, the demurrers could not have been sustained solely upon that ground.

Section 980 of the Civil Code was amended materially in 1947. At the time the *Stanley* and *Golding* cases were commenced, the section read as follows: "The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession." As amended, the section read: "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition." Insofar as is material to this action, the section is now in the same form.

In the *Stanley* and *Golding* cases, protection was extended to an "idea" rather than to the form and manner of its expression. The judgment in favor of *Stanley* was affirmed upon the ground that his idea was the new and novel combination of elements for a radio program. 35 Cal.2d at page 664, 221 P.2d 73. In the *Golding* case the court, relying upon the former wording of section 980, held that the "product of the writer's creative mind", 35 Cal.2d at page 695, 221 P.2d at page 97, is protectible and it extended that protection to his idea, "the basic dramatic core", 35 Cal.2d at page 697, 221 P.2d at page 99, of his play. Such extension of protection to an idea transcends the normal bounds of common law copyright, *Moore v. Ford Motor Co.*, D. C., 28 F.2d 529, 536, affirmed, 2 Cir., 43 F. 2d 685; *Amdur*, Copyright Law and Practice 50, § 11; Note, 23 A.L.R.2d 244, 249, in which ideas "are free as air". *Fendler v. Morosco*, 253 N.Y. 281, 287, 171 N.E. 56. However, in its earlier form, the statute

expressly protected both the idea, the "product of the mind", and "the representation or expression thereof".

[9] The 1947 amendment to section 980 has eliminated the protection formerly given to "any product of the mind". The statute as it now exists, and as it read at the time this cause of action arose, provides protection only "in the representation or expression" of a composition. The Legislature has abrogated the rule of protectibility of an idea and California now accepts the traditional theory of protectible property under common law copyright. 38 Cal.L.Rev. 337; Note, 23 A.L.R.2d 244, 262, n. 1.

No problem is presented in this case as to whether Weitzenkorn's idea has been reduced to concrete form, the composition for which she claims protection being attached to the complaint. Therefore, the question whether she has a protectible property interest depends upon the originality of form and manner of expression, the development of characterizations and sequence of events. *Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F.2d 354, 363; *Harold Lloyd Corp. v. Witwer*, 9 Cir., 65 F.2d 1, 24-27; *Stephens v. Howells Sales Co.*, D.C., 16 F.2d 805, 808. The idea alone, the bare, undeveloped story situation or theme, is not protectible. *Shipman v. R.K.O. Radio Pictures*, 2 Cir., 100 F.2d 533, 536-537; *Nichols v. Universal Pictures Corp.*, 2 Cir., 45 F.2d 119, 122, certiorari denied, 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795; *Dymow v. Bolton*, 2 Cir., 11 F.2d 690, 691. Here, to use the form of analysis employed in the *Golding* case, Weitzenkorn's idea, or "basic dramatic core", 35 Cal.2d at page 694, 221 P.2d at page 99, is to combine certain characters in an African locale with the myth of a fountain of eternal youth and, through the adventures which befall them, to teach a moral. The moral appears to be that eternal youth is not a blessing but a curse, the only satisfactory life being one full of love and affection. However, the "representation or expression" now protected by the statute is not this basic dramatic core, but is rather the development of both characterizations and adventures.

[10] The next point requiring consideration concerns similarity. Access being admitted by the demurrer, if some substantial similarity between the compositions reasonably could be found, the issues of similarity and of copying are to be determined by the trier of fact.

In the *Golding* case it was said that whether the "evidence is sufficient to sustain the jury's implied finding of similarity is a question which can only be determined upon appeal by reading the play and seeing the moving picture, which have been done by this court.

"The parties are directly at variance as to whether this issue of similarity presents a question of law or of fact. The only direct statements in the cases appear to confirm the playwrights' position that it is a question of fact for the jury. (Citations.) However, they extend this point too far when they contend that the determination by the jury of this issue 'is conclusive' upon appeal. No finding of fact is binding upon an appellate court if it is not supported by substantial evidence. The function of this court, when the contention of insufficiency is made, is to examine the record to ascertain whether there is evidence to support the verdict of the jury.

"* * * It is necessary to read or view the two works to see if they present any substantial similarity insofar as the plaintiff's property in his work is concerned. This is not to say that the appellate court will substitute itself for the jury to decide what it thinks of the issue of similarity; it is merely a question of determining if there is any substantial evidence of similarity to support the jury's finding." 35 Cal.2d at pages 698-699, 221 P.2d at page 99.

[11] Unquestionably, an appellate court may determine, as a matter of law, that the evidence is insufficient to support the judgment. As a corollary of this fundamental principle, whether there is any question to present to the trier of fact is, in the first instance, a question of law. And the two productions, the only evidence of similarity which could possibly be offered, are before the court upon the demurrer in accordance with the statute.

The Stanley case recognizes the rule as to similarity applied in the Golding case. The court there held: "With respect to the comparison between the two programs and without unnecessarily 'dissecting' them, there appears to be sufficient similarity to justify the finding of the jury as the 'average, reasonable man.' * * * We then have a question of fact—that of the similarity between the two programs. This question of fact was decided adversely to defendant by the jury whose duty it was to make the determination. The rule is settled that this determination will not be interfered with upon appeal where there is evidence to sustain it. The evidence, in the form of the two programs alone, shows that there is substantial similarity to support the verdict." 35 Cal.2d at pages 662–663, 221 P.2d at page 78. If no similarity had appeared between the two productions, as a matter of law, the judgment entered upon the verdict of the jury would have been reversed.

[12] Having both productions before it in accordance with section 426(3), the court may determine whether there is substantial similarity between them. If, as a matter of law, there is no such similarity, no question of fact is in issue and the demurrers to each count of the complaint were properly sustained. But if, from a comparison of the two productions, such similarity reasonably might be found, that issue, and also the question as to copying, should have been submitted to the jury for determination.

[13] In order for the third count of the complaint to state a cause of action for plagiarism, there must be some substantial similarity between the motion picture and protectible portions of Weitzenkorn's composition. *Golding v. R.K.O. Pictures, Inc.*, supra, 35 Cal.2d at pages 699, 700, 221 P.2d 95; *Shipman v. R.K.O. Radio Pictures*, supra, 100 F.2d 533, 537–538; *De Montijo v. 20th Century Fox Film, D.C.*, 40 F.Supp. 133, 138–139; *Echevarria v. Warner Bros. Pictures, D.C.*, 12 F.Supp. 632, 638. A careful comparison of Weitzenkorn's composition and the motion picture shows no similarity between them as to form and manner of expression. It is true that a

portion of the "basic dramatic core" might be found similar. Both productions combine the characters of Tarzan, Jane and Cheta in an African locale with the myth of a fountain of eternal youth. However, even here there is an essential difference. The combination of characters, locale and myth is not utilized for the same purposes. If the motion picture has a moral, it is that eternal youth is the reward for the good, which must be saved from the grasp of evil forces which would corrupt it. In achieving their divergent goals from certain similar combinations of basic ingredients, the two stories are developed along widely different lines. This is true of characterizations, descriptions, and events. Because there is no similarity as to protectible portions of Weitzenkorn's composition, the demurrer to the third count of the complaint properly was sustained.

[14,15] The question of protectibility need not be considered in determining the sufficiency of the allegations of the first count of the complaint, based upon express contract. As it is pleaded, the proof could show that Lesser and Lesser Productions agreed to pay for Weitzenkorn's composition if they used it, or any portion of it, regardless of its originality. An "idea if valuable, may be the subject of contract. While the idea disclosed may be common or even open to public knowledge, yet such disclosure if protected by contract, is sufficient consideration for the promise to pay." *High v. Trade Union Courier Pub. Corporation*, Sup., 69 N.Y.S.2d 526, 529, affirmed 275 App.Div. 803, 89 N.Y.S.2d 527; *Cole v. Phillips H. Lord, Inc.*, 262 App.Div. 116, 121, 28 N.Y.S.2d 404; *Schonwald v. F. Burkart Mfg. Co.*, 356 Mo. 435, 448, 202 S.W.2d 7; *Brunner v. Stix, Baer & Fuller Co.*, 352 Mo. 1225, 1232, 181 S.W. 643.

[16,17] The charge of breach of contract, however, is dependent upon the allegation that the motion picture "is patterned upon and copies and uses" Weitzenkorn's composition. If, as a matter of law, there is no similarity whatsoever between the productions, the first count does not state a cause of action. However, although there is no similarity between protectible portions of Weitzenkorn's composition and the

defendants' production, similarity may exist because of the combination of characters, locale, and myth. It is conceivable, even though improbable, that Weitzenkorn might be able to introduce evidence tending to show that the parties entered into an express contract whereby Lesser and Lesser Productions agreed to pay for her production regardless of its protectibility and no matter how slight or commonplace the portion which they used. Such evidence, together with comparison of the productions, would present questions of fact for the jury as to the terms of the contract, access, similarity, and copying. Under these circumstances, the facts pleaded in the first count are sufficient to state a cause of action and the demurrer to it was improperly sustained.

The second count of the complaint alleges that Weitzenkorn submitted her composition to Lesser and Lesser Productions "at their special instance and request * * * for the purpose of sale to or use by defendants upon payment to plaintiff of the reasonable value thereof and said defendants * * * thereupon accepted submission of said literary and dramatic composition by plaintiff and retained the same and became fully familiar with the contents thereof." Incorporated by reference from the first count are the allegations of originality, copying, the reasonable value of the production, and the defendants' refusal to pay. This is, in essence, the common count of *quantum valebant* for the reasonable value of goods sold and delivered.

[18, 19] "This form of pleading, a common count, by long continued practice is not subject to attack by general demurrer or by a special demurrer for uncertainty." *Auckland v. Conlin*, 203 Cal. 776, 778, 265 P. 946; *Pike v. Zadig*, 171 Cal. 273, 276, 152 P. 923; *Abadie v. Carrillo*, 32 Cal. 172, 175. Nor is it subject to special demurrer on the ground of ambiguity or unintelligibility. *Pleasant v. Samuels*, 114 Cal. 34, 38, 45 P. 998; see, generally, *King, The Use of the Common Counts in California*, 14 So. Cal. L. Rev. 288, 306. Although an allegation of the promise to pay was essential to an action of *assumpsit* in common law

pleading, *Shipman, Common-Law Pleading*, 3d Ed., p. 258, it is unnecessary as a part of the common count under the code system of pleading. *Gregory v. Clabrough's Executors*, 129 Cal. 475, 478, 62 P. 72; *Wilkins v. Stidger*, 22 Cal. 231, 235.

[20] The defendants contend that, where a demurrer is sustained as to a count specifically pleaded, it should also be sustained as to the common count based upon the same facts. Although it is proper under such circumstances to sustain a general demurrer to the entire complaint, *Hays v. Temple*, 23 Cal. App. 2d 690, 695, 73 P. 2d 1248; *Harris v. Kessler*, 124 Cal. App. 299, 303, 12 P. 2d 467, the rule is not here applicable. The first count is sufficient to state a cause of action and the facts relied upon in the second count are identical, with the exception that no express promise to pay is alleged. That the facts may also be substantially similar to those in the third count, which does not state a cause of action, will not defeat the common count unless it clearly appears to be based upon the insufficient, rather than the sufficient, specific allegations.

[21, 22] Under the code system of pleading, as at common law, the common counts are sufficient to state a cause of action upon either a contract implied in fact, *McClure v. Alberti*, 190 Cal. 348, 351, 212 P. 204; *Castagnino v. Balletta*, 82 Cal. 250, 257-259, 23 P. 127, or a contract implied in law. *Steiner v. Rowley*, 35 Cal. 2d 713, 717-718, 221 P. 2d 9; *Minor v. Baldridge*, 123 Cal. 187, 190, 55 P. 783. "It is not necessary for the pleader to indicate what kind of 'implied' contract, whether in fact or in law, he relies upon." *Shipman, Common-Law Pleading*, 3d Ed., p. 154. However, the common count will not lie where the obligation of the defendant is something other than the payment of money. *Willett & Burr v. Alpert*, 181 Cal. 652, 658-662, 185 P. 976; *O'Connor v. Dingley*, 26 Cal. 11, 22-23. Therefore, although no objection to the claim for damages for failure to give screen credit was raised as a ground for demurrer to the second count, it should be noted that recovery, if any, upon the *quantum valebant* count must be limited solely to the reason-

able value of the composition, or portion of it, which was used.

[23, 24] Although it is unnecessary for the pleading to distinguish between the contract implied in fact and the contract implied in law, or quasi-contract, the elements which must be proved for recovery upon each of them are quite different. The only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct. *Silva v. Providence Hospital of Oakland*, 14 Cal.2d 762, 773, 97 P.2d 798; *Smith v. Moynihan*, 44 Cal. 53, 62; *Grant v. Long*, 33 Cal.App.2d 725, 736-737, 92 P.2d 940; Civ.Code, §§ 1619-1621. Under the theory of a contract implied in fact, the required proof is essentially the same as under the first count upon express contract, with the exception that conduct from which the promise may be implied must be proved. *Cole v. Phillips H. Lord, Inc.*, supra. Therefore, for the reasons stated in discussing the sufficiency of the allegations of the first count of the complaint, the demurrer to the second count should not have been sustained.

[25] This conclusion does not mean, however, that, upon trial, Weitzenkorn may be able to recover upon either the theory of a contract implied in fact or that of one implied in law. The so-called "contract implied in law" in reality is not a contract. *Philpott v. Superior Court*, 1 Cal.2d 512, 520, 36 P.2d 635, 95 A.L.R. 990; *Hallidie v. Enginger*, 175 Cal. 505, 508, 166 P. 1. "Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." Rest., Contracts, § 5, com. a. Quasi contractual recovery is based upon benefit accepted or derived for which the law implies an obligation to pay. "Where no benefit is accepted or derived there is nothing from which such contract can be implied." *Rowell v. Crow*, 93 Cal.App.2d 500, 503, 209 P.2d 149, 151.

[26, 27] The existence of a contract implied in law under a *quantum valebant*

count depends upon whether the defendant "has used for its benefit any property of [plaintiff] in such manner and under such circumstances that the law will impose a duty of compensation therefor." *Thomas v. R. J. Reynolds Tobacco Co.*, 350 Pa. 262, 266, 38 A.2d 61, 63, 157 A.L.R. 1432; *Bowen v. Yankee Network, D.C.*, 46 F. Supp. 62, 63; *Bailey v. Haberle Congress Brewing Co.*, 193 Misc. 723, 724-725, 85 N.Y.S.2d 51; *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 487, 23 N.Y.S.2d 892; *Bristol v. Equitable Life Assur. Society*, 132 N.Y. 264, 267, 30 N.E. 506. The material which is used must constitute protectible property if recovery is to be had upon quasi contract. *Booth v. Stutz Motor Car Co. of America*, 7 Cir., 56 F.2d 962, 969; *Plus Promotions, Inc. v. RCA Mfg. Co., Inc., D.C.*, 49 F.Supp. 116. Therefore, the proof necessary to recover upon the theory of a contract implied in law is the same as that required by the tort action for plagiarism. There is no similarity between these productions as to form and manner of expression, the portion which may be protectible property. Thus, because the defendants have used no property belonging to Weitzenkorn, she cannot recover upon a quasi contractual theory. Had that been the only cause of action stated by the allegations of the second count, the demurrer thereto properly would have been sustained. It is only because the common count includes also facts charging an implied-in-fact contract that the demurrer should have been overruled.

[28] Weitzenkorn complains that it was an abuse of discretion for the trial court to sustain the demurrers without leave to amend. The conclusions which have been reached make it necessary to consider this contention only as to the third count of the complaint. The only evidence of similarity between the productions which can be presented is the productions themselves. Because there is no similarity between them as to protectible portions of Weitzenkorn's composition, no cause of action for plagiarism is or can be stated. Under such circumstances, there was no abuse of discretion in sustaining the demurrer to the third count without leave to amend. *Routh v.*

Quinn, 20 Cal.2d 488, 493, 127 P.2d 1, 149 A.L.R. 215.

The judgment is affirmed as to the third cause of action and reversed as to the first and second causes of action with directions to permit the defendants to answer.

GIBSON, C. J., and SHENK, J., concur.

TRAYNOR and SPENCE, JJ., concur in the judgment.

SCHAUER, Justice (concurring).

For the reasons stated in my concurring opinion in *Burtis v. Universal Pictures Company, Inc.*, Cal.Sup., 256 P.2d 933, I concur in the judgment herein and also in those portions of Justice EDMONDS' opinion which are not inconsistent with the views I have particularly indicated.

CARTER, Justice.

I dissent.

I disagree with the interpretation placed by the majority on the 1947 amendment to § 980 of the Civil Code. That section as it formerly read provided that "The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession." As amended, it read (at the time of this action) that "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition." The majority holds that the 1947 amendment has "eliminated the protection formerly given to 'any product of the mind'." The statute as it now exists, and as it read at the time this cause of action arose, provides protection only 'in the representation or expression' of a composition. The Legislature has abrogated the rule of protectibility of an idea and California now accepts the tradi-

tional theory of protectible property under common law copyright." It is held that the basic dramatic core is no longer protected but only the "representation or expression"—the development of both characterizations and adventures. This is the method by which the majority has determined that the question of originality shall be decided. It is admitted that a "portion of the 'basic dramatic core' might be found similar" in comparing Weitzenkorn's composition and the motion picture in the instant case, but because of changes in the characterizations, descriptions and events,—what the majority calls the protectible interests involved—the demurrer to the third count (plagiarism) of the complaint was held properly sustained. It has been stated that the policy of the law is to promote the progress of literature by protecting the author against the plagiarist, 38 CLR 332, but by minor changes in the sequence of events and the characterizations, the plagiarist may escape liability under this holding that only the *representation or expression of an idea or plot is protected*. This unnecessarily harsh result will not have the effect of promoting the progress of literature. Authors, anxious to find a market for their work, are not in an advantageous bargaining position to insist that the one to whom the composition is submitted sign a contract agreeing to compensate them if the work is used. It can be admitted that the characters Tarzan, Jane and Cheta are well-known, old and in the public domain as is the myth of the Fountain of Youth. A combination of those characters and the myth of the Fountain of Youth—or the basic, central plot—could very easily be considered original, but this Court denies protection now to the plot, or central idea, and says that only the expression of the characterizations, events and descriptions are to be protected under the 1947 amendment to § 980 of the Civil Code. The movie industry is constantly looking for "ideas" and "plots" which it develops as it sees fit. That plots are protectible, see *Shipman v. RKO Radio Pictures, Inc.*, 2 Cir., 100 F.2d 533, 536-537; *Dam v. Kirke La Shelle*, 2 Cir., 175 F. 902, 907,

908, 41 L.R.A.,N.S., 1002; *Nichols v. Universal Pictures*, 2 Cir., 45 F.2d 119, 121. Even when a book is purchased by the industry and made into a motion picture, the motion picture may differ so radically from the book because of the change in events, characterizations, locale, and conclusion that one who has read the book has difficulty in recognizing any similarity between it and the picture. To extend protection only to the expression and representation is to give no protection at all.

It is admitted in the majority opinion that an idea may be protected by an express contract, but any recovery for breach of that contract depends upon similarity between the two productions. In its statement with respect to the first count, based upon express contract, this Court practically directs the trial court to direct the jury to find that Lesser did not promise to pay for Weitzenkorn's production: "*It is conceivable, even though improbable, that Weitzenkorn might be able to introduce evidence tending to show that the parties entered into an express contract whereby Lesser and Lesser Productions agreed to pay for her production regardless of its protectibility [which is unimportant so far as this Court is concerned] and no matter how slight or commonplace the portion which they used. Such evidence, together with comparison of the productions, would present questions of fact for the jury as to the terms of the contract, access, similarity, and copying. Under these circumstances, the facts pleaded in the first count are sufficient to state a cause of action and the demurrer to it was improperly sustained.*"

No concise test has ever been laid down for determining the question of originality. It has been said that one requisite is that the work be original in the sense of being the creative product of the author's own effort. There is no requirement that the work be original in the sense of being novel, that is, the first of its kind in existence. *Amdur*, Copyright Law and Practice, 3, p. 69; *Gerlach-Barklow Co. v. Morris & Bendien*, 2 Cir., 23 F.2d 159. It has also been said that a composition, or work, to be a subject of copyright protec-

tion, must be useful, and its production must have involved independent effort and some judgment, selection, or experience on the part of the author; that many works which are original in the sense of the law would be disdained by the critic, because the latter's standard of originality is based upon a different theory and serves a different purpose; that to entitle a person to a copyright it is not necessary that he be the sole creator of the work for which the protection is claimed—that one who makes material changes, additions, improvements, notes, comments, or a substantially new adaption or arrangement of an old piece of music, or an abridgement, translation, dramatization, digest, index or concordance of a work is entitled to a copyright for his results. *Ball, The Law of Copyright and Literary Property*, 111, pp. 237-241. "Although original plots (dramatic situations) were exhausted centuries ago, original and novel ideas for handling old plots seem inexhaustible, and as long as sufficient originality in treatment or handling of the old plot appears the law endeavors to afford * * * protection", concurring opinion of Mr. Justice Schauer, *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 668-669, 221 P.2d 73, 82. Where, as here, plaintiff has combined old elements in a new way, the question of originality should have been submitted to the jury. I do not agree that the 1947 amendment to § 980 of the Civil Code has circumscribed the protection of the law to merely the form and manner of expression of a literary composition.

Insofar as the issue of similarity is concerned, I am of the opinion that the test is still that impression received by the average reasonable man upon a comparative reading of the two productions and that if reasonable minds could differ as to whether or not the two were similar, the question is one of fact and should be submitted to the jury.

Because it is my belief that the majority opinion interprets the 1947 amendment to § 980 of the Civil Code so narrowly as to provide no protection whatever to the products of an author's creative mind and be-

cause there is inherent therein too strict a test for determining the issue of similarity between the two productions, I would reverse the entire judgment with directions to the trial court to overrule the demurrers and permit the defendants to answer if they be so advised.

Rehearing denied; CARTER, J., dissenting.



40 Cal.2d 799

**KURLAN v. COLUMBIA BROADCAST-
ING SYSTEM, Inc. et al.**
L. A. 22094.

Supreme Court of California, in Bank.
April 29, 1953.

Rehearing Denied May 28, 1953.

Suit against broadcasting company for infringement of radio program and format created by plaintiff and previously submitted to defendant. The Superior Court of Los Angeles County sustained general demurrers of defendants, and plaintiff appealed. The Supreme Court, Edmonds, J., held that complaint was sufficient to state causes of action founded on contract, express and implied, and for plagiarism.

Judgment reversed, with directions.

Traynor and Spence, JJ., dissented in part; Carter, J., dissented.

Prior opinion, 233 P.2d 936.

1. Appeal and Error ⇨763, 1078(1)

Generally, where a party has neglected to present a point in his brief, he may be precluded from insisting that the court consider the point when deciding the case, but court is not prohibited from considering and deciding points of law which have not been argued and urged in briefs originally filed, if it appears that an important legal principle is necessarily involved in the newly discovered point, and proper disposition of case requires a discussion and decision of that point.

2. Literary Property ⇨9

Statute requiring, in case of demand for relief on account of alleged infringement of rights in and to a literary, artistic or intellectual production, that there be attached to complaint a copy of production

as to which infringement is claimed, and copy of alleged infringing production applies not only to tort action for plagiarism but also to causes of action for infringement of related contract rights, and order making records of radio programs allegedly infringing plaintiff's literary composition a part of complaint, affected both causes of action founded upon contract and cause founded on tort. Code Civ.Proc. § 426, subd. 3.

3. Jury ⇨31(6)

Statute in substance requiring attachment to complaint charging infringement of literary composition, of composition alleged to be infringed and the infringing production, provides a method for considering the alleged infringed and infringing productions upon demurrer, and does not deprive a plaintiff of his right to a jury trial, since, if a question of fact is shown to exist after a comparison of the productions, the cause is to be submitted to the jury. Code Civ.Proc. § 426, subd. 3.

4. Evidence ⇨5(2)

On demurrer to complaint reciting causes of action for infringement of rights to a radio program and format, court when determining question of originality of allegedly infringed production is not entitled to take judicial notice of contents of published books and plays and of former and contemporary radio programs. Code Civ. Proc. § 426, subd. 3.

5. Literary Property ⇨9

Where complaint for infringement of plaintiff's radio program and format, based upon express and implied contract with defendants who had thereafter produced an allegedly similar product, disclosed that any property interest of plaintiff in either the story or characters had been lost by publication, there was not, as a matter of law, any protectible property in the basic dramatic core of the story, its characters and their relationships, or the form and manner of its expression. Civ.Code, §§ 980, 983.

6. Literary Property ⇨9

Where program incorporated in complaint for infringement of radio program and format by broadcasting company de-

clared that it featured the further adventures of two named characters of certain original stories, from the producer of which plaintiff had procured right to use the characters, it was to be assumed for purposes of demurrers that the story was a sequel to, and not a reproduction of the literary creation, and, when so viewed, even though the dramatic core of plaintiff's radio program, together with its principal characters, their relationships, and its locale, were unoriginal under allegations of pleading, neither its style and manner of expression nor its minor characters could be held to lack originality as a matter of law. Civ.Code, §§ 980, 983.

7. Literary Property ⚡9

One whose radio program idea had been reduced to a production format, in order to have a protectible interest therein, was required to establish both originality and novelty.

8. Evidence ⚡5(2)

Literary Property ⚡2

Court will take judicial notice of fact that there is nothing new and novel in idea of capitalizing upon a famous and successful story, play and motion picture by producing it on the radio, and that consequently idea involves nothing which might constitute protectible property.

9. Pleading ⚡216(1)

In view of fact that court cannot have judicial knowledge of all methods of highly complicated radio industry, and extrinsic evidence is required to prove whether there is any element of novelty in particular radio program techniques, court could not determine, upon demurrer, whether there was any protectible property right in radio program and format of plaintiff which was allegedly infringed by production of broadcasting company.

10. Literary Property ⚡9

Where access and inclination to copy were admitted by broadcasting company's demurrer to plaintiff's complaint charging infringement of radio program and format if it might be said that some substantial similarity between programs reasonably could be found, issues of similarity and of copying were issues to be determined by

the trier of fact. Code Civ.Proc. § 426, subd. 3.

11. Pleading ⚡216(1)

Upon demurrer to complaint charging infringement of radio program and format by broadcasting company, the court, having both programs before it in accordance with statute, could properly determine whether there was substantial similarity between them, and could sustain demurrers, if, as a matter of law, there was not such similarity as to raise a question of fact. Code Civ. Proc. § 426, subd. 3.

12. Literary Property ⚡9

Count of complaint for infringement of radio program by broadcasting company, which was not founded on contract, but on tort of plagiarism, stated a cause of action only if there was some substantial similarity between defendants' program and protectible portions of plaintiff's production. Code Civ.Proc. § 426, subd. 3.

13. Literary Property ⚡9

In view of fact that radio program and format of plaintiff, allegedly infringed by defendant broadcasting company's program, may have involved a program format original and novel, as to which there may have been similarity in method of program presentation and radio techniques of defendant, count of complaint charging defendant with plagiarism stated a cause of action and sustaining of demurrers thereto was improper.

14. Literary Property ⚡9

Count of complaint which in substance alleged that plaintiff created a new and original radio program and format which he submitted to defendants in return for their promise, express or implied, to pay the reasonable value thereof, if they used it, was sufficiently broad in its allegations to permit introduction of evidence tending to prove a promise, either express or implied in fact, to pay for use of program whether or not it was original, and complaint was not demurrable on ground that, as a matter of law, the program was neither original nor novel.

15. Literary Property ⚡9

Complaint for breach of an express agreement of defendants to pay reasonable

value of plaintiff's allegedly new and original radio program and format, if program was used by defendants, when considered with the attached programs, presented questions of fact for jury as to the contractual provisions, access, similarity of the programs, and copying.

16. Frauds, Statute of ☞89(1)

A transaction, otherwise within the statute of frauds, is removed therefrom by acceptance of part of the goods by the buyer. Civ.Code, § 1624a(3).

17. Frauds, Statute of ☞149

Complaint for breach by defendants of an express contract to pay plaintiff the reasonable value of his radio program and format, if used by defendants, which alleged facts from which access, copying and use by defendant conceivably could be found, was not demurrable as showing on its face that contract was in the bar of the statute of frauds, since findings in accordance with allegations of complaint could show acceptance of at least a portion of the goods received, thereby removing contract from within statute of frauds.

Civ.Code, § 1624a(3).

18. Literary Property ☞9

Counts of complaint alleging that plaintiff was creator of radio program and format submitted to defendants at their request for the purpose of sale to or use by them upon payment to plaintiff of reasonable value, or submission at defendants' request pursuant to implied agreement that, if used by them, they would pay reasonable value, were sufficient to state causes of action upon common count of quantum valent upon either a contract implied in fact or one implied in law.

19. Contracts ☞346(2)

Literary Property ☞9

Proof under theory of contract implied in fact is essentially the same as that for a count upon express contract, with exception that conduct, rather than words of promise, must be proved from which the promise may be implied, but proof necessary upon a contract implied in law whereby defendant was to pay for use of plaintiff's radio program and format, was same as that required by tort action for plagiarism

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Aubrey I. Finn, Hollywood, Pacht, Tannenbaum & Ross, Clore Warne, Gordon Stulberg and Maxwell E. Greenberg, Los Angeles, amici curiæ on behalf of appellant.

O'Melveny & Myers, Homer I. Mitchell, W. B. Carman, Los Angeles, and Harned Pettus Hoose, Beverly Hills, for respondents.

Thelen, Marrin, Johnson & Bridges, Loeb & Loeb, Herman F. Selvin and Harry L. Gershon, Los Angeles, amici curiæ on behalf of respondents.

EDMONDS, Justice.

Arthur Kurlan is suing Columbia Broadcasting System, Inc., and others for damages upon the ground that they copied and used a proposed radio program owned by him. As in *Weitzenkorn v. Lesser*, Cal. Sup., 256 P.2d 947, the appeal is from a judgment entered upon an order sustaining the demurrers of the defendants without leave to amend.

For his first cause of action, Kurlan alleges that Ruth McKenney "originated, created and wrote certain stories for the 'New Yorker Magazine' which were subsequently dramatized in a stage play entitled 'My Sister Eileen,' and which were subsequently used as the basis of a motion picture photoplay also entitled 'My Sister Eileen' featuring the same leading female characters known as 'Ruth' and 'Eileen', and depicting unique characterizations and relationships between said characters". He states that, by written agreement, McKenney transferred to him "the sole and exclusive right to use for radio broadcasting purposes said leading female characters". She also assigned to him "all radio broadcasting rights" which she had "expressly reserved" in connection with prior licenses and uses of these characters. A further allegation is that, prior to the commencement of this action, McKenney assigned to him all causes of action which she might have against these defendants arising out of transactions alleged in this complaint.

Kurlan then pleads that he "conceived, originated, and devised a new and original radio program idea and original untitled radio program" featuring Ruth and Eileen. In connection with this program, he states, he originated new program techniques and methods of radio presentation, including a new radio production format. These, he says, he "reduced to concrete form and embodied" in a written script and a sample audition recording, at a cost of \$10,000, retaining at all times his common law rights of ownership and authorship.

Kurlan states that he submitted his radio program to the defendants at their special instance and request pursuant to an express oral agreement. In consideration of such submission, if they used all or any part of the program they promised to pay him its reasonable value. The defendants accepted submission of the program script and recording, he states, heard it, and became fully familiar with it. Thereafter, CBS and the other defendants, without Kurlan's authority or license, produced and broadcast over a coast-to-coast network a weekly series of radio programs entitled, "My Friend Irma". This radio broadcast, the complaint continues, substantially copied, used and embodied his radio program idea and format. Kurlan claims general damages of \$150,000 for rendering valueless his "personal property".

The second count of the complaint incorporates by reference all of the allegations of the first one except the averments with respect to an express agreement. In addition, it declares that Kurlan submitted his radio program idea and sample audition recording to the defendants at their request for the purpose of sale to or use by them upon payment to him of its reasonable value.

The third count also incorporates by reference all of the allegations of the first one except the averments with respect to an express agreement. It then alleges that Kurlan submitted his radio program idea and audition recording to the defendants at their request pursuant to an implied agreement that, in consideration for the submission, if used by them, they would pay him

the reasonable value of the program idea, or any part of it.

After incorporating by reference all of the allegations of the first count except those with respect to an express agreement, the fourth count asserts that the radio program was submitted to the defendants at their request pursuant to trade customs, practices and usages. These customs, the complaint declares, are that the defendants would not use or copy all or any part of his program without his consent and that they would not do or permit any act in derogation of its value.

By reference all of the allegations of the first count, except those respecting an express agreement, use of the program by the defendants and damages, are made a part of the fifth one. Kurlan then pleads that he submitted his program to the defendants at their request for the purpose of sale to them. They heard the audition recording, he says, and retained it in their possession for several weeks, becoming fully familiar with its contents.

Thereafter, according to the complaint, the defendants negotiated with him for production of a series of radio programs based upon his idea. These negotiations, Kurlan states, were terminated when the defendants informed him that they "intended to use" his idea, characters and format "without compensation therefor by merely changing the names of the characters and describing the leading female characters as girl friends instead of sisters". According to Kurlan, the defendants said that by doing so they would save the expense of compensating him and McKenney and own and control the program. Kurlan alleges that he immediately objected to the proposed action and notified the defendants that they would act at their peril.

Thereafter Kurlan states, with full notice and knowledge of his rights and "in wilful and deliberate disregard thereof", the defendants broadcast over a coast-to-coast network a weekly series of radio programs entitled, "My Friend Irma". These programs substantially copied, used, embodied and misappropriated his "untitled and unpublished sample audition recording". By such conduct, Kurlan says,

the defendants "have appropriated the rights, benefits, royalties and profits to which" he "is solely and exclusively entitled", and they have destroyed the value of his "personal property". He alleges general damages in the amount of \$150,000.

The fifth count includes an allegation that, because of their nature, "it is not practicable to attach to the complaint" either Kurlan's audition recording or recordings of the defendants' radio programs. The defendants' recordings are in their possession and control, it is said. Kurlan makes profert of his recording and consents that the records which he submitted to the defendants "shall be deemed to be a part of this complaint for all purposes and upon any demurrer, motion or other proceeding in this cause". By stipulation, this allegation was made a part of each of the preceding counts of the complaint.

The defendants demurred to the complaint upon the grounds that each count fails to state facts sufficient to constitute a cause of action. They also moved to require Kurlan to comply with section 426(3) of the Code of Civil Procedure.

The motion to require compliance with the statute was granted and the records of both radio programs were ordered to be introduced and filed as exhibits on demurrer. Thereafter, demurrers were sustained without leave to amend and judgment entered "that plaintiff take nothing as against said defendants".

This court has studied the scripts and heard recordings of both radio programs. Kurlan's program, "My Sister Eileen", features "the further adventures of Ruth and Eileen", the principal characters "from Ruth McKenney's best-selling stories and from the Broadway and motion picture hit" of the same name. The principal idea of the program is to capitalize upon the success of McKenney's creation. As stated in an advertising blurb in the audition script, "Millions of people have read the Ruth and Eileen stories or seen the play or picture * * * which means that several million dollars worth of some one else's money has already been spent for you, Mr. Prospective Client. * * * These characters

have been highly successful in every medium—magazines—books—stage—and screen * * * *but*—as a series have never before been presented on the air * * * the medium for which they are best suited."

The program may be summarized as follows: Ruth and Eileen are sisters living in an apartment which Eileen found for them in New York City. Ruth possesses average intelligence and capabilities and is the balance wheel of the pair. Eileen is semi-moronic, scatterbrained, impulsive, naive, completely thoughtless and oblivious to the consequences of most of her acts. Lucille Ball, a motion picture actress under contract to Kurlan, plays the part of Ruth.

Ruth, as narrator introduces a series of incidents in which Eileen's stupidity creates situations extremely embarrassing to Ruth. Ruth is constantly trying to rescue one or both of them from Eileen's scrapes, while Eileen continues to add complications. Through Ruth's efforts, Eileen's situations are turned to the benefit of the pair.

Most of the situations which Eileen creates arise, directly or indirectly, from the fact that Eileen is man-crazy. She trusts any man, and has an astonishing capacity for acquiring large numbers of them in unorthodox ways. This trait introduces certain minor characters into the program, including one dispossessed male who moves in to live with the girls. There is a loud-mouthed Texan boor who, thanks to Eileen, forces his crude attentions upon Ruth. Among other characters are an eccentric old landlady and an ill-tempered canine monstrosity. Ruth's boy friend, Lloyd Carter, is mentioned in the audition recording but his personality is not developed.

The defendants' program, "My Friend Irma", also features two girls, one reasonably intelligent, the other stupid, living in an apartment in New York City. However, it in no way attempts to capitalize upon the success of McKenney's creation. Jane and Irma are chance friends, not sisters. Jane, for lack of a better place to live, moved into an apartment already occupied by Irma. Marie Wilson, a motion picture and stage actress famous for "dumb-blonde" roles, plays the part of Irma.

Jane, the more intelligent of the two, acts as narrator, introducing a series of incidents in which Irma's stupidity creates situations extremely embarrassing to one or both girls. Jane, however, is totally incapable of coping with the dilemmas posed by Irma's antics. With helpless fascination, Jane watches the unfolding of each new near-catastrophe. Inevitably, in the most improbable and unexpected manner, each situation turns out for the benefit of all concerned.

Irma is a confirmed "one-man girl". Her boy friend, Al, a smooth talking phony, is the third principal character in the show. Al, with his schemes, frequently does as much or more than Irma to create the uncomfortable situations to which the characters are subjected. Jane also is a "one-man girl", very much in love with her socialite businessman employer Richard Rhinelander, III. Richard is frequently the baffled victim of Irma's stupidity and Al's machinations. Minor characters include an avaricious landlady, a burlesque violinist, Richard's mother, and a succession of startlingly unconventional neighboring tenants and friends of Al.

Kurlan contends that his complaint tenders issues of fact with respect to access, originality, similarity and copying and that the trial court erred in deciding these issues upon demurrer. He further claims that each count of his complaint is well pleaded and that the trial court erred in sustaining the demurrers without leave to amend. The 1947 "procedural" amendment to section 426(3) of the Code of Civil Procedure, he says, was not intended to prevent jury trials upon the merits and did not change the "substantive" rule of law that issues of fact shall not be determined upon demurrer or motion.

Another point urged by Kurlan is that the first four counts of his complaint, based upon express and implied contract, state causes of action which cannot be governed by the principles applicable to the tort action of plagiarism. As to the fifth count, he declares that the cause of action will lie for deliberate taking of his idea and format although no literary property is involved.

The defendants contend that, under section 426(3), the court must, upon demurrer, examine the alleged infringed and infringing productions and determine whether Kurlan's production is legally protectible property and whether there is any substantial evidence of similarity with respect to such property. In determining the issue of originality, they argue, the court should apply the doctrine of judicial notice. They also contend that the complaint shows upon its face that the literary content of Kurlan's program previously has been published and is, therefore, a part of the public domain. Because no legally protectible material was used by them, they say, the demurrers to each cause of action were properly sustained. In addition, as to the counts upon express and implied in fact contract, the defendants assert that the alleged agreement is within the statute of frauds and unenforceable.

[1] The preliminary question here, as in *Weitzenkorn v. Lesser*, supra, is: To what actions does section 426(3) of the Code of Civil Procedure apply? Kurlan's counsel does not raise this point in his briefs. However, it appears from the record that the order requiring compliance with section 426(3) was entered over his objection and after argument concerning the question. The general rule is "that ordinarily, where a party has neglected to present a point in his brief, he may be precluded from insisting that the court consider the point when deciding the case. * * * However, we know of no hard and fast rule which prohibits the court from considering and deciding points of law which may not have been urged and argued in the briefs originally filed if it appears to the court that an important legal principle is necessarily involved in the newly discovered point, and that a proper disposition of the case requires a discussion and decision of that point." *Schubert v. Lowe*, 193 Cal. 291, 294, 223 P. 550, 551; *Philbrook v. Randall*, 195 Cal. 95, 105, 231 P. 739.

[2] In *Weitzenkorn v. Lesser*, supra, it is held that the statute applies not only to a tort action for plagiarism but also to causes of action for infringement of related con-

tract rights. Therefore, the order of the trial court making the records of both radio programs a part of the complaint affects all five alleged causes of action and a comparison of the productions must be made in considering each count.

[3] Kurlan contends that the statute cannot and does not deprive him of his right to a jury trial of issues of fact with respect to access, originality, similarity and copying. As held in *Weitzenkorn v. Lesser*, supra, the statute provides a method for considering the alleged infringed and infringing productions upon demurrer. This in no way deprives a plaintiff of his right to a jury trial. If, from a comparison of the productions, a question of fact is shown to exist, the cause should be submitted to the jury.

[4] The defendants argue that the court may take judicial notice of the contents of published books and plays and of former and contemporary radio programs in determining whether Kurlan's claim of originality is well founded. For the reasons stated in the *Weitzenkorn* case, the court cannot do so.

However, Kurlan has alleged facts which negative originality as to the major portion of his production. He states that "My Sister Eileen" featuring the characters "Ruth" and "Eileen" and "depicting unique characterizations and relationships between said characters" was originated, created and written by Ruth McKenney for the "New Yorker Magazine". The audition recording which Kurlan has attached to his complaint also states that the story has been published in books. According to the recording, "Millions of people have read the Ruth and Eileen stories".

At the time Kurlan's cause of action arose, section 983 of the Civil Code provided: "If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned." Section 980 of the same code, as then in effect, provided that, "The author of any product of the mind, * * * has an exclusive ownership therein, and in the representation or expression thereof, which

continues so long as the product and the representations or expressions thereof made by him remain in his possession."

[5] Kurlan's complaint shows that any property interest which McKenney may have had in either the story or characters of "My Sister Eileen" has been lost by publication. According to the pleader, neither the product of McKenney's mind nor its representations or expressions remain in her possession. Therefore, as a matter of law, there is no protectible property in the "basic dramatic core" of the story, its characters and their relationships, or the form and manner of its expression.

It is suggested however, that McKenney retained the right to use the characters "Ruth" and "Eileen" in sequels to the original stories. The implication is that no one else could acquire this right. But even if we assume that characterizations may be protectible, these characters were products of the mind which intentionally had been made public. Under the circumstances, there was nothing to prevent McKenney or anyone else from utilizing them in other productions.

[6] The program incorporated in the complaint declares that it features "the further adventures of Ruth and Eileen". Therefore, we must assume for the purposes of the demurrers that the story is a sequel to, and not a reproduction of, McKenney's literary creation, which is not before the court and the contents of which we cannot judicially notice. Even though the dramatic core of Kurlan's production, together with its two principal characters, their relationships, and its locale, are unoriginal under the allegations of the pleading, neither its style and manner of expression nor its minor characters can be held, upon demurrer, to lack originality as a matter of law. *Weitzenkorn v. Lesser*, supra.

[7] In addition to his allegation that he created an "original untitled radio program", Kurlan claims to have "devised a new and original radio program idea" for which he "originated, created and devised * * * new program techniques and methods of radio presentation * * * includ-

ing a new radio production format". Insofar as the radio program idea and techniques are concerned, this case is similar to *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 221 P.2d 73, 23 A.L.R.2d 216, and *Kovacs v. Mutual Broadcasting System*, 99 Cal.App.2d 56, 221 P.2d 108, where the claimed protectible property was a "radio program idea" rather than the traditional conception of "literary property". Under the rule stated and applied in deciding those cases, for Kurlan to have a protectible interest in his radio program idea as reduced to a production format, he must establish both originality and novelty.

[8,9] Kurlan's radio program idea was to capitalize upon a famous and successful story, play and motion picture by producing it on the radio. The court may take judicial notice of the fact that there is nothing new and novel in this idea which might constitute protectible property. *Stanley v. Columbia Broadcasting System*, supra, 35 Cal. 2d at page 663, 221 P.2d 73. Whether there is any originality or novelty in Kurlan's "new program techniques and methods of radio presentation" is more difficult to determine. There is nothing novel about customary broadcasting techniques, but the court cannot have judicial knowledge of all of the methods of the highly complicated radio industry. It might be possible for Kurlan to show that he created something novel in the way of program techniques and methods of presentation. Because extrinsic evidence is required to prove whether there is any element of novelty in his program techniques, it cannot be determined, upon demurrer, that there is no protectible property in them. Insofar as the question of a lack of originality or novelty may be involved in each cause of action, the demurrers could not properly have been sustained solely upon that ground.

[10,11] The next question for decision is that of similarity. Access and inclination to copy being admitted by the demurrer, then if it may be said that some substantial similarity between the programs reasonably could be found, the issues of similarity and of copying are issues to be determined by the trier of fact. Having both programs before it upon demurrer in accordance with

section 426(3), the court may determine whether there is substantial similarity between them. *Weitzenkorn v. Lesser*, supra. If, as a matter of law, there is no such similarity, then there is no question of fact and the demurrers to each count of the complaint were properly sustained.

[12,13] In order for the fifth count of the complaint to state a cause of action for plagiarism, there must be some substantial similarity between the defendants' radio program and protectible portions of Kurlan's production. *Weitzenkorn v. Lesser*, supra. Even if it might be found that there is some originality in the development of minor characters which Kurlan may have added to McKenney's story for the purposes of the radio program, there is no similarity between them and characters in the defendants' program. Nor is there any similarity between the two shows as to the form and manner of expression of their literary content. However, some similarity might be found in the methods of program presentation and radio techniques. Because evidence may tend to prove that Kurlan's program format was both original and novel, the demurrers to the fifth cause of action were improperly sustained.

The defendants strike directly at the heart of Kurlan's other claims by asserting that the complaint charges only the breach of an express, or an implied in fact, contract to pay for a "new and original" radio program, if used. They argue that, both from the allegations of the complaint and from the audition program itself, it appears, as a matter of law, that the program is neither original nor novel. Therefore, they say, no cause of action is stated upon an express or implied in fact contract.

[14] However, as previously stated, it cannot be determined upon demurrer in the absence of evidence of previously published works that there is nothing original in the literary content of the program or that the radio production techniques utilized lack novelty. Nor may the complaint be construed so narrowly as suggested by the defendants. In substance, it alleges that Kurlan created a new and original radio program which he submitted to the defendants in return for their promise, express or im-

plied, to pay "the reasonable value thereof" if they used it. Although Kurlan has described his production as a new and original program, he does not allege that he represented it to the defendants as such. Nor is there any allegation that the agreement was conditioned upon Kurlan's production being new and original. The pleading allows Kurlan to present evidence, if there be such, tending to prove a promise, express or implied in fact, to pay for the use of his program whether or not it is original.

[15] For this reason, and in accordance with the rule stated in *Weitzenkorn v. Lesser*, supra, the question of protectibility need not be considered in determining the sufficiency of the allegations of the first count of the complaint, based upon express contract. Kurlan may be able to present evidence showing some similarity between the program techniques. In addition, although there is no similarity between protectible portions of the literary content of Kurlan's program and the defendants' broadcasts, there is the possibility of finding some similarity in the use by each production of a "dumb" character who produces difficult situations for a "smart" character, both being girls who share an apartment in New York City. The terms of the contract and the content of the programs present questions of fact for the jury as to the contractual provisions, access, similarity, and copying.

[16, 17] However, the defendants argue that, even if the cause of action upon express contract otherwise is well pleaded, the demurrers to it properly were sustained because the complaint shows on its face that the contract is within the bar of the statute of frauds. Even if it be assumed that the transaction alleged might be said to be a sale of "goods" within section 1624a of the Civil Code, the complaint, upon its face, does not show the bar of the statute. A transaction is removed from the statute by acceptance of part of the goods received. "There is an acceptance of goods * * * when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods." § 1624a(3). Kur-

lan alleges facts from which access, copying and use conceivably could be found. If such findings were made, acceptance of at least a portion of the goods received would be proved and the statute would constitute no bar to the action. Under the circumstances, the facts pleaded in the first count are sufficient to state a cause of action and the demurrers thereto were improperly sustained.

[18, 19] The second and third counts of the complaint are based upon the common count of *quantum valebant* and are sufficient to state a cause of action upon either a contract implied in fact or one implied in law. *Weitzenkorn v. Lesser*, supra. As stated in the *Weitzenkorn* case, "Although it is unnecessary for the pleading to distinguish between the contract implied in fact and the contract implied in law, or quasi-contract, the elements which must be proved for recovery upon each of them are quite different." Here, it might be possible for Kurlan to recover upon either a contract implied in fact or one implied in law. Under the first theory, the required proof is essentially the same as that for the count upon express contract, with the exception that conduct, rather than words of promise, must be proved from which the promise may be implied. On the other hand, if Kurlan relies upon a contract implied in law, the proof necessary for a recovery is the same as that required by the tort action for plagiarism. For these reasons, the demurrers to the second and third counts of the complaint should not have been sustained.

The fourth count relies upon a contract implied in fact from trade customs, practices and usages. The conclusions in regard to the count upon express contract are equally applicable to this count and the demurrers thereto were improperly sustained.

These conclusions make it unnecessary to consider Kurlan's contention that it was an abuse of discretion for the trial court to have sustained the general demurrers to all five causes of action without leave to amend.

The judgment is reversed as to each cause of action with directions to permit the defendants to answer.

GIBSON, C. J., and SHENK, J., concur.

SCHAUER, Justice.

I concur in the judgment and with all that portion of the opinion which is not inconsistent with the views expressed by me in *Golding v. R. K. O. Pictures, Inc.* (1950), 35 Cal.2d 690, 710, 221 P.2d 95; in *Stanley v. Columbia Broadcasting System* (1950), 35 Cal.2d 653, 668, 221 P.2d 73, 23 A.L.R.2d 216; and in *Burtis v. Universal Pictures Company, Inc.*, Cal.Sup., 256 P.2d 933.

TRAYNOR, Justice (concurring and dissenting).

Plaintiff seeks recovery for the alleged unauthorized use of his plan for a radio program to consist in the serialized presentation of the adventures of two sisters living in a New York apartment. He reduced his plan to concrete form by preparing a script and audition of one sample program and submitted it to defendants. He alleges that they made use of his program by producing "My Friend Irma," and that either under the terms of an express or implied contract, or by virtue of piracy of his literary property, he is entitled to recover damages for such use. The majority opinion holds that he has stated causes of action both for breach of contract and for plagiarism. Since in my opinion plaintiff has not alleged facts, which if proved, would establish infringement of his literary property, I cannot agree with the latter holding.

Plaintiff's program may be divided into three elements. There is the raw material consisting of the two principal characters, the basic relationship between them, and the locale of their adventures. Since this material was taken from the published works of Ruth McKenney, it could in no event constitute protectible literary property under the law of this state. Civil Code § 983. Accordingly, it is unnecessary to decide whether it constituted merely some of the basic ideas embodied in the program, or would, had it not been previously published, constitute a sufficient development and treatment of basic ideas to be the subject of copyright protection.

See *Golding v. R. K. O. Pictures, Inc.*, 35 Cal.2d 690, 701, 221 P.2d 95, dissent, and cases and authorities there cited.

Using McKenney's material, plaintiff produced his sample program in which he presented one adventure of the two sisters. Although he cannot claim copyright protection under the law of this state for McKenney's material nor for the ideas he may have added to it, he is entitled to protection for any original treatment and development he has given to such material and ideas. I agree with the holding of the court, however, that in so far as the dramatic content of the sample program is concerned, there is no similarity between plaintiff's original contributions and defendants' program. Such similarity as does exist in this respect arises only from the common use of the basic dramatic situation found in the McKenney works, and accordingly, will not support a finding of piracy. *Golding v. R. K. O. Pictures, Inc.*, 35 Cal.2d 690, 695-696, 221 P.2d 95.

The third element of plaintiff's program is its basic plan as distinct from the specific episode or adventure presented as a sample or illustration thereof. The plan or format consists of a combination of the following ideas: the use of the McKenney material as the basis for a serialized radio program; the use of first person narration by the intelligent sister to set the stage and bridge the gaps between the scenes in each program; and the use of the principal characters to carry over listener interest from week to week. It may be assumed that this combination of ideas was original with plaintiff. Moreover, although there is nothing new or novel about any one of these ideas, it may be assumed that they had not been combined in the same manner in any earlier radio program. It does not follow, however, that this combination of ideas constitutes protectible intellectual property. The basic program plan adopted as the foundation for a radio serial is analogous to the basic dramatic core or plot of a play or movie. It consists only of the author's general ideas as distinct from his original treatment or development of them. Such general ideas are free and cannot constitute property. See *Golding*

v. R. K. O. Pictures, Inc., 35 Cal.2d 690, 701, 221 P.2d 95, dissent; Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 672, 221 P.2d 73, dissent.

In *Weitzenkorn v. Lesser*, Cal.Sup., 256 P.2d 947, the court holds that since the 1947 amendment to Civil Code section 980, ideas, as distinct from the original form and manner of their expression, do not constitute literary property in this state. It justifies the protection against plagiarism that was given to the basic dramatic core of plaintiffs' play in *Golding v. R. K. O. Pictures, Inc.*, 35 Cal.2d 690, 221 P.2d 93, and to the radio program idea in *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 221 P.2d 73, on the ground that "in its earlier form, the statute expressly protected both the idea, the 'product of the mind', and 'the representation or expression thereof.'" Since in the present case the cause of action arose before the statute was amended, the court follows the *Stanley* and *Golding* cases in treating plaintiff's radio program idea as protectible literary property.

As it was originally enacted, Civil Code section 980¹ referred generally to "any product of the mind," and then listed the different types of intellectual property that might exist. Among those listed was "a composition in letters or art," and protection was extended not only to the product itself, that is, to the composition in letters or art, but also to any representation or expression thereof. Thus protection was not limited to the exact literary composition created by the author, but extended to other and different representations and expressions that might be copied therefrom. Under its terms, however, the protection existed only so long "as the product and the representations or expressions

thereof" remained in the author's possession. It was thus arguable that the common law copyrights in a literary composition might be lost by a transfer of possession of the manuscript even without actual publication.

In 1947 the statute was amended to deal specifically with compositions in letters or art,² and the provisions relating to other forms of intellectual property and the limitation with respect to possession were deleted.³ Thus the amendment made clear that the author's common law copyrights in a composition in letters or art are not dependent upon possession of the composition or its expression or representation, but are only lost in the event of publication as provided in section 983 of the Civil Code. The statute now deals expressly with copyrights as distinct from rights of possession or ownership of the original manuscript itself. Cf. Civil Code § 985. Neither before nor after its 1947 amendment, however, did section 980 purport to define the extent to which property rights might exist in original ideas as distinct from their treatment and development. An expression or representation of an original composition might consist only in the statement of the general outline of the dramatic core or plot of a play or movie, or in the statement of a general plan for a radio program. *Golding v. R. K. O. Pictures, Inc.*, supra; *Stanley v. Columbia Broadcasting System*, supra. Thus, if the *Golding* and *Stanley* cases were correctly decided, protection could be extended to the basic dramatic core of a play or the plan of a radio program under the present statute just as it was in those cases under the former.

In my opinion, however, the court properly accepted the concession of the par-

1. "The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession."

2. "The author or proprietor of any com-

position in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition."

3. A separate subdivision dealing with other forms of intellectual property was added to section 980 in 1949. Stats. 1949, ch. 921, § 1.

ties in the Stanley case that sections 980 and 983, as formerly worded, were but codifications of the common law. The 1947 amendments to those sections, which antedated the decisions in the Stanley and Golding cases, merely clarified this fact by eliminating the language that might have been interpreted as making the duration of common law copyrights turn on possession rather than publication. Accordingly, the common law rule that ideas are not property, which the court now recognizes, *Weitzenkorn v. Lesser*, Cal. Sup., 256 P.2d 947, should be applied in this case by holding that plaintiff has not stated a cause of action for plagiarism.

From a comparison of the two programs it cannot be said as a matter of law that defendants have not used plaintiff's radio program idea. Although that idea is not property, it may be protected by an express or an implied-in-fact contract. *Weitzenkorn v. Lesser*, Cal. Sup., 256 P.2d 947; *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 674, 221 P.2d 73; dissent. Since plaintiff has pleaded counts in both express and implied-in-fact contract, I concur in the judgment to the extent that it reverses the order sustaining the demurrer to those counts.

SPENCE, J., concurs.

CARTER, Justice.

I dissent.

I concur in the reversal of the judgment but I cannot concur in the greater part of the reasoning and law propounded in the majority opinion.

It is stated by the majority that "Kurlan's complaint shows that any property interest which McKenney may have had in either the story or characters of 'My Sister Eileen' has been lost by publication." The pleading shows that the story and characters were made public in a play, picture, magazines and books. It also shows that the stories had never been presented on the air and that by written agreement plaintiff's assignor had expressly reserved the sole and exclusive right to use for radio broadcasting purposes these leading female characters. "The owner of the com-

mon-law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto, enjoy the benefit of a restricted publication without forfeiture of the right of general publication. Thus, he may communicate the contents of his work under restrictions without forfeiture of the right. This communication of *contents under restriction, known as a restricted or limited publication*". Emphasis added; *Bobbs-Merrill Co. v. Straus*, 2 Cir., 147 F. 15, 18, 15 L.R.A., N.S., 766. "A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. *Abernethy v. Hutchinson*, 3 L.J.Ch. 209; *Nichols v. Pitman*, 26 L.R.Ch.Div. 374; *Caird v. Sime*, 12 L.R.App.Cas. 326; *Tompkins [Tompkins] v. Halleck*, 133 Mass. 32, 43 Am.Rep. 480; *Palmer v. De Witt*, 47 N.Y. 532, 7 Am.Rep. 480; *Turner v. Robinson*, 10 Ir.Ch.Rep. 121, 135; *Laura Keene v. Wheatley & Clarke*, 9 Am.Law. Reg. 33-80, Fed.Cas.No.7,644." *Werckmeister v. American Lithographic Co.*, 2 Cir., 134 F. 321, 324, 68 L.R.A. 591; *Amdur Copyright Law and Practice*, pp. 354-356.

"It is well settled that the public performance of a dramatic or musical composition is merely a limited publication which does not confer upon the hearer or spectator any title to the manuscript, or any right to a copy which may have been obtained surreptitiously, or which may have come into his possession accidentally; because only a publication of the manuscript will amount to an abandonment of the rights of the author and a consequent transfer of them to the public domain, and *no such publication occurs as long as the author exercises control over his manuscript, or has a right to such control*. *Crowe v. Aiken*, Fed.Cas.No.3441; *Keene v. Clark*, 28 N.Y.Super.Ct. (5 Rob.) 38; *Keene v. Kimball*, 16 Gray, Mass., 545, 77 Am.Dec. 426; *Brown v. Ferris*, 122 Misc. 418, 204 N.Y.S. 190. Consequently a special public use of it by the author for his own benefit is no evidence of abandonment of his property therein, because such a use is entirely consistent with

his exclusive right to its control. Thus, the reading, recital or stage representation of a manuscript play in public for profit, with the consent of the author, does not constitute any evidence of abandonment to the public of any rights arising from the authorship of the play; nor does it deprive him of his right to copyright the play. *Boucicault v. Fox*, 3 Fed.Cas. page 977, No. 1,691.

"A ticket of admission merely entitles the holder to witness and enjoy a single exhibition of the play, without conferring upon any member of the public the right to obtain surreptitiously the possession of the original manuscript for subsequent representation for profit, or to reproduce the composition from memory or from notes taken during the performance, in order to share in the earnings of its public presentation. *If the author of a play were not entitled to claim the protection of the law to secure to him the profits resulting from public performances of his composition, dramatists would soon cease to write plays for the amusement and entertainment of the public, unless subsidized by government or aided by private patronage: for the revenue derived from the sale of published copies of a popular drama would be negligible in comparison with the box-office receipts.* (Werckmeister v. American Lithographic Co., 2 Cir., 134 F. 321, 68 L.R.A. 591.

"Where an uncopyrighted and unprinted drama has been publicly performed at a theatre with the author's consent, no unlicensed person has a right to repeat the performance in a public theatre, or to publish copies of the dramatic composition, whether obtained surreptitiously or reproduced from memory after witnessing a performance thereof; *for the author's permission to act it at a public theatre does not amount to an abandonment of his title to it or to a dedication of it to the public; and the proprietor of the exclusive performing rights, or his assignee, by virtue of his common law rights, is entitled to an injunction restraining an unauthorized representation thereof.* *Ferris v. Frohman*, 223 U.S. 424, 32 S.Ct. 263, 56 L.Ed. 492.

"Where the intent of the owner is to give the public merely a right to a limited use of his literary property or to use it in a particular way, the owner's act does not constitute an abandonment of all his property; but the *public acquires a right to use it only to the extent of the dedication.* *Aronson v. Baker*, 43 N.J.Eq. 365, 12 A. 177." *Ball, Law of Copyright and Literary Property*, 1944, § 61, p. 135. (Emphasis added.)

It is common practice to reserve the dramatizing rights on the sale of a book and these rights are respected and upheld by the courts. *Ford v. Charles E. Blaney Amusement Co., C.C.*, 148 F. 642. Section 1(b) of the 1909 Copyright Act, 35 Stat. 1075, expressly confers upon the copyright proprietor the exclusive right to transform the work by translation, dramatization, adaptation, and by making other versions embodying material and substantial parts of the original in order to enable the author to reap the profits of his work in every field of intellectual property in which it can be exploited advantageously by vending copies or by public performance for profit. *O'Neill v. General Film Co.*, 171 App.Div. 854, 157 N.Y.S. 1028. This section has been liberally construed by the courts to cover any adaptation of a literary work which tells the same story as the original, whether the resulting drama be adapted for presentation in the form of a stage play or for exhibition on the screen, *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 32 S.Ct. 20, 56 L.Ed. 92; *International Film Service Co. v. Affiliated Distributors, D.C.*, 283 F. 229.

For the purpose of the demurrer, all allegations of the complaint must be taken as true. It is alleged in the complaint here that on or about the 11th day of March, 1946, Ruth McKenney and plaintiff entered into an agreement in writing, wherein Ruth McKenney did grant to plaintiff the sole and exclusive right to use for radio broadcasting purposes the leading female characters created by her and featured or portrayed in "said stories, stage play and motion picture entitled 'My Sister Eileen,' and said Ruth McKenney did furthermore grant

to said plaintiff Arthur Kurlan all radio broadcasting rights therein and thereto which had theretofore been expressly reserved by said Ruth McKenney in connection with each and all of said prior licenses and uses of said characters in connection with said stories, play and motion picture hereinbefore mentioned." (Emphasis added.) It is further alleged that after the expiration of the original term of the agreement the time was extended by the parties, Ruth McKenney and plaintiff; that Ruth McKenney reserved and retained the right to receive royalties in connection with the production of any and all radio programs licensed under the agreement. Hence, plaintiff's assignor reserved all radio rights in the two leading characters, and it cannot be true, as is stated in the majority opinion, that "as a matter of law, there is no protectible property in the 'basic dramatic core' of the story, its characters and their relationships, or the form and manner of its expression" because there has been a publication. The allegations of the complaint show that the publication was a limited one with certain rights reserved.

It has been recognized that different types of rights may be reserved in literary works and that publication may be restricted so as to preserve those rights. See *Manners v. Famous Players-Lasky Corporation*, D.C., 262 F. 811; *L. C. Page & Co. v. Fox Film Corporation*, 2 Cir., 83 F.2d 196; *Gogniat v. Universal Pictures Corp.*, 35 U.S.Pat.Q. 117; *Casino Productions v. Vitaphone Corp.*, 163 Misc. 403, 295 N.Y.S. 501; *Society of European Stage Authors and Composers v. New York Hotel Statler Co.*, D.C., 19 F.Supp. 1; *Gillette v. Stoll Film Co.*, 120 Misc. 850, 200 N.Y.S. 787; *Benelli v. Hopkins*, 198 Misc. 734, 103 N.Y.S.2d 526; *G. Ricordi & Co. v. Paramount Pictures*, 2 Cir., 189 F.2d 469, certiorari denied 342 U.S. 849, 72 S.Ct. 77, 96 L.Ed. 641.

At the time Kurlan's cause of action arose, § 980 of the Civil Code provided protection for "any product of the mind * * * and in the representation or expression thereof". The majority says, however, that the two leading characters involved were unoriginal and unworthy of protection inasmuch as any property right in them had been lost by publication. As I have heretofore stated, it is my opinion that the publication was a limited one, with the radio rights expressly reserved and that there was a protectible property interest involved. The statute reads, for our purposes, as it did when this Court decided *Golding v. R.K.O.*, 35 Cal.2d 690, 221 P.2d 95, wherein a basic, dramatic core with one important dramatic figure was held to constitute a protectible interest.

Characters and characterizations which are products of the mind *should* be held to be protectible property interests. The radio industry is a large one, and radio programs are frequently based upon a single character, personality or characterization. To illustrate the extremely valuable theatrical-radio properties which are in existence one only must look as far as the radio column in his daily paper to note the programs, built around a single character, or family, which continue from day to day, week to week, and year to year.¹ It should be apparent to even the least intelligent that these programs are as valuable as the most gilt-edged security listed on the Stock Exchange. No court would hesitate to extend its protection to the lawful owner of a security, and yet equally valuable "character-types" are not given the same protection. It is surely a subject of judicial notice that California is the center of the motion picture industry of the world and if its law are inadequate for the protection of the individual creative writer who must find a market for his work, then those laws should be amended. It is axiomatic that the movie industry could

1. *Sherlock Holmes*; *The Thin Man*; *The Fat Man*; *Michael Shane*; *Count of Monte Cristo*; *Crime Doctor*; *The Whistler*; *Mr. District Attorney*; *A Date with Judy*; *Adventures of Bulldog Drummond*; *Adventures of Ellery Queen*; *Adventures of the Falcon*; *Jack Armstrong*; *Blondie*; *Captain Midnight*; *The*

Lone Ranger; *Stella Dallas*; *Ma Perkins*; *The Great Gildersleeve*; *Perry Mason*; *Superman*; *Young Dr. Malone*; *The Cisco Kid*; *Fibber McGee and Molly*; *Mr. and Mrs. North*; *One Man's Family*; *The Aldrich Family*; *Amos n' Andy*; *Edgar Bergen and Charlie McCarthy*; *Burns and Allen*; and many others.

not exist without the writer and yet, if the present trend continues, the writer will vanish from the scene. The same is true of the radio industry. A writer submits his work to either industry in the hope and rightful expectation that if his work is used, he will be paid its value, but, under presently existing conditions, and court decisions, these industries may make minor changes in the play, or manuscript, and escape liability and any obligation to pay any consideration therefor. As Goldsmith wrote (*Enquiry into the Present State of Polite Learning*) as an epitaph to the memory of his friend, Ned Purdon, an author:

"Here lies poor Ned Purdon, from misery freed,

Who long was a bookseller's hack;

He led such a damnable life in this world,
I don't think he'll wish to come back!"

The statement attributed to *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 221 P.2d 73, 79, found in the majority opinion here is misleading so far as this case is concerned. The statement is "Kurlan's radio program idea was to capitalize upon a famous and successful story, play and motion picture by producing it on the radio. The court may take judicial notice of the fact that there is nothing new and novel in this idea which might constitute protectible property." We said there that there was "nothing new in a play broadcast over the air". There is nothing new in a play broadcast over the air, but there is something new in a play broadcast by someone else over the air for the first time if the author of that play has reserved the radio rights thereto, because the play is being used in a medium new to it. The *Stanley* case was not concerned with the broadcasting rights in a play; it was concerned with a combination of ideas which was being used for the first time in a certain way and the originator of that combination of ideas, with the permission of the author of the new play, was suing the broadcasting system.

Section 426(3) of the Code of Civil Procedure now provides that the copy of the production as to which the infringement is claimed and a copy of the alleged infringing production must be attached to the com-

plaint. This permits the trial court, upon demurrer, to decide in the first instance whether or not there is similarity between the two productions. Heretofore, the question of similarity has been considered to be one of fact, *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 221 P.2d 73; *Golding v. R. K. O.*, 35 Cal.2d 690, 221 P.2d 95; *Kovacs v. Mutual Broadcasting System*, 99 Cal.App.2d 56, 221 P.2d 108; *Frankel v. Irwin, D.C.*, 34 F.2d 142; *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 8 Cir., 153 F.2d 893, and the test to be that impression received by the average reasonable man upon a comparative reading of the two works. There should be no change in the test to be used under the new code section. It should still be that of the reasonable man. In other words, *if reasonable minds could differ as to whether or not there is similarity between the two works, then the question is still one of fact for the jury.*

In the play "My Sister Eileen," Ruth, as narrator, is a young, attractive, intelligent working girl who is the unwilling victim of a succession of difficulties created by her sister, Eileen, with whom she lives because "apartments are hard to find in New York." Ruth is the balance-wheel for her completely thoughtless, impulsive, scatterbrained sister, Eileen. Eileen is hopelessly unable to hold a job and has had six of them within four months. She has no financial sense and never has any money because she spends every cent she has on "junk" which everybody seems to be able to sell her. She uses the common exchequer and family funds without Ruth's knowledge or consent and makes life unbearable for Ruth with her scatterbrained schemes; embarrasses Ruth by ridiculous lies told without malice or intent to create mischief but with every desire to help her sister and roommate. Ruth and Eileen are from Ohio. Ruth has acquired some city "sophistication" while Eileen has not and remains completely naive. Ruth's supposed fiancé, Claude is described as a blustering "braggart," but she is in love with a serious, intelligent businessman, Lloyd Carter.

Jane, in the radio production "My Friend Irma," as narrator, is a serious, intelligent

working girl from Wyoming who has acquired a certain amount of city "sophistication." She lives with her "friend Irma" because apartments are "hard to find these days." Jane is in love with a serious, intelligent businessman, Richard Rhinelander III. Irma is gay, careless, impulsive, thoughtless and completely lacking in sophistication; she causes Jane endless difficulties because of her scatterbrained schemes. Irma's boy friend, Al, is described as a "phony windbag." In this program, as in the play "My Sister Eileen" there is an eccentric landlady.

In conjunction with the similarities just set forth, attention is called to the summary of the two productions as set forth in the majority opinion. It cannot be said, as a matter of law, that there is no similarity between the two. The briefs show that in describing the radio program entitled "My Friend Irma," the New York Herald-Tribune, on March 22, 1948, stated in a dramatic criticism and review of the program: "The *central idea*, that of two young girl roommates, one bright, the other one almost intolerably innocent of all knowledge, was *taken almost intact from a very funny play entitled 'My Sister Eileen.'*" (Emphasis added.) The question of similarity between the two productions is most assuredly one on which reasonable minds might differ as can be seen from the above quoted dramatic review and the fact that three justices of the District Court of Appeal, see Cal.App., 233 P.2d 936, as well as myself feel that within the common knowledge of the average reader, observer, spectator or listener there are sufficient similarities to induce the belief that copying has taken place. It is true that there are differences between the two programs, but as Mr. Justice Edmonds said in the Golding case "such differences go to the quality of the plagiarism, and not to its existence or non-existence." Golding v. R. K. O., 35 Cal.2d 690, 699, 221 P.2d 95, 100.

No test other than the reasonable minds one has ever been laid down for determining the question of similarity between the alleged infringed and infringing productions and there is no reason why, in deter-

mining the matter upon a demurrer, the trial court should apply any other rule. As I read the majority opinion in this case and in that of Weitzenkorn v. Lesser, Cal.Sup., 256 P.2d 947, I do not find that any test has been proposed other than that of "substantial similarity." In Weitzenkorn v. Lesser, supra, it is said "if some substantial similarity between the compositions reasonably could be found, the issues of similarity and of copying are to be determined by the trier of fact" and in the instant case it is said that "If, from a comparison of the productions, a question of fact is shown to exist, the cause should be submitted to the jury." In my opinion, these statements are not the equivalent of saying that the question is one for the jury if reasonable minds could differ on whether or not the two productions are similar.

I would reverse the judgment with directions to the trial court to overrule the demurrer as to all counts and permit defendants to answer if they be so advised.

Rehearing denied; CARTER and SPENCE, JJ., dissenting.



41 Cal.2d 70

BARRETT v. CITY OF CLAREMONT.

L. A. 22543.

Supreme Court of California, in Bank.

May 19, 1953.

Rehearing Denied June 11, 1953.

Action by pedestrian against city for injuries sustained when pedestrian tripped and fell because of an allegedly defective sidewalk expansion joint. The Superior Court, Los Angeles County, entered judgment on verdict for pedestrian, and city appealed. The Supreme Court, Edmonds, J., held that asphaltum, which constituted filler between concrete slabs of sidewalk, which arose one-half inch above sidewalk surface and tapered gradually to sidewalk level, and over which pedestrian tripped when her toe became stuck therein, constituted a minor defect in sidewalk, pedestrian would not have been injured had she been exercising reasonable care, and, therefore, city was not liable for such injuries.

Judgment reversed with directions.

Carter, J., dissented.

Prior opinion 247 P.2d 113.

1. Municipal Corporations ⇨817(1, 2)

Elements essential to recovery against municipality for injuries resulting from dangerous or defective condition of public streets include proof that dangerous condition existed and that municipality had notice or knowledge thereof. Government Code, §§ 53050-53056.

2. Municipal Corporations ⇨768(1)

Because of difficulty of maintaining heavily traveled sidewalk surfaces in perfect condition, continued existence of minor defects, which inevitably occur both in construction and maintenance, is not unreasonable and will not, regardless of whether municipality has notice thereof, result in liability of municipality for injuries resulting therefrom. Government Code, §§ 53050-53056.

3. Municipal Corporations ⇨791(2)

In actions for injuries resulting from defective condition of public streets, plaintiff, who cannot show that municipality had actual notice of condition, may rely upon constructive notice imputed to municipality by passage of time, since, had municipality performed its duty of conducting a reasonable inspection, it would have had actual knowledge of existence of a dangerous defect. Government Code, §§ 53050-53056.

4. Municipal Corporations ⇨791(1)

If defect in public street is of such trivial character that it presents no element of conspicuousness or notoriety, its continued existence does not impart constructive notice thereof to municipality. Government Code, §§ 53050-53056.

5. Evidence ⇨25(2)

It is a matter of common knowledge that it is impossible to maintain a sidewalk in perfect condition.

6. Municipal Corporations ⇨821(5)

Question whether defect in public street constitutes a minor defect is not always one of fact. Government Code, §§ 53050-53056.

7. Municipal Corporations ⇨768(3), 806(3)

Asphaltum, which constituted filler between concrete slabs of sidewalk, which arose one-half inch above sidewalk surface and tapered gradually, on each side, to sidewalk level, and over which pedestrian tripped when her toe became stuck therein, constituted a minor defect in sidewalk, pedestrian would not have been injured had she been exercising reasonable care, and therefore municipality was not liable for such injuries. Government Code, §§ 53050-53056.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for appellant.

Knight, Gitelson, Ashton & Hagenbaugh, Van Hagenbaugh and Leon J. Alexander, Los Angeles, for respondent.

EDMONDS, Justice.

Mary E. Barrett sued the City of Claremont for damages, charging the defendant with negligence in the construction and maintenance of a public sidewalk. The injuries which she sustained resulted from a fall occurring when she tripped upon a ridge of asphaltum filler material protruding above the surface of the walk. Whether that defect was a trivial or substantial one is the principal question presented upon the appeal from the judgment against the city.

In 1938, the city constructed a sidewalk, approximately 10 feet wide, consisting of concrete slabs about four inches thick. A space of one-half inch, extending the entire width of the walk, was left between the slabs to accommodate changes in temperature. Although standard building practice called for filling such space with asphaltum to a height of one-quarter to one-half inch below the top of contiguous slabs, the filler in the joint in question was made level with the surface of the sidewalk.

The black filler material readily absorbs the rays of the sun. On warm days, its internal temperature may rise to a point greatly above that of the surrounding air, causing the material to become soft.

Warm weather also expands the concrete slabs, pushing the filler material up and out of the joint. People using the sidewalk step upon the small ridge created and spread the material over the sidewalk's surface. As a result of this process, sufficient asphaltum had been expelled from the joint upon which Miss Barrett tripped to create a ridge about five inches wide. At the center, its highest point, the ridge was about one-half inch above the surface of the sidewalk and tapered gradually on each side to the level of the walk.

The accident occurred in the afternoon of a warm day in June. Because of a crust of dirt and other substances, the surface of the ridge appeared to be normal but the center was soft. Miss Barrett, while walking along the sidewalk, caught her toe upon the strip and fell.

The present action was commenced pursuant to the provisions of the Public Liability Act of 1923, Stats.1923, p. 675, Deering's Gen.Laws, Act 5619, now Gov.Code §§ 53050-53056. Her complaint alleged that she had suffered an injury as a result of a dangerous and defective condition of the sidewalk and that the defendant city had notice of such condition but failed to remedy it. By its answer, the city denied generally the allegations of the complaint and pleaded affirmatively the defense of contributory negligence.

A jury awarded Miss Barrett damages. Motions by the city for a directed verdict, for judgment notwithstanding the verdict, and for a new trial were denied. The appeal is from the judgment entered upon the verdict.

The city takes the position that, as a matter of law, the defect must be deemed to have been a minor or trivial one. Another contention is that the trial court improperly rejected an offer of proof that the records of the city between 1940 and 1948 would disclose that, with the exception of the claim of Miss Barrett, no report had been made of an accident having occurred at that joint or at any other joint in the streets of the city.

[1] The Public Liability Act of 1923 provides that a municipality shall be liable

for injuries resulting from a dangerous or defective condition of the public streets in all cases where having notice or knowledge of the condition those persons having authority to remedy it fail, within a reasonable time, to do so. Elements essential to a recovery under this statute include proof that a dangerous condition existed and that the municipality had notice or knowledge of it. *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 363, 54 P.2d 725.

[2] A determination of whether the defect involved is a minor or trivial one may be material to the establishment of each of these requirements. Growing out of the difficulty of maintaining heavily traveled surfaces in perfect condition is the practical recognition that minor defects inevitably occur, both in construction and maintenance, and that their continued existence is not unreasonable. In such case, irrespective of the question of notice of the condition, no liability may result. *Graves v. Roman*, 113 Cal.App.2d 584, 248 P.2d 508; *Robson v. Union Pacific R. R. Co.*, 70 Cal. App.2d 759, 761-762, 161 P.2d 821; *Clarke v. Foster's, Inc.*, 51 Cal.App.2d 411, 414, 125 P.2d 60; *Sischo v. City of Los Banos*, 37 Cal.App.2d 717, 718, 100 P.2d 305.

[3,4] The same problem may arise in connection with the question of notice. In many instances, the plaintiff cannot show actual notice of the condition and must rely upon the constructive notice imputed to the municipality by the passage of time. *Hook v. City of Sacramento*, 118 Cal.App. 547, 553, 5 P.2d 643; *Dawson v. Tulare Union High School*, 98 Cal.App. 138, 142, 276 P. 424. The theory of those decisions is that the city, had it performed its duty of conducting a reasonable inspection, would have had actual knowledge of the existence of a dangerous defect. See *Nicholson v. City of Los Angeles*, supra, 5 Cal. 2d at pages 364-365, 54 P.2d 725. If the defect is of such trivial character that it presents no element of conspicuousness or notoriety, its continued existence does not impart constructive notice to the municipality. *Whiting v. City of National City*, 9 Cal.2d 163, 166, 69 P.2d 990; *Nicholson v. City of Los Angeles*, supra, 5 Cal.2d at pages 367-368, 54 P.2d 725; *Balmer v.*

City of Beverly Hills, 22 Cal.App.2d 529, 531, 71 P.2d 854.

[5, 6] The plaintiff contends that, in any event, the question of whether the defect was trivial or substantial is one of fact, which the jury has resolved in her favor. But, as was said in *Whiting v. City of National City*, supra, "[i]t is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise, the city could be held liable upon a showing of a trivial defect." 9 Cal.2d at page 165, 69 P.2d at page 991.

Miss Barrett argues that the physical properties of the asphaltum filler material distinguished the present case from those involving trivial defects. In this connection, she relies upon *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 184 P.2d 708, affirming an award of damages for injury caused by slipping upon a puddle of syrup on the floor of a grocery store. To bring herself within the rule of that case, she characterizes the ridge of asphaltum as a "sticky puddle".

The evidence most favorable to Miss Barrett shows only that the asphaltum filler may become soft and sticky on warm days. It does not support an inference that she slipped upon the substance. Her answer to the direct inquiry of whether she had a sensation of slipping was in the negative. She stated that, as she stepped upon the ridge in such manner as to place her full weight upon her right foot, the tip of her toe "caught" or "stuck" in the substance, retarding her forward motion and throwing her off balance.

[7] The record does not show that the small amount of asphaltum above the level of the sidewalk presented any greater danger of injury than that disclosed in other

trivial defect cases. The accident occurred on one of the busiest streets of the city. Miss Barrett had traveled it many times. At its highest point, the ridge was only one-half inch above the surface of the sidewalk. Moreover, it did not rise sharply to that height but curved gradually upward from each edge toward the center, much in the same manner as a common door sill. Many decisions hold that defects of a greater magnitude than that shown here are minor ones. *Whiting v. City of National City*, supra (adjoining sidewalk panels differing in elevation $\frac{3}{4}$ inch at the highest point); *Nicholson v. City of Los Angeles*, supra (1½ inches difference in elevation); *Sischo v. City of Los Banos*, supra (grade in sidewalk of $\frac{58}{100}$ inch per foot); *Balmer v. City of Beverly Hills*, supra (1 inch difference in elevation of sidewalk panels); *Dunn v. Wagner*, 22 Cal.App.2d 51, 54, 70 P.2d 498 (1 inch rise in sidewalk); *Meyer v. City of San Rafael*, 22 Cal.App.2d 46, 50, 70 P.2d 533 (adjoining sidewalk panels varying from $\frac{5}{8}$ inch to 1½ inches in height). Accordingly, the defect here concerned must be deemed to have been one within that category.

In the cases relied upon by the respondent which hold that the question of negligence is one of fact, either different circumstances were shown by the record or the question as to what constitutes a trivial defect was not discussed. *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773 (pot hole in sidewalk from 5 inches to two feet deep); *Anderson v. County of San Joaquin*, 110 Cal.App.2d 703, 244 P.2d 75 (chuck hole 2 to 6 inches deep); *Murphy v. County of Lake*, 106 Cal.App.2d 61, 234 P.2d 712 (question of whether or not defect was a minor one not raised); *Warren v. City of Los Angeles*, 91 Cal.App.2d 678, 205 P.2d 719 (hole 2 inches deep, 10 inches square, containing oil and grease); *Owen v. City of Los Angeles*, 82 Cal.App.2d 933, 187 P.2d 860 (hole 9-11 inches long, 4-6 inches wide, and 2-3½ inches deep); *Louie v. Hagstrom's Food Stores*, supra (puddle of syrup on floor, 6 to 8 inches wide); *Maddern v. City and County of San Francisco*, 74 Cal.App.2d 742, 169 P.2d 425 (depression in street 65 to 80 feet long,

10 to 12 feet wide, and 8 to 10 feet deep); Sheldon v. City of Los Angeles, 55 Cal.App. 2d 690, 131 P.2d 874 (depression in sidewalk 1½ inches deep); Balkwill v. City of Stockton, 50 Cal.App.2d 661, 123 P.2d 596 (hole in sidewalk 5 inches long, 2 inches wide, and 2 inches deep); Allen v. City of Los Angeles, 43 Cal.App.2d 65, 110 P.2d 75 (bridge raised 2 inches above sidewalk); Ackers v. City of Los Angeles, 40 Cal.App. 2d 50, 104 P.2d 399 (hole in sidewalk 12 inches long, 3 inches wide, and 2 inches deep); Hook v. City of Sacramento, supra (hole 2 feet long, 18 inches wide, and 1½ inches deep). Barrett v. City of Sacramento, 128 Cal.App. 708, 18 P.2d 356, decided prior to the Nicholson and Whiting cases, is not in harmony with those decisions and and is disapproved.

From the minor nature of the defect here concerned it must be concluded, as a matter of law, that no injury would be sustained by one exercising reasonable care in the use of the sidewalk. Accordingly, a finding of negligence on the part of the city is without support in the evidence.

The judgment is reversed with directions to the trial court to grant the defendant's motion for judgment notwithstanding the verdict.

GIBSON, C. J., and SHENK, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

This case presents a factual situation which is resolved as a matter of law by the majority, in spite of the finding by the jury and the trial court on denial of a motion for a new trial, and a determination by the unanimous decision of the District Court of Appeal. I adopt the decision of the District Court of Appeal affirming the judgment on the verdict as ably disposing of the case. Barrett v. City of Claremont, Cal.App., 247 P.2d 113.

There is no doubt that, under the public liability law, Gov.Code, § 53050 et seq., in order for the city to be liable, there must be a dangerous or defective condition and the city must have either actual or constructive knowledge thereof. The majority

opinion discusses both of those features but apparently rests its decision on but one, namely, lack of a dangerous or defective condition, and hence, no negligence, because the defect was trivial. More will be said concerning that issue later.

Both of those issues are determinable, and were properly determined, by the trier of fact. We said in Fackrell v. City of San Diego, 26 Cal.2d 196, 206, 157 P.2d 625, 630, 158 A.L.R. 773: "Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact." The test as to whether it becomes a question of law is stated in Owen v. City of Los Angeles, 82 Cal.App.2d 933, 938, 187 P.2d 860, 863: "** * * whether a condition is defective or dangerous is one which calls for the application of the rule that where there is room for difference of opinion among reasonable minds, the question is one of fact.*" (Emphasis added.) Here, the jury, the learned trial judge and three able justices of the District Court of Appeal—all possessing reasonable minds—concluded that reasonable minds could conclude that the defect was dangerous. The principle is cogently stated in Stone v. New York, C. & St. L. R. Co., 344 U.S. 407, 73 S. Ct. 358, 359, 97 L.Ed. 441, where the court was dealing with the question of negligence. While there were three dissenters, they did not disagree with the principle here involved. The court said: "The standard of liability is negligence. * * * To us it appears to be a debatable issue *on which fair-minded men would differ.* * * * *Those circumstances were for the trier of facts to appraise.*" (Emphasis added.) Applying those rules to the instant case compels the conclusion that reasonable minds—"fair-minded men"—could conclude that the defect was a dangerous one.

In fact, the soft tarry substance became not only a dangerous condition by its protuberance above the sidewalk but was a trap for the unwary. It would look substantial to a pedestrian but, being soft and sticky, the pedestrian would, as plaintiff did here, unknowingly step on it and her foot would sink in. There was sufficient cohesive quality to cause her foot to stick, at least momentarily. That was enough to

throw her off her stride and result in an imbalance and fall. Certainly, reasonable men could call such a condition dangerous and defective.

In the foregoing discussion, I have accepted the facts as stated by the majority as complete,—that is, that there was a ½ inch high asphalt hump across the sidewalk which arose by reason of that substance being placed between the slabs of concrete in a crevice left therefor to accommodate the expansion and contraction; that the common standard practice is to install the asphalt in the crevice to a point ½ inch *below* the surface of the sidewalk. That was *not* done here; the city caused the asphalt to be *flush* with the sidewalk surface. Thus it definitely appears that the sidewalk was negligently constructed from the beginning, *being contrary to the standard practice*. Deviation from custom or standard practice may constitute negligence. 19 Cal.Jur. 581-3. The jury could have so found here. The evidence shows that it is the tendency of asphalt to work upward and out of a crevice and not return. That is what happened here to the extent of ½ inch. If it had been properly installed it would have worked upward only to the surface of the sidewalk. We have, therefore, negligence in the installation of the asphalt and it necessarily follows that the city knew of it because it made that installation itself.

There is even more evidence of knowledge. The city's superintendent of streets testified that the condition of the asphalt in and on this sidewalk had *been the same since 1940*. Thus the city had double actual knowledge of the defective condition.

Under the foregoing circumstances, there is no room for the application of the "trivial" defect exception to liability because, if it were applied, the city would escape liability where it knowingly created and maintained a dangerous defect as long as it was small. Indeed, it could create as many and as dangerous pitfalls as it wished and be subject to no liability when it kept them unobtrusive. No such strained construction of the public liability act should be indulged.

The trivial defect rule is court-made, as the statute makes no distinction between

dangerous or defective conditions according to their magnitude, and in most of the cases, it has been relied upon to hold that there *could not be constructive notice where the defect was minor*. See *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725. In this case, as above demonstrated, the city had *actual notice*—the facts conclusively establish it. Therefore, the rule of the *Nicholson* case is not applicable here.

As to its applicability on the question of whether the condition is dangerous or defective, we also have direct evidence, as seen from the foregoing, that the condition *was defective and fraught with danger*. The majority seeks to escape the result of that evidence by stating there are cases which hold that a defect may be so trivial that it does not constitute a dangerous condition. In *none* of those cases, however, was the defect actually known or created by the defendant, and for that reason, it was held that defendant need not anticipate an injury arising from it. The basic case that the majority relies upon is *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990, which was concerned *solely with the question of notice*, rather than whether a defect may be so trivial as to constitute no hazard. Where, as here, the city had actual knowledge of the defect and knew that the construction was contrary to standard practice, there is no basis whatsoever for saying that it could not anticipate an injury. No question is presented as to whether the city, as a responsible person, *should* have anticipated the injury, because, in view of its knowledge it must have expected it.

Moreover, it is firmly established that a dangerous or defective condition may be the basis for liability by the use of a general plan of operation of city operated property as well as by a structural defect. *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723; *Bauman v. San Francisco*, 42 Cal.App.2d 144, 108 P.2d 989; *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 243 P.2d 868. That situation is presented here because the method of construction of the sidewalk was contrary to the accepted standard.

Finally, there is a basis for the jury's verdict which is not mentioned in the majority opinion. There was a strip of asphalt on the sidewalk. It is a tarry substance which, on warm days, becomes soft and sticky. The accident occurred on a warm day. The surface of the asphalt appeared gray in color, concealing its lack of firmness and adhesive character. The city knew all of those things yet permitted the condition to exist. Plaintiff stepped on this asphalt and the toe of her shoe momentarily adhered to the asphalt, retarding the forward motion of her foot, thus throwing her off balance and into a fall. That makes out a case of negligence against defendant. It is indistinguishable from the slippery floor cases where wax has been applied to the floor. There the injured person slips and falls. Here, one foot is retarded for sufficient time to destroy her balance and a fall results. It is settled that where a floor is made slippery by the application of wax, the possessor of the property is liable for injury to a business visitor who slips and falls on the floor. *Hatfield v. Levy Brothers*, 18 Cal. 2d 798, 117 P.2d 841; *Lorenz v. Santa Monica High School Dist.*, 51 Cal.App.2d 393, 124 P.2d 846; *Nicola v. Pacific G. & E. Co.*, 50 Cal.App.2d 612, 123 P.2d 529; *Williamson v. Hardy*, 47 Cal.App. 377, 190 P. 646; *Lamb v. Purity Stores, Inc.*, 119 Cal.App. 690, 7 P.2d 197; *Brinkworth v. Sam Seelig Co.*, 51 Cal.App. 668, 197 P. 427; *Brown v. Holzwasser, Inc.*, 108 Cal. App. 483, 291 P. 661; *Henderson v. Progressive etc. System*, 57 Cal.App.2d 180, 134 P.2d 807; *Cagle v. Bakersfield Medical Group*, 110 Cal.App.2d 77, 241 P.2d 1013. Those cases also hold that whether maintenance of the slippery floor is negligence is for the trier of fact. If the maintenance of a slippery condition is negligence so is the maintenance of a sticky surface as either condition may cause injury.

The majority enunciates no rule, fixes no standard, establishes no basis for determining what condition constitutes a trivial defect for which there is no liability, or for the determination of what is a dangerous and defective condition for which liability may be imposed. The trier of fact—the

jury or trial judge—is required to speculate as to what four members of this Court may ultimately conceive to be a dangerous and defective condition within the purview of the public liability statute. Even though the jury and trial judge may have viewed the premises, the result would be the same. Without some standard for the determination of what constitutes a dangerous and defective condition, there is nothing to guide the trial court and jury in any case.

The traditional rule that, where the factual situation is such that reasonable minds might differ, the issue is one of fact, is ignored by the majority. It must necessarily ignore this rule, because to apply it in the case at bar would require the majority to say that the jury, the trial judge and the three justices of the District Court of Appeal who ruled in favor of plaintiff, did not have reasonable minds. To avoid this absurd holding, the majority predicates its decision on its own concept of what is a dangerous and defective condition, and holds that notwithstanding the finding of the jury, the trial judge and the unanimous decision of the District Court of Appeal, the defect here proven did not constitute a dangerous and defective condition even though plaintiff suffered a serious injury as a result of such defect. In other words, the only standard is what the majority of this Court fixes in each individual case. This is not announcing a rule of law—it is a rule of four men—who may be, for the time being, men who have a preconceived notion in cases such as this, and who are disposed to usurp the function of the jury and trial judge in a grasp for power—power denied them by the Constitution and laws of this state. Because the Constitution and laws of this state guarantee to litigants, in a case such as this, the right to trial by jury, which means that factual issues are to be determined by the jury. Those factual issues were so determined, and in view of the ruling of the trial court in denying a motion for a new trial and the decision of the District Court of Appeal affirming that ruling, that determination should be final.

As I have heretofore pointed out, this Court is presented with numerous proposi-

tions of law of tremendous importance to the people of this state, the determination of which would consume all of the time available to the members of this Court, without undertaking to review and redecide issues of fact, and I again state that cases such as this, involving only issues of fact, and which was correctly decided by the trial court and the District Court of Appeal, should not have been taken over and redecided by this Court.

I would, therefore, affirm the judgment.

Rehearing denied; CARTER, J., dissenting.



41 Cal.2d 1

In re JAMISON'S ESTATE.

JAMISON v. JAMISON et al.

L. A. 22087.

Supreme Court of California, in Bank.

May 8, 1953.

Rehearing Denied June 4, 1953.

Will contest, wherein the Superior Court, Los Angeles County, admitted the holographic will to probate, and the contestants appealed. The Supreme Court, Carter, J., held that a nonsuit on undue influence issue was improper.

Affirmed in part and reversed in part.

Edmonds, J., dissented.

Prior opinion, 249 P.2d 859.

1. Wills ⇨164(3), 166(5)

Aspects of unnaturalness and undue profiting by proponent under will are factors bearing upon issue of undue influence, but standing alone such factors are insufficient to establish undue influence, and proponent also must have been active in procuring will's execution.

2. Wills ⇨166(12)

On undue influence issue, activity of proponent in procuring execution of will may be established by inference, that is, by circumstantial evidence. Code Civ.Proc. § 2055.

3. Wills ⇨166(2)

Where fiduciary relationship is combined with unduly profiting by will, its

being unnatural, and activity on part of proponent in procuring its execution, there is persuasive evidence of undue influence.

4. Wills ⇨324(3)

Contestants' evidence on undue influence issue was sufficient to make case, and therefore judgment of nonsuit on that issue was improper. Code Civ.Proc. § 581c.

5. Wills ⇨386

If there is any substantial evidence to support finding that testator was of sound mind and competent to make will, it cannot be disturbed even though there is sharp conflict in evidence and abundant evidence to support contrary conclusion.

6. Wills ⇨52(1)

There is presumption that testator was sane, which contestants must overcome.

7. Evidence ⇨571(2)

Wills ⇨35

Opinion of doctors, who attended decedent in his last illness, to effect that he was suffering from senile dementia, and thus was of unsound mind when will was made, is not conclusive on issue of competency; and incompetency to make will is not necessarily established by fact that decedent was adjudged an incompetent in guardianship proceeding.

8. Wills ⇨55(1)

Evidence sustained finding that testator had been possessed of mental capacity to make testamentary disposition.

9. Wills ⇨344

Will contest judgment declaring will entitled to be admitted to probate was adequate, even though it failed to specifically order will admitted to probate. Probate Code, § 373.

10. Wills ⇨405, 409

Statute authorizing order for payment of costs by any party to proceedings, or out of assets of estate, as justice may require, is applicable to will contests before probate, but court should not exercise its discretion and award costs until final determination of such contest. Probate Code, § 1232; Rules on Appeal, rule 26(a).

11. Wills 410

Where Supreme Court determining that new trial was required on issue of undue influence in will contest it would require each party to bear his own costs on appeal. Probate Code, § 1232; Rules on Appeal, rule 26(a).

Frederick W. Mahl, Jr., Los Angeles, Edward Alton, Frank M. Sturgis, Beverly Hills and Allan F. Bullard, San Pedro, for appellants.

Church, Church & Howard and Charles H. Church, Los Angeles, for respondent.

CARTER, Justice.

Chance Jamison, respondent here, petitioned for probate of the holographic will,¹ dated December 31, 1949, of Arthur C. Jamison, his father. California Trust Company petitioned for the probate of a witnessed will of the decedent, dated May 17, 1948. Frances Johnson, decedent's daughter, for herself and her two minor children, Leanore Patterson, another daughter of the decedent, her children, and Katharine Jamison, the divorced wife of respondent, filed oppositions to the probate of the holographic will. Louise Jamison, surviving widow of decedent, did not oppose it. Under the 1948 will, decedent had left \$5,000 to each of his two daughters, to respondent, his son, and to his brother Roy; \$15,000 to his wife, Louise; \$50,000 to Katharine Jamison; and the residue to his grandchildren. In the 1949, or holographic, will, supra, he left 2% of his estate to his daughter, Leanore Patterson, 5% to his daughter Frances Johnson, 8% to his wife Louise and the balance of 85% to respondent, his son. The 1949 will revoked previous wills. Decedent left an estate of a stipulated value of \$237,000.

The grounds of contest of the probate of the holographic will were: (1) That it was not written and signed by decedent;

(2) that it was executed under the undue influence of respondent; and (3) that the decedent was mentally incompetent to execute it. Contestants abandoned the first ground on this appeal, leaving only the last two. The case was tried by the court without a jury.

At the close of contestants' case, respondent moved for a nonsuit on each and all of the grounds of contest. The court granted the motion as to the first two grounds and denied it as to the third, mental capacity. The judgment at the close of the case concluded that decedent had executed the 1949 will, having the mental capacity to do so, had not then acted under undue influence, and that the will was entitled to probate. Contestants appeal from that judgment.

The propriety of granting a motion for a nonsuit as to some of the grounds of contest and denying it as to others is doubtful when we speak of nonsuit in its true meaning. That is so because ordinarily a judgment of nonsuit is on the merits, Code Civ. Proc. § 581c, is considered a final disposition of the case and is appealable. 3 Cal. Jur.(2d), Appeal & Error, §§ 50, 39. A nonsuit as to some of the grounds of contest does not dispose of the whole case but only disposes of a portion of it. Thus there would be the possibility of two judgments in the same case (the one of nonsuit and another judgment at the close of the case on issues as to which a nonsuit had been denied) when the general rule is that there should be only one judgment. 3 Cal. Jur. (2d), Appeal & Error, § 40. This would raise the question of whether it would be necessary to appeal from the first judgment of nonsuit on some of the grounds of contest. Further difficulties appear when we note that in reviewing a judgment of nonsuit, the test applied by the appellate court is whether, according to plaintiff (contestants) the benefit of all favorable evidence together with inferences therefrom, it is sufficient to make a case, while if the

I. "Dec. 31-49

"I hereby revoke all past wills—codicils by me made—declare this is my last will—I give $\frac{1}{2}$ all my properties to my four heirs as follows—

Lea Patterson 2%

Frances Johnson 5%

Chance Jamison 85%

Louise Jamison 8%

"I appoint Chance Jamison as Executor of my will without bond

A. C. Jamison"

trial court sitting without a jury, passes upon the weight of the evidence, even though the only evidence produced be that of plaintiff, and gives judgment for defendant, the rule on review is that the evidence must be viewed most favorably to defendant. In a case tried to a jury the proper procedure, rather than granting a motion for nonsuit on some of the grounds, would be for the court to instruct the jury to find for proponent on the issues upon which it thought a nonsuit would be proper. See *Estate of Hewitt*, 63 Cal.App. 440, 444, 218 P. 778. What was done in the instant case should not be considered as a true nonsuit. Rather the respondent, proponent of the will, by his motion for a nonsuit, in effect said to the court, "I do not wish to put on any evidence to answer that produced by contestants for I do not think their evidence is sufficient as a matter of law to make a case on the first and second grounds and I am willing that the court decide these issues on that basis—as a matter of law, and refrain from weighing the evidence." The findings of fact made after all the evidence was in, show that is what happened here because the trial court did not make a finding on the issue of undue influence, the second ground of contest, but, in its judgment, stated its conclusion that decedent was not acting under undue influence. We take that to mean that, as a matter of law, the court felt that the evidence on that issue was not sufficient; that it had not purported to weigh the evidence on that issue. Therefore on that issue the scope of review must be the same as that on a nonsuit, while on the finding of mental capacity the test is whether there was sufficient evidence to support the finding.

Contestants' main contention is that the evidence when viewed most favorably to them is sufficient to establish undue influence and that the evidence is insufficient to support the finding of mental capacity.

Turning first to the question of undue influence there is evidence from which the following appears: The testator died on February 11, 1950, at the age of 83, a month and 11 days after he made the 1949 holographic will. He had been married twice, his first wife having predeceased him. He

left, surviving him, his second wife, Louise, his son, respondent here, and his wife, Esther, Katharine Johnson, divorced wife of respondent, and Jeanne, their daughter, Leane Patterson, another daughter, and her four children, Jean, Patricia, Virginia and Robert, Frances Johnson, another daughter, and her two children, Franklin and Jacqueline, Clare and Roy Jamison, his brothers.

The testator had not been actively engaged in business since 1930, except as to the investment of his money. He had been well until the onset of the illness in May, 1949, which culminated in his death. He was a family man and took an active interest in his children and grandchildren. His first wife died in 1945, and he married his surviving widow in 1948. Respondent and his father, the decedent, had been estranged for many years, the latter being displeased with the way his son conducted his life and felt that he was "no good." The testator had been a person of strong character tending toward domination as the head of his clan. At the onset of his last illness, he had adamantly maintained that he would not go to a hospital and had remained at home for a week. After he entered the hospital on May 20, 1949, he became "docile." At the hospital he had a daily fever, his gall bladder was diseased, he was anemic, and a heart ailment required medication and oxygen. He was suffering from arteriosclerosis and senile dementia. He was mentally confused and showed it in his actions. He could not add figures, indicating, contestants assert, that he could not have computed the percentages in the holographic will. His personal physician testified that he was of unsound mind on December 31, 1949, the date of the holographic will. He left the hospital and returned to his home where he remained until his death on February 11, 1950, still suffering from his various ailments and under constant nursing care.

[1, 2] There is thus a showing that decedent was in such a mental condition on December 31, 1949, when the will was purportedly executed, that he would be easily influenced; that being estranged from respondent, his son, and being fond of his grandchildren and daughters and his son's

first wife, it would not be probable that he would leave most of his estate to respondent. There were aspects of unnaturalness and undue profiting by respondent under the 1949 will, by which he received much more than he did under the 1948 will. These are all factors bearing upon the issue of undue influence. Estate of Teel, 25 Cal. 2d 520, 154 P.2d 384; Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990. Of course, standing alone these factors are insufficient to establish undue influence. The proponent must also be active in procuring the execution of the will. Estate of Teel, supra, 25 Cal.2d 520, 154 P.2d 384; Estate of Lingenfelter, supra, 38 Cal.2d 571, 241 P.2d 990. Such activity may be established by inference, that is, circumstantial evidence. Estate of Abert, 91 Cal.App.2d 50, 204 P.2d 347; Estate of Hannam, 106 Cal.App.2d 782, 236 P.2d 208; Estate of Leahy, 5 Cal. 2d 301, 54 P.2d 704; Estate of Sproston, 4 Cal.2d 717, 52 P.2d 924; Estate of Kilborn, 162 Cal. 4, 120 P. 762; In re McDevitt, 95 Cal. 17, 30 P. 101; see cases collected 26 Cal.Jur. 760-61.

In the instant case, according to respondent's testimony under section 2055 of the Code of Civil Procedure, the will which was dated December 31, 1949, was handed to him by decedent on February 7, 1950, 38 days after its date and 4 days before his death. This occurrence took place in decedent's home while respondent was visiting him, although the decedent did not say, and respondent did not know, that what was handed to him was a will. Decedent said he did not have long to live, handed him the will and cautioned respondent not to show it to anyone. Respondent did not know when the will was executed. On this review, guided by the same principles as pertaining in a nonsuit, the portion of such testimony favorable to contestants must be accepted and that which is unfavorable rejected. The fact remains that when the testator died, respondent had possession of the will and offered it for probate.

There is evidence that respondent had an interest or motive in having a will executed which would give him the major share of the estate and that he had the opportunity to exercise undue influence. In connection

with the matter of opportunity, it appears, according to respondent's testimony, that he visited his father frequently when he was ill in the hospital, made almost daily visits after he had returned home and that he was with his father several hours on December 31, 1949, the date of the will, a part of which time he was with his father alone.

In addition to the foregoing, contestants point to other circumstances shown by the evidence: that decedent had a great regard for his grandchildren, respondent's divorced wife, and his children, with the exception of respondent, who he felt was "no good"—no son of his. (Decedent left respondent \$5,000 by the 1948 will as compared with 85% of his estate by the 1949 will which made no provision for his grandchildren or respondent's divorced wife.) In May, 1949, Frances Johnson, respondent's sister, told him that he was to receive \$5,000 under the 1948 will and his divorced wife was to get \$50,000. Later he was similarly advised and he stated he was going to break the will. About August 1, 1949, Frances and respondent were in attorney Arkoff's office discussing the matter of having Frances appointed guardian of decedent's estate and the testamentary disposition of his property. Arkoff said decedent could make a will even though a guardian was appointed and he explained how a holographic will was made and executed. From this it may be inferred that respondent was inquiring about that kind of a will although he had said he was not there to discuss wills. Respondent spoke to the testator and others about the testator making a new will (different from the 1948 will). On two occasions, once while decedent was in the hospital, and once when he was at home (September, 1949), respondent handed a will in his own handwriting to his father for his signature. This proposed will bequeathed the estate to decedent's three children and revoked all previous wills. When it was handed to decedent he said he would see about it and laid it aside. Respondent then replaced it in his pocket. As above seen, respondent was a constant visitor to his father after his illness although they had previously been estranged. Respondent's second wife had formerly been a legal secretary, and secretary to

Giannini of the Bank of America, where she may have acquired some legal knowledge. As far as appears, respondent was the only person who knew of the 1949 will until after decedent's death. After his father's death, respondent had the bank's representative show him the 1948 will without divulging his possession of the 1949 will. Later he delivered the 1949 will to his attorney. From this, it is asserted, that it may be inferred he was afraid to use the 1949 will because he knew it was invalid and would not have done so if he had found the 1948 will to be favorable to him.

Contestants point out that the will is so concise and legally complete that it is unreasonable to believe that the testator, in his weakened condition, could have prepared it of his own volition; that he was mentally incapable of listing the percentage each legatee would receive so that the various percentages would total 100%, or his entire estate. Also, the appearance of the writing in the will itself shows it must have been a laborious task for the writer.

Finally it is claimed that the relationship between testator and respondent, that of father and son, is a fiduciary relationship which is a factor in the question of undue influence, citing *Estate of Eakle*, 33 Cal. App.2d 379, 91 P.2d 954. To that case may be added *Robins v. Hope*, 57 Cal. 493, 497, and *Bacon v. Soule*, 19 Cal.App. 428, 434, 126 P. 384. However, this Court said in *Estate of Lingenfelter*, supra, 38 Cal.2d 571, 585, 241 P.2d 990, 998: "Consanguinity of itself does not create a fiduciary relationship." It is, however, some evidence of a fiduciary relationship. *Estate of Llewellyn*, 83 Cal.App.2d 534, 562, 189 P.2d 822, 191 P. 2d 419. While there is evidence that respondent and his father had been estranged, there is also evidence that after his father became ill and for several months thereafter he had conscientiously visited his father. The decedent thought he was a good son and liked him, discussed his affairs with him and gave him papers dealing with finances to examine. From the father and son relationship and that evidence it could be inferred that a confidential relationship existed.

There is conflict in the evidence concerning many of the foregoing circumstances as well as in the inferences which may be drawn from them but, as seen, the sole question is whether the evidence most favorable to contestants was sufficient as a matter of law to establish undue influence, and the conflicts must, therefore, be disregarded.

[3] The general rule is as stated in *Estate of Teel*, supra, 25 Cal.2d 520, 528, 154 P.2d 384, 388: "* * * where such fiduciary relationship is combined with unduly profiting by the will, and its being unnatural, and activity on the part of the proponent in procuring its execution, we have persuasive evidence of undue influence."

[4] While generally it is not fruitful to compare factually other will contest cases because of the variation in existence and degree of the factors involved, nevertheless *Estate of De Laveaga*, 165 Cal. 607, 133 P. 307, is quite persuasive. There the testatrix was of weak mind (retarded development), had lived for many years with her sister and her sister's husband who had made all of her decisions for her. It was there held that the relationship was a fiduciary one. The will there involved was holographic and precise in its form. The testatrix left the bulk of her estate to her sister and only a small share to her brother who contested it. According to the testimony of the sister-proponent, and her husband, on the date of the will, the testatrix called them to her room and showed them the will which she said she had written. The testatrix signed it in their presence and handed it to the sister who kept it until testatrix' death. The sister testified that they had exercised no influence. The probate court found in favor of the contestant on the grounds of unsoundness of mind and undue influence. This Court affirmed the probate court on both grounds, stating: "The evidence is likewise amply sufficient to sustain the finding of undue influence. Of course there can be no claim that the evidence does not sufficiently show the relation of trust and confidence between the deceased and the Cebrians, and the complete and perfect control of the deceased by them.

There was certainly sufficient proof of interest and opportunity. The claim of learned counsel in this regard is that there was no proof that any undue influence was brought to bear directly upon the testamentary act. It is well settled that 'undue influence, * * * must in order to avoid a will destroy the free agency of the testator at the time, and in the very act of the making of the testament. It must bear directly upon the testamentary act' (Estate of Higgins, 156 Cal. [257] 261, 104 P. [6] 8); 'there must be substantial proof of the pressure which overpowers the volition of the testator at the time the will was made' (Estate of Ricks, 160 Cal. [450-461] 462, 117 P. [532] 537). And to warrant the setting aside of a will on this ground there must of course be substantial evidence of the exercise of undue influence on the testamentary act. 'Substantial evidence must do more than raise suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proved which are inconsistent with the claim that the will was the spontaneous act of the alleged testator.' Estate of Ricks [160 Cal. 450, 462, 117 P. 532, 537]. And it is said that the only evidence as to the execution of this will was that given by Mr. and Mrs. Cebrian, and that this evidence shows without conflict that there was nothing in the way of influence, undue or otherwise, attempted to be exerted upon deceased in the matter. But the court was not bound to accept as true the testimony of the Cebrians in this regard. If it was sufficiently made to appear that the deceased was absolutely incompetent to understandingly and intelligently consider her property with a view to its proper disposition, and alone and unaided to compose and write the paper offered for probate as her will, to warrant the trial judge in so concluding, as we have seen is the fact, we have substantial proof of undue influence bearing directly upon the testamentary act; and in view of the testimony of Mr. and Mrs. Cebrian that they were the only persons present at the time of the execution of the will, taken in connection with the other matters to which we have referred,

it is certainly a reasonable, if indeed not an irresistible, inference, that whatever undue influence was in fact exerted, was exerted by one or the other or both of them. In addition to the matters already stated as being shown by sufficient evidence, it is proper to note that the evidence shows that Mr. Cebrian was a man of education, and one with a considerable knowledge of law and legal forms; and also that the alleged will indicated on its face that in so far as the actual writing was concerned it was a laborious effort. As said by the learned trial judge: 'It is quite plainly the product of much manual exertion. If she was not following copy or taking dictation, she was certainly engaged in hard work in the writing of this will; it is not an example of fluency in penmanship nor of accuracy in spelling.' It is also proper to take into consideration the improbability that deceased, if she was of sound and disposing mind and memory, and not acting under undue influence, would have so discriminated against her brother, who, in the language of the trial judge 'had been a great service to her for many years and who had conserved her estate without the diminution of a dollar, indeed with increase, and without retaining anything for personal benefit,' and of whom, as the evidence shows, she was very fond." Estate of De Laveaga, supra, 165 Cal. 607, 622, 133 P. 307, 313. From the foregoing discussion and authorities it appears that there is sufficient evidence on the issue of undue influence to support a finding in favor of contestants and the judgment of nonsuit on this issue must, therefore, be reversed.

On the issue of unsoundness of mind, there is testimony by many witnesses, including several doctors, who were attending decedent, that the latter was of unsound mind and did not know of what his property consisted on the date (December 31, 1949) stated in the 1949 will and at other times near that date. A guardian was appointed for decedent in late July or August of 1949, on the ground that he was incompetent to handle his affairs. The trial court found, nevertheless, that the

testator was of sound mind and competent to make the will.

[5-7] If there is any substantial evidence to support that finding it cannot be disturbed even though there is a sharp conflict in the evidence and abundant evidence to support a contrary conclusion. *Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689; *Estate of Teel*, supra, 25 Cal.2d 520, 154 P.2d 384. And there is a presumption that the testator was sane—of sound mind—which the contestants must overcome. *Estate of Lingenfelter*, supra, 38 Cal.2d 571, 241 P.2d 990. The opinion of the doctors who attended decedent in his last illness that he was suffering from senile dementia and thus was of unsound mind when the will was made is not conclusive on the issue of competency. *Estate of McCollum*, 59 Cal.App.2d 744, 140 P.2d 176; *Arais v. Kalensnikoff*, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163; 20 Am.Jur., Evidence, § 1211; *Estate of Sandman*, 121 Cal.App. 9, 8 P.2d 499. Incompetency to make a will is not necessarily established by the fact that decedent was adjudged an incompetent in a guardianship proceeding. *Hellman Commercial T. & S. Bk. v. Alden*, 206 Cal. 592, 275 P. 794; *Estate of Loveland*, 162 Cal. 595, 123 P. 801; *Estate of Johnson*, 57 Cal. 529; *Jensen v. Jensen*, 84 Cal.App.2d 754, 192 P.2d 55; see *In re Zanetti*, 34 Cal.2d 136, 208 P.2d 657.

[8] Opposed to contestants' evidence is the testimony of several witnesses, including the respondent, that testator was of sound mind on the date borne by the 1949 will and on prior and subsequent occasions. This testimony recounted the rational behavior of decedent and showed that he was in possession of his faculties. Also, the will itself bears mute evidence of testator's competency. The conflict was resolved by the trial court which weighed the evidence and its conclusion is binding on this appeal.

[9] Contestants contend that the judgment is erroneous in that it did not order the 1949 will admitted to probate. Section 373 of the Probate Code provides that in a will contest before probate upon proof

taken by the court where a jury is waived, the court must render "judgment either admitting the will to probate or rejecting it." Here the judgment states that the 1949 will is "entitled to be admitted to probate" rather than that it is admitted to probate. On the same day, the court made an order admitting the will to probate. No appeal was taken from that order. On respondent's motion to dismiss the instant appeal, the District Court of Appeal held that an order admitting a will to probate is not proper after judgment following a contest before probate and that the judgment should order the will admitted to probate but it reserved the question as to the claimed error in the judgment to be decided when the appeal was decided on the merits, *Estate of Jamison*, 107 Cal. App.2d 483, 237 P.2d 546. It is clear that the judgment substantially complies with section 373 of the Probate Code. When it declared that the will was entitled to be admitted to probate nothing remained to be done. Although it could have been worded more precisely we find no substantial error.

[10,11] Contestants assert the court erred in awarding costs to respondent, proponent of the 1949 will. The statute states: "When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." Prob. Code, § 1232. That section applies to will contests before probate. *Estate of Jones*, 166 Cal. 147, 135 P. 293; *Estate of Bump*, 152 Cal. 271, 92 P. 642. However, the court should not exercise its discretion and award costs until the final determination of the contest. Thus it should not make an award where an appeal is taken. *Estate of Hart*, 107 Cal.App.2d 58, 236 P.2d 891; *Estate of Jones*, supra, 166 Cal. 147, 135 P. 293; *Estate of Berthol*, 163 Cal. 343, 125 P. 750; *Henry v. Superior Court*, 93 Cal. 569, 29 P. 230; *Estate of Johnson*, 198 Cal. 469, 245 P. 1089, 200 Cal. 307, 252 P. 1052; *Estate of Wallace*, 12 Cal. 2d 476, 481, 86 P.2d 95. Here the contest

is not ended for, as appears, there must be a new trial on the issue of undue influence.

The judgment is affirmed insofar as it determines decedent was competent when the 1949 will was made. It is reversed insofar as it determines that there was no undue influence and remanded for a new trial on that issue. The portion allowing costs is reversed.

Each party shall bear his own costs on this appeal. See Rules on Appeal, Rule 26(a).

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

Recently, this court reiterated the long established rule that "[t]o overturn a will on the ground of undue influence, not only must there be evidence of activity on the part of the beneficiary, it also 'is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. * * * Evidence must be produced that pressure was brought to bear directly upon the testamentary act. * * * mere opportunity to influence the mind of the testator, even coupled with an interest or motive to do so, is not sufficient.'" Estate of Lingenfelter, 38 Cal.2d 571, 586, 241 P.2d 990, 999.

That activity must be of such a nature as to have "overpowered the mind and bore down the volition of the testator at the very time the will was made." Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876. Moreover, it must be proved by evidence in addition to that tending to prove such other factors as unnaturalness of the will, motive by the proponent, and susceptibility to influence on the part of the testator. As I read the record in the present case, there are no facts from which such conduct reasonably may be inferred.

The evidence relied upon by the contestants as giving rise to such an inference shows only motive, unnaturalness in the will, or the testator's susceptibility to influence, factors which do not replace but are in addition to the requirement that the

proponent's activity in procuring the will be shown. Other facts are mentioned in the majority opinion but it is not held that they are sufficient to support an inference of activity which invalidates the testamentary document. Estate of De Laveaga, 165 Cal. 607, 133 P. 307, 312, is said to be "quite persuasive" of the conclusion reached but the facts of that case clearly distinguish it from the present situation.

There, from childhood, the decedent had been incapable of carrying on her own business affairs, trusting all of such matters to her brothers and sisters. Her sister, the proponent of the will, directed all of her activities, the decedent obeying without protest. Her mind was that of a child, "unable to comprehend anything beyond the most simple matters". It was found specifically that she was incompetent mentally to execute a will.

In addition, it was shown that the decedent had no knowledge of the nature or value of her property, but the will was explicit in designating items and amounts. The proponent and her husband, who with others managed her business affairs, were alone with the decedent at the time the will was executed. There was evidence that she signed any and all papers which they presented to her, without inquiry as to their nature and effect, and "she never indicated her ability unaided to compose and write any paper beyond the simplest and most childish message, the few writings of any other character shown, exclusive of the alleged will, having been produced with great and laborious effort and under such circumstances as to indicate the aid and assistance of others." 165 Cal. at page 621, 133 P. at page 313.

Here, the evidence viewed most favorably to the contestants shows only the following facts: Prior to the execution of the will, Chance Jamison, each time in the presence of at least one other person, sought twice to have the testator revoke a previous will and execute a new one dividing the estate among the children. Chance knew how to prepare a holographic will. The mind of the testator was weak, but not to such an extent to justify a finding of mental incompetency. The testator

prepared a will which was concise and legally complete, the appearance of which "shows it must have been a laborious task for the writer". Chance and his wife visited the testator on the day the will was executed, being alone with him part of that time; the rest of the day he was either alone or in the company of various other persons, no evidence being offered as to the time of day the will was executed.

The most that can be said for this evidence is that it shows a possible desire and opportunity to influence the testator to prepare a new will. But to say that from such evidence it may be found that the proponent "overpowered the mind and bore down the volition of the testator at the very time the will was made" is to permit the will to be overturned, not upon proof, but upon speculation.

I would affirm the judgment in its entirety.

SPENCE, J., concurs.

Rehearing denied; SPENCE, J., dissenting.



118 Cal.App.2d 45

PEOPLE v. PATTERSON.

Cr. 2412.

District Court of Appeal, Third District,
California.

May 21, 1953.

Defendant was convicted of assault with a deadly weapon while serving less than a life sentence in a state prison and of possessing a knife or other deadly weapon while in prison officials' custody. The Superior Court, Sacramento County, Grover W. Bedeau, J., rendered judgment on the verdicts, and defendant appealed. The District Court of Appeal, Schottky, J., held that the evidence was sufficient to support the verdicts.

Judgment affirmed.

1. Criminal Law $\S$ 1172(7)

Instructions that jury must find whether defendant's alleged confession of crimes charged was voluntary or involuntary before they could consider it and that a confession is involuntary when obtained by violence, threats, or direct or implied promises of immunity or benefit, were not prejudicial to defendant as characterizing their statements to police officers shortly after commission of offenses as admissions of guilt, instructions being favorable to defendant as authorizing jury to consider whether such statements were voluntary or involuntary.

2. Criminal Law $\S$ 1037(1)

A contention that district attorney was guilty of improper conduct in making certain statements concerning defendant during argument to jury may not be raised for first time on appeal from judgment on verdicts of conviction.

3. Criminal Law $\S$ 719(1)

In prosecution of prison inmate for assault on another inmate with a deadly weapon and possession of knife or other deadly weapon, district attorney's statements in argument to jury that defendant was worse than a rattlesnake, which at least gives a little rattle before striking, but defendant came up behind victim silently and stuck a knife in his back, was within bounds of legitimate argument, in view of well known fact that a rattlesnake almost invariably gives warning rattle before striking and evidence that defendant stabbed without warning. Pen.Code, §§ 4501, 4502.

4. Convicts $\S$ 5

Evidence was sufficient to support convictions of prison inmate for assault on another inmate with deadly weapon and possession of knife or other deadly weapon as against contentions that evidence was entirely circumstantial and that there was no testimony by any one who actually saw defendant stab other inmate. Pen.Code, §§ 4501, 4502.

5. Criminal Law $\S$ 1144(16), 1159(6)

On appeal from judgment on verdict of conviction, court must assume in favor

of verdict existence of every fact which jury could reasonably have deduced from evidence and determine whether a reasonable jury could have found defendant guilty beyond reasonable doubt, and if circumstances reasonably justified verdict, appellate court's opinion that they might also reasonably be reconciled with defendant's innocence will not warrant interference with jury's determination.

6. Criminal Law §552(3)

The rule that circumstances relied on by prosecution for conviction must be consistent with defendant's guilt and inconsistent with hypothesis of his innocence is a rule of instruction for jury, and not a rule for court's guidance on review of judgment on verdict of conviction.

Robert R. Harlan, Public Defender, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant was charged by grand jury indictment with having violated sections 4501 and 4502 of the Penal Code. Section 4501 provides that a prisoner serving less than a life sentence in a state prison who commits an assault upon another with a deadly weapon is guilty of a felony. Section 4502 provides that every prisoner who, while under the custody of prison officials, has in his possession a knife, pistol or other deadly weapon is guilty of a felony.

Defendant pleaded not guilty to both counts, and following a trial was found guilty on both counts by a jury. Defendant has appealed from the judgment pronounced in accordance with the said verdicts.

Defendant urges a number of grounds for reversal of the judgment. Before discussing them we shall give a brief summary of the evidence as it appears in the record.

The defendant was an inmate at Folsom Prison. On July 22, 1952, at approximately 9:30 a. m., one Henry Balbuena, also an inmate at Folsom, was being escorted by officers Brown and Hargrove from the re-

ception room at Warden Heinze's office to the segregation room. One officer was on either side of Balbuena, each walking slightly to the rear of him. As they were walking down a corridor approaching Building Four there was an impact and Balbuena flinched. Brown turned around and saw a knife, but did not then see who had it. Then both Brown and Hargrove saw the defendant about 8 to 10 feet behind them with a knife in his hand. The two officers testified that defendant then stated: "I have been waiting a long time to do that." At Brown's request the defendant gave up the knife, and Brown then escorted him to the captain's office. During the time of the incident neither of the officers saw anyone in the corridor other than Balbuena and the defendant. The officers did not see who did the actual stabbing. Balbuena was treated at the prison hospital for a wound of his back. While his condition was critical for a time, he eventually recovered.

Upon being taken to the captain's office and there questioned if he stabbed Balbuena, it was testified to that defendant stated: "Yes, I did." He also said he had done it with the knife which he surrendered to Brown. Upon further questioning defendant showed the officers in which location of the back he had stabbed Balbuena. Later the same day, on two occasions, defendant was overheard by officer Thornton admitting to another inmate, one Perez, that he had stabbed Balbuena. A statement was taken from defendant in the warden's office on the day of the stabbing, at which time defendant denied the stabbing and refused to state whether or not he was in the corridor at the time of the stabbing.

At the trial defendant took the stand and denied the stabbing, stating that he had come upon the place near where the stabbing took place and observed another inmate running from the scene; that he saw this inmate drop something; that upon inspection he found it was a knife, which he picked up and then surrendered to Brown. At the trial defendant admitted making the various statements attributed to him, except the one claimed to have been made by him at the time of the stabbing, that "I have been waiting a long time to do that." The

reason defendant gave at the trial for making these statements was that he did so to help the man who had done it, to keep him from "being down here where I am sitting right now."

A fellow inmate, Juan Armijo, testified at the trial that he was approaching the scene of the stabbing about the time it took place and saw the defendant pick up the knife and then surrender it to Brown. Armijo denied that defendant stated he had "been waiting a long time to do that."

[1] Appellant's first major contention is that the instructions given by the court concerning the voluntary or involuntary character of a confession was reversible error.

We have hereinbefore detailed the statements made by appellant shortly after the offense was committed. Appellant argues that at no time has he claimed that these statements or any statement was extracted from him by force, fear, duress or promises of immunity or reward, and that he was prejudiced by the giving of the instructions to the jury that before they could take the alleged confession into consideration they must find whether it was voluntary or involuntary, and that "a confession is involuntary when it is obtained by any sort of violence or threats, or by any direct or implied promises of immunity or benefit." Appellant asserts that the giving of these instructions for all practical purposes characterized appellant's statements as admissions of guilt.

Appellant cites *People v. Southack*, 39 Cal.2d 578, 248 P.2d 12, 16. In this case the court held that instructions as to confessions had no application to the evidence since the only statement of the defendant was his declaration, "Oh my God, I did it," and there was no evidence of any other statement which could be construed as a confession. However, the court went on to say that the defendant had not shown that "the giving of the abstractly correct instruction could have prejudiced him."

We find no merit in appellant's contention that he was prejudiced by the giving of these instructions, because while, upon the record here, appellant was not entitled to have such instructions given, the giving of them was distinctly favorable to appellant

as it gave the jury the right to consider whether the statements made by appellant in the presence of police officers and in response to their questions were voluntary or involuntary.

[2, 3] Appellant next contends that the district attorney was guilty of improper conduct during his argument by stating as to appellant, "Why, he is worse than a rattlesnake." Appellant concedes that by failing to object at the time, his counsel may have waived the prejudicial effect of the challenged statements. However, in fairness to respondent it should be pointed out that the statement of the district attorney was as follows: "Why, he is worse than a rattlesnake. A rattlesnake at least gives a little rattle before it strikes, I believe, but he comes up behind a man silently and sticks a knife in his back."

While such a contention may not be raised for the first time upon appeal, *People v. Carr*, 113 Cal.App.2d 783, 248 P.2d 977; *People v. Tolson*, 109 Cal.App.2d 579, 241 P.2d 32; *People v. Sampsell*, 34 Cal.2d 757, 214 P.2d 813; *People v. Codina*, 30 Cal.2d 356, 181 P.2d 881, we deem it proper to state that the questioned remarks of the district attorney were well within the bounds of legitimate argument as it is a well known fact that a rattlesnake almost invariably gives a warning rattle before striking, and the evidence in the instant case was sufficient to justify the conclusion that appellant stabbed without warning.

[4] The final contention urged by appellant is that the evidence was insufficient to support the verdict. Appellant argues that the evidence relied upon by the people was entirely circumstantial and that there was no testimony by anyone who actually saw the stabbing. There is no merit in this contention as is evident from the summary of the evidence hereinbefore set forth. It appears from the testimony that on July 22, 1952, Henry Balbuena, an inmate of Folsom State Prison, California, was stabbed in the back while he was being escorted by two prison guards from the Warden's office in the prison to the segregation area. Neither of the officers, who were on either side of Balbuena and about two steps behind him, saw who had done the

stabbing, but as Balbuena flinched from an impact Officer Brown glimpsed a knife about one foot from Balbuena. On turning around both officers saw the defendant and appellant about 8 to 10 feet in back of them with a knife in his hand. Defendant and appellant then stated: "I have been waiting a long time to do that." Neither of the officers saw any other persons in the corridor where the stabbing took place at that particular time.

[5, 6] In *People v. Huizenga*, 34 Cal.2d 669, 213 P.2d 710, the contention was made by the defendant that the evidence was insufficient to justify the conviction on the ground that it failed to meet the requirement set out by the instruction to the jury on circumstantial evidence that the prosecution, when resting its case upon circumstantial evidence, must not only show a set of circumstances consistent with guilt, but must show a set of circumstances inconsistent with any reasonable theory of innocence. In answer to this contention the Supreme Court, 34 Cal.2d at pages 675, 676, 213 P.2d at page 713, stated:

"This contention confuses the function of court and jury by implying that if the court itself can formulate a reasonable theory of innocence from the evidence it must reverse a judgment of conviction. It is not for the court, however, to determine whether it can formulate such a theory. It must assume in favor of the verdict the existence of every fact that the jury could reasonably deduce from the evidence and then determine whether or not a reasonable jury could find the defendant guilty beyond a reasonable doubt. 'If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury.' *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780. Thus, 'the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the

jury, and is not the rule for the guidance of the court on review.' *People v. Newland*, supra, 15 Cal.2d at page 682, 104 P.2d [778] at page 780."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



117 Cal.App.2d 792

GRAF et al. v. GARCIA et al.

Civ. 15330.

District Court of Appeal, First District,
Division 2, California.

May 18, 1953.

Rehearing Denied June 17, 1953.

Hearing Denied July 15, 1953.

In action for death of motorist whose vehicle collided in intersection on dark rainy night with defendants' vehicle which approached intersection on through street, wherein defendants filed a cross-complaint, the Superior Court, County of Santa Clara, rendered judgment for defendants on their cross-complaint, and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that evidence was not such as to justify trial court's refusal to give tendered instruction that plaintiffs were entitled to presumption that decedent had used due care for his own safety.

Reversed.

1. Death ☞58(1)

Presumption that decedent exercised due care obtains unless testimony of witnesses produced by party who would benefit by presumption is wholly irreconcilable with presumption, or only one reasonable conclusion may be drawn from facts established by testimony of such witnesses and that conclusion is that decedent was negligent.

2. Negligence ☞6, 121(1)

Violation of a statute is negligence per se, but such presumption is not conclusive and may be overcome by other evidence showing that under all circumstances sur-

rounding event conduct in question was excusable, justifiable and such as might reasonably have been expected from person of ordinary prudence.

3. Automobiles ⇨246(60)

In action for death of motorist whose vehicle collided in intersection on dark rainy night with defendants' vehicle which approached intersection on through street, evidence was not such as to justify trial court's refusal to give tendered instruction that plaintiffs were entitled to presumption that decedent had used due care for his own safety. Vehicle Code, § 552.

4. Automobiles ⇨245(14)

Whether motorist acted with due care or negligently in proceeding across through highway is jury question. Vehicle Code, § 552.

5. Automobiles ⇨244(11)

In action for death of motorist whose vehicle collided in intersection on dark rainy night with defendants' vehicle which approached intersection on through street, there was evidence in record from which jury could find that defendant driver had been guilty of negligence in operation of her vehicle. Vehicle Code, § 552(b)

6. Automobiles ⇨171(5, 8, 9)

Driver on through street is not absolved from duty of maintaining proper lookout and keeping her automobile under control, and where another vehicle enters intersection at time when automobile on through highway is not approaching so closely as to constitute an immediate hazard, driver of automobile on through highway is under duty to yield right of way to vehicle engaged in crossing it. Vehicle Code, § 552(b).

7. Automobiles ⇨168(1)

A driver may be negligent under circumstances of particular situation even though he is driving within legal speed limit.

8. Appeal and Error ⇨1067

On issue as to whether plaintiffs had been prejudiced by failure of trial court to instruct that driver may be negligent even though he is driving within legal speed limit,

it, it could not be said that a jury of laymen, uninstructed on subject, might not erroneously assume that the speed within legal limit could not be negligent.

Arthur T. Bridgett, San Francisco, Frank B. Blum and McGuire & Lahanier, San Francisco, for appellants.

Campbell, Hayes & Custer, Austen D. Warburton, San Jose, Hardy, Carley & Brenner, John M. Brenner, Palo Alto (W. R. Dunn, Burlingame, of counsel), for respondents.

DOOLING, Justice.

In an action for wrongful death of Albert Graf defendants and cross-complainants Garcia recovered a judgment on their cross-complaint following the verdict of a jury. The action arose out of a collision at the intersection of Alma Street and San Antonio Road in Santa Clara County.

Alma Street at this point runs northerly and southerly and parallels the main tracks of the Southern Pacific Railroad which lie on the westerly side of Alma Street, the nearest rail being about 65 feet from the westerly edge of the paved portion of Alma. San Antonio Road runs easterly and westerly and crosses Alma Street at a right angle. In general the paved portion of San Antonio Road on both sides of Alma Street is 18 feet in width but on the westerly side of Alma commencing at the most easterly rail of the railroad track the sides of San Antonio Road spread out in wide arcs so that its paved portion where it intersects Alma is approximately 75 feet in width. At the time of the collision Alma Street was a through highway protected by stop signs on either side where San Antonio enters it. However because of the wide arc at the edge of San Antonio where it intersects Alma the stop sign on the westerly side of Alma was located about 36 feet from the center line of San Antonio, so far to the right of a car approaching Alma on San Antonio at a right angle that the direct beam of the headlights of such a car might not fall upon the stop sign. At the time of the collision the letters "STO" appeared in white paint on the paved surface of San

Antonio near its westerly intersection with Alma and beyond those letters a broken white line. The word "STOP" had originally been painted on the pavement with a solid white line beyond it. An officer called by defendants as a witness testified of these painted marks: "it had been worn quite a bit, the stop sign * * * from heavy travel."

The collision occurred about 8:30 p. m. on February 2, 1949. The night was very dark, the sky overcast with clouds and there is testimony that there was a very heavy mist falling, it was drizzling. The intersection was not lighted or illuminated in any way.

The car driven by the decedent Graf approached Alma Street traveling easterly on San Antonio Road. Two men, Lucas and Palmer, who were riding in the back seat of the automobile driven by decedent were produced by plaintiffs and testified that Graf brought his car to a stop on the westerly side of the railroad tracks. This would be at a point something over 80 feet from the westerly edge of Alma Street. The car proceeded from that point very slowly, at a speed of from 5 to 10 miles per hour. Both witnesses testified on direct that Graf brought his car to a second stop between the railroad tracks and Alma Street. On cross-examination in answer to leading questions they conceded that the second stop might have been a "rolling stop" or a "hesitation stop". Lucas summed up his testimony on this subject in the following language: "I said originally it was a stop, and you said it could possibly not be a stop. I said my impression was a stop, it was going so slowly it could not have been a stop in every sense of the word, although we were going so slowly it might have, but it seemed to us, to me, at least, it seemed like a stop." Graf then shifted gears and his car proceeded into the intersection picking up to a speed of 10 to 15 miles per hour. Just before the collision Graf exclaimed: "Isn't that car going to stop?" or "Is it going to stop?" and the collision occurred. Neither witness had observed any stop sign, and neither saw the other car until the instant before the impact.

The defendant Merle Garcia testified that she was driving a station wagon in a southerly direction on Alma Street at a speed of 35 to 45 miles per hour. She first saw the headlights of the automobile driven by Graf on the westerly side of the railroad tracks, "back from the railroad tracks a little way, I don't know how far." She then looked away and did not see the Graf car again until "As I came into the intersection I turned my head back, and I looked out the window, and his headlights were shining directly into my right hand window, and he hit me."

The Graf car was spun around clockwise by the collision and the station wagon driven by Mrs. Garcia turned or rolled over onto its top and struck a tree approximately 65 feet from the point of collision with such force as to uproot it from the ground. There was no other traffic on either highway at this time.

Respondents contend that on this evidence the court should have granted a nonsuit or a directed verdict against appellants on their complaint, taking the position that the evidence establishes decedent's negligence as a matter of law. This contention may best be discussed in connection with appellants' argument that the trial court committed prejudicial error in refusing to give their tendered instructions that the plaintiffs were entitled to the presumption that the decedent Graf used due care for his own safety.

[1-4] Although there are some opinions of the District Courts of Appeal which it may not be possible to reconcile with this rule, an examination of the decisions of the Supreme Court on the subject satisfies us that where the question concerns the conduct of a person who is dead the presumption of the exercise of due care is operative unless the testimony of the witnesses produced by the party who would benefit by the presumption is "wholly irreconcilable" with the presumption or "only one reasonable conclusion [may] be drawn from the facts established by the testimony of" such witnesses and "[t]hat conclusion was that the deceased in that action had been guilty of contributory neg-

ligence." *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590, 594; *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826; *Scott v. Burke*, 39 Cal.2d 388, 247 P.2d 313; *Anderson v. County of San Joaquin*, 110 Cal. App.2d 703, 244 P.2d 75.

The testimony of the eye-witnesses Lucas and Palmer produced by the appellants in this case is not of that character. Their testimony on the question of whether or not the decedent stopped his car a second time after crossing the railroad tracks and before entering the intersection does not establish with certainty that he did not, but beyond this there is another area which must be left to the determination of the jury upon which their testimony is not "wholly irreconcilable" with the presumption of due care. The jury was properly instructed that while the violation of a statute is negligence per se "such presumption is not conclusive, it may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence."

There was no evidence produced that decedent saw either the partly obliterated "STO" on the pavement or the stop sign far to his right outside the paved portion of San Antonio Road. There was no evidence produced that decedent was familiar with this intersection or knew that it was marked with stop signs, the only evidence touching that question even remotely being that decedent lived in San Francisco. There is affirmative evidence that the night was very dark, a mist was falling and the intersection was unlighted. Under the evidence a jury might reasonably conclude that decedent did not see the stop signs and that his failure to do so "might reasonably have been expected from a person of ordinary prudence." Under not dissimilar conditions of weather and darkness the supreme court recently held that the violation of the statutory duty to yield the right of way to a pedestrian in a crosswalk was excusable or justifiable. *Ornales v. Wigger*, 35 Cal.2d 474, 218 P.2d 531. The court said, 35 Cal.2d at page 480, 218

P.2d at page 535: "Certainly, the weather, the darkness and plaintiff's attire were all matters beyond the control of defendant. It was held in the *Satterlee* case [*Satterlee v. Orange Glen School Dist.*, 29 Cal.2d 581, 177 P.2d 279] that 'the issue as to whether the circumstances were such as to excuse violation' should be left to the trier of the fact." Under similar conditions of weather and darkness whether the partially obliterated "stop" marks on the pavement and the unusually situated stop sign were, and in the exercise of ordinary care should have been, observed by decedent equally presents a question for the trier of fact.

Respondents argue further that the failure to yield the right of way was negligence per se. Veh.Code, sec. 552. Whether the station wagon was "approaching so closely on the through highway as to constitute an immediate hazard" (the language of section 552) likewise would seem to present a fact question. On the evidence the jury could find that the station wagon was traveling at least four times as fast as the decedent's car. From the broken intersection line painted on the pavement of San Antonio it is about 20 feet to the point of collision as marked by at least one witness. If the station wagon was traveling 4 times as fast as the decedent's car it would be at least 80 feet away when decedent crossed this partly obliterated limit line, and from the conduct of the station wagon after the collision the jury could find that it was traveling much faster. On that assumption it could have been much further away. "Section 552 does 'not set a hard and fast rule for the conduct of drivers approaching through highways'. Whether a driver acts with due care or negligently in proceeding across a through highway is a jury question." *Grasso v. Cunial*, 106 Cal.App.2d 294, 300, 235 P.2d 32, 37; *Stickel v. San Diego Electric Ry. Co.*, 32 Cal.2d 157, 195 P.2d 416; *Malinson v. Black*, 83 Cal.App.2d 375, 188 P.2d 788; *Wilkinson v. Marcellus*, 51 Cal.App.2d 630, 633, 125 P.2d 584; *Hershey v. Laswell*, 63 Cal.App.2d 219, 222, 146 P.2d 509.

We conclude that the court erred to appellants' prejudice in refusing to instruct

the jury on the presumption of the decedent's exercise of care. The suggestion in the briefs that such an instruction would violate the rule of *Pezzoni v. City and County of San Francisco*, 101 Cal.App.2d 123, 225 P.2d 14 is answered by *Scott v. Burke*, supra, 39 Cal.2d 388, which at page 401, 247 P.2d 313 disapproved the rule of the *Pezzoni* case for which it is cited by respondents.

[5,6] It seems equally clear that there is evidence in the record from which a jury could find that Mrs. Garcia was guilty of negligence in the operation of the station wagon. She first saw the headlights of the Graf car on the other side of the railroad tracks, something over 80 feet from the westerly edge of Alma Street. At that time she must have been at least three or four hundred feet from the intersection with San Antonio road, using the testimony of the speeds of the two automobiles as a basis of calculation. She did not again look in that direction or make any other observation of the Graf car until almost the instant of collision, although there was no other traffic in sight to claim her attention, and she proceeded into the intersection without appreciably slackening her speed. In *Grasso v. Cunial*, supra, 106 Cal.App.2d 294, at pages 300-301, 235 P.2d 32, this court reviewed the cases on the duty of care of the driver of a car on a through highway. These cases demonstrate that a driver on a through highway is not absolved from the duty of maintaining a proper lookout and keeping his car under control, and that where another car enters the highway at a time when the car on the through highway is not "approaching so closely * * * as to constitute an immediate hazard" the driver of the vehicle on the through highway is under a duty to yield the right of way to the car engaged in crossing it. Veh.Code, sec. 552(b).

[7,8] The appellants proposed two instructions embodying the principle that a driver may be negligent under the circumstances of the particular situation even though he is driving within the legal speed limit. The principle is well settled, *Reynolds v. Filomeo*, 38 Cal.2d 5, 13-14, 236 P.2d 801; *Grasso v. Cunial*, supra, 106 Cal.App.2d 294, 301, 235 P.2d 32, and the error in failing to instruct on the subject is highlighted by the fact that almost at the close of the trial respondents proved by the traffic officer that there were no signs on Alma Street in the neighborhood of the collision that established a speed limit of less than 55 miles per hour. We cannot say that a jury of laymen uninstructed on the subject might not erroneously assume that in a 55-mile zone a speed under that limit, being permitted by law, could not be negligent.

The second of these instructions also dealt with the duty of maintaining a lookout and keeping the car under proper control, patterned on the language of *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125, and should have been given.

Judgment reversed.

NOURSE, P. J., and GOODWELL, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



117 Cal.App.2d 749

SMITH v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15395.

District Court of Appeal, First District,
Division 2, California.

May 14, 1953.

Action for injuries sustained by plaintiff when he was struck while in crosswalk by municipal bus making left turn on a dark night during a heavy rain. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeals, Nourse, P. J., held that evidence supported implied finding of negligence on part of pedestrian proximately contributing to accident.

Affirmed.

1. Automobiles ⇨244(58)

In action for injuries sustained by plaintiff when he was struck while in crosswalk by municipal bus making left turn on a dark night during a heavy rain, evidence supported implied finding of negligence on part of pedestrian proximately contributing to accident.

2. Appeal and Error ⇨1064(1)**Negligence** ⇨63

The so-called defense of inevitable accident is nothing more than a denial by defendant of negligence, or contention that his negligence, if any, was not proximate cause of injury; and therefore giving of instruction on matter is not reversible error when question whether injury was proximately caused by negligence of defendant is for jury to decide.

3. Negligence ⇨136(14, 25)

Normally, whether or not violation of statute proximately contributed to accident and whether violation was excusable or justifiable remain questions of fact for jury.

4. Appeal and Error ⇨882(1)

Appellant could not be heard to make assertion on appeal when he had taken opposite position in court below.

5. Appeal and Error ⇨882(12)

Instruction on unavoidable accident was a normal complement to plaintiff's proposed instructions concerning basic speed law and statutory requirement that bus driver yield right of way to pedestrian crossing in marked crosswalk, and under doctrine of invited error plaintiff could not complain to giving thereof in action for injuries sustained by plaintiff when he was struck while in crosswalk by municipal bus making left turn on a dark night during a heavy rain. Vehicle Code, §§ 560, 677.

Andrew Bodisco and George L. Cooke, San Francisco, for appellant.

Dion R. Holm, City Atty., and Clayton W. Horn, Deputy City Atty., San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for personal injuries caused by a collision with a municipal bus op-

erated by defendant. The verdict was for defendant and plaintiff appeals.

The accident happened at about 6:00 P. M. of a dark night and during a heavy rain. Plaintiff had stood under a shelter at the northwest corner of Post and Larkin Streets in San Francisco before crossing Post Street in a southerly direction. When the automatic signal turned green in his favor he speeded to the curb and walked rapidly into the pedestrian crosswalk. He was there struck by the middle or right side of the very slowly moving bus at a point estimated by witnesses as between four and eight feet from the northerly curb. The bus, which was fully lighted, had been making a left turn from Larkin Street at the southeast corner of the intersection into Post Street. Plaintiff knew the intersection and the turn there made by the buses well. He was wearing a brown suit and hat. The latter he had pulled down to protect his face from the rain. He did not look to the left after he left the curb and he noticed the bus only when it was approximately at one arm's length distance from him. His sight was good. There was evidence that the operator of the bus did not see plaintiff in time due to a partially fogged windshield, the rain and the glare of lights from the street. Only the right half of the windshield was fogged; the left half directly in front of the operator was clear.

[1] Appellant does not contend that the evidence does not support the verdict, correctly so, as the facts stated support an implied finding of negligence of plaintiff proximately contributing to the accident. Appellant's only assignment of error is the giving of an instruction on unavoidable accident. The wording or substance of the instruction given is not criticized but it is contended that no instruction on the subject should have been given because the operator was negligent as a matter of law, having violated section 560(a) of the Vehicle Code, requiring him to yield the right of way to a pedestrian crossing in a marked crosswalk and section 677, Vehicle Code, prohibiting the driving of a motor vehicle when the windshield is in such a defective condition as to impair the driver's vision to the front, whereas said violations—or at

least the violation of section 677—were as a matter of law not excused by the surrounding circumstances.

[2-5] “[T]he so-called defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury.” Scott v. Burke, 39 Cal.2d 388, 401, 247 P.2d 313, 321. Therefore the giving of an instruction on this matter is not reversible error when the question whether the injury was proximately caused by negligence of the defendant is for the jury to decide. See Parker v. Womack, 37 Cal.2d 116, 122, 230 P.2d 823. Normally whether or not a violation of a statute proximately contributed to an accident and whether the violation was excusable or justifiable remain questions of fact for the jury. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 590, 177 P.2d 279; Driver v. Norman, 106 Cal.App.2d 725, 236 P.2d 6. Appellant contends that in this case there were no such questions for the jury but he cannot be heard to make this assertion on appeal as in the court below he took the opposite position. He did not move for a directed verdict, or request an instruction that defendant’s negligence as a matter of law proximately caused the injury, but to the contrary proposed his instructions Nos. 24 and 26, which were given by the court as proposed and which in part were to the effect that the questions whether the driver had violated any of the provisions of the Vehicle Code read to the jury, whether such violation was excused by facts or circumstances in evidence and whether such violation proximately caused the damage complained of by plaintiff were for the jury to determine. (Plaintiff had proposed instructions containing the basic speed law and section 560 of the Vehicle Code, which were read, but no instruction on section 677 of said code, which accordingly was not read.) To the instructions which submitted these questions to the jury the instruction on unavoidable accident was a normal complement and under the doctrine of invited error (if any) appellant cannot complain. Miller v. Dollar Steamship Lines, Inc., 19 Cal.App.2d 206, 212, 64 P.2d 1163; Ray v. Kennedy, 24 Cal.App.2d

583, 76 P.2d 147; Cedzo v. Bergen, 53 Cal. App.2d 667, 675, 128 P.2d 683; Rivera v. Goodenough, 71 Cal.App.2d 223, 231, 162 P.2d 498.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



WALLACE et ux. v. CITY OF FRESNO
et al.*

Civ. 4631.

District Court of Appeal, Fourth District,
California.

May 13, 1953.

Hearing Granted July 9, 1953.

Mandamus proceedings brought to compel city to pay a service pension. The Superior Court, Fresno County, denied the relief sought by the petitioner-husband and he appealed. The District Court of Appeal, Mussell, J., held that the petitioner-husband, a police officer, in accepting employment from city in 1929 and accepting pension when he retired in 1949, acquired pension rights subject not only to charter provision authorizing establishment of pension fund by ordinance and 1923 ordinance providing for loss of pension after 25 years of service only if removal from department were for habitual drunkenness, conviction of felony, etc., but also to 1946 ordinance authorizing discontinuance of pension upon conviction of felony.

Judgment denying writ to petitioner-husband affirmed and that portion thereof granting writ to petitioner-wife reversed.

1. Constitutional Law ⇨102(2)

Municipal Corporations ⇨229(9)

City employee has vested right to pension, but amount, terms and conditions of benefits may be altered.

2. Municipal Corporations ⇨8

Language of city charter must be interpreted in its ordinary meaning and in accordance with legislative intent.

3. Constitutional Law ⇨102(2)

Public employee's right to a pension does not become vested until happening of contingency on which pension becomes payable; usually retirement for disability or for length of service.

4. Municipal Corporations ⇨220(9)

City employee acquires vested right to pension at time of his employment, subject to defeasance upon happening of prescribed contingency, if pension enactment so provides.

5. Municipal Corporations ⇨187(11)

Police officer accepting employment from city in 1929 and accepting pension when he retired in 1949 took pension rights subject not only to charter provision authorizing establishment of pension fund by ordinance and 1923 ordinance providing for loss of pension after 25 years of service only if removal from department were for habitual drunkenness, conviction of felony, etc., but also to 1946 ordinance authorizing discontinuance of pension upon conviction of felony.

Lawrence W. Young, Fresno, for petitioners and appellants.

C. M. Ozias, City Atty., Fresno, for respondents.

MUSSELL, Justice.

Petitioners appeal from a judgment in proceedings for a writ of mandate to compel the city of Fresno to pay petitioner, R. T. Wallace, a service pension in the sum of \$150 per month during his lifetime and upon his death to pay said pension to his wife, Clara Wallace.

There is no dispute as to the material facts. On August 15, 1921, petitioner, R. T. Wallace, was appointed a member of the police department of the city of Fresno. He served the city as a police officer and as chief of police until July 30, 1949, when he was granted a service pension at the rate of \$150 per month, to commence on that date. He then retired from the police department and thereafter received his service pension until June 4, 1952. On April 21, 1952, he was convicted in the United

States District Court of a felony, upon his plea of guilty to preparing and filing false and fraudulent income tax returns. On June 4, 1952, the Policemen and Firemen's Pension Board of the city, upon being informed of this conviction, passed a resolution terminating the pension as to R. T. Wallace and ordering it paid to his wife, Clara Wallace, until such time as he should be released and discharged from imprisonment under the judgment of conviction, and further ordering that all pension payments be then terminated and ended. This resolution was approved by the city commission on June 5, 1952, and these proceedings to obtain a writ of mandate were commenced.

The trial court denied the writ as to petitioner, R. T. Wallace, and issued a peremptory writ commanding the pension board and the city commission to either (a) resolve to deny the pension as to petitioner, Clara Wallace; or (b) resolve to grant the pension to her during her lifetime and to make such a determination within thirty days.

The question here to be determined is whether the petitioners are bound by the provisions of city ordinance No. 1415, passed September 8, 1927, and ordinance No. 3116, passed March 14, 1946, particularly the provisions found in Section 11 of each of said ordinances, which section is as follows:

"Section 11. Whenever any person who is receiving any pension from the pension fund as provided herein, shall fail to report himself as required by order of the pension board, after being notified as required by this ordinance, or shall wilfully disobey the requirements and orders of said board or shall be convicted of a felony or crime involving moral turpitude, become dissipated or become nonresident of this state except by permission of the board, then said board may, after notice to the petitioner, order that the pension allowance of said person shall immediately cease and terminate; and the pension board in its discretion may order the pension or allowance to be paid to the dependents of said petition-

er, if there be any, in the order or succession as stated in Section 9 hereof."

At the time petitioner, R. T. Wallace, was first appointed as a member of the police force in 1921, Section 26 of the Charter of the city of Fresno provided as follows:

"Relief and Pension Funds. The City Commission shall by ordinance provide for and establish a fund, or funds for the relief and pensioning of members of the Police and Fire Departments, who have been disabled or become superannuated in the service of the city, and shall provide for the administration of such fund, or funds."

Pursuant to this charter provision, the city commission passed an ordinance on October 11, 1923, to create, maintain and provide for the disbursement of a policemen and firemen's relief, health, life insurance and pension fund. This ordinance, No. 1021, provided, among other things, that any member of the police department of the city who had attained the age of 55 years and who had served in that department 25 years in the aggregate was as a matter of right entitled, on his application, to a retirement pension not to exceed \$150 per month for life and upon his death said pension was payable to his widow during her lifetime or until she remarried. It was also provided therein that no removal of any member from the department after 25 years of service should deprive him of the benefits of the section except if such removal was for habitual drunkenness, notorious insubordination or conviction of a felony or crime involving moral turpitude and then only in the event the commission in its discretion ordered that such removal operated to deprive such member of the benefit of the provisions thereof.

Ordinance No. 1021 contained no provision for payments by members of the police department into the pension fund and the first payments made by such members began July 5, 1938, under the terms of ordinance No. 1415 at the rate of 4% of the member's monthly salary. This payment was increased to 4½% by the terms of ordinance No. 3116.

Appellant argues that Section 26 of the city charter establishes two conditions upon which a pension may be given, to wit, age or disability of the employee, and that where either of these conditions occur, the officer, provided he has 25 years service with the city, is entitled to his pension as a matter of right; that the city cannot modify or supersede by ordinance any provision of the charter and that by enacting Section 11 in ordinances 1415 and 3116, the city attempted to modify the charter contrary to its provisions. We cannot agree with this argument.

[1,2] Section 26 of the charter is a grant or authority to the city to establish and administer pension funds. It is specifically provided therein that this be done by ordinance. The amount of the pension benefits, the determination of disability and superannuation of employees and many other matters were to be provided for in such ordinances. In this connection it may be noted that no provision is made in the charter for payment of such funds to the dependents of members of the police department. There is then no charter provision establishing pension rights as to petitioner, Clara Wallace. The language in the charter must be interpreted in its ordinary meaning and in accordance with legislative intent. *Tripp v. Board of Fire, etc., Com'rs*, 94 Cal.App. 720, 723, 271 P. 795. The plain intent expressed in the charter is that the city commission is given the authority to provide by ordinance rules and regulations for the administration of pension funds. A pension law may be changed or modified and when one is placed upon the pension roll, he does not obtain a vested right to any fixed or definite benefits, but only to a substantial or reasonable pension. He has a vested right to a pension, but the amount, terms and conditions of the benefits may be altered. *Kern v. City of Long Beach*, 29 Cal.2d 848, 855, 179 P.2d 799.

In *Brophy v. Employees Retirement System*, 71 Cal.App.2d 455, 162 P.2d 939, plaintiff was appointed to the civil service position of fireman in October, 1909, under the then provisions of the San Francisco city charter. He was a member of the department until his retirement in May, 1942.

In 1909 the city charter provided that a fireman, after 25 years of active service, could retire on a monthly retirement allowance equal to one-half the amount of salary attached to the rank held by him for 3 years prior to retirement. In 1932 a new charter was adopted, which contained a provision similar to the 1909 provision but added an entirely new provision, as follows: "Should any retired person, except persons retired for service prior to January, 1932 * * * engage in a gainful occupation prior to attaining the age of 62, the retirement board shall reduce that part of his monthly pension or retirement allowance which is provided by contributions of the city and county to an amount which, when added to the amount earned monthly by him in such occupation shall not exceed the compensation on the basis of which his pension or retirement allowance was determined." It was contended by plaintiff that the 1909 civil service retirement provisions, under which he was first employed, constituted a contract for wages for services rendered, and that the 1932 amendment had no application to him, and that to apply the 1932 amendment to him, would be to impair the obligation of his contract with the city and interfere with his vested rights. The court held that the contention that the right and the extent of the right of appellant became fixed and vested before 1932 was without merit; that the plaintiff's right to a pension did not become vested until May, 1942, when he retired and that the 1932 amendment to the charter was applicable to him.

In *McCarthy v. City of Oakland*, 60 Cal. App.2d 546, 141 P.2d 4, one J. F. McCarthy, a member of the police department, was killed in the performance of his duty, whereupon his widow, in accordance with the provisions of the city charter was granted a pension equal to one-half of the salary attached to the decedent's rank. On January 12, 1940, the widow was convicted of three felonies. At the time of her conviction, the city charter contained a provision to the effect that "any member of the police department receiving a pension from the Police Relief and Pension Fund, who shall become convicted of a felony, * *

shall forfeit all right to said pension". Subsequent to plaintiff's conviction, the board passed a resolution striking her name from the pension roll and in 1941 the section of the charter containing the above quoted provision was amended by substituting the words "any person" for "any member of the police department". The court held that the amendment was not retroactive; that it was operative from the date of its approval; that at the time the right of plaintiff to the pension accrued, there was no contingency for forfeiture upon conviction of a felony and that the charter provision prior to its amendment prevailed.

[3-5] In the instant case the provisions of Section 11 of ordinances Nos. 1415 and 3116 relative to the termination of petitioner's pension rights upon conviction of a felony became effective in 1927 and were from that time a part of his contract of employment. His right to a pension became vested upon his acceptance of employment by the city. However, as was said in *Brophy v. Employees Retirement System*, supra, 71 Cal.App.2d at page 459, 162 P.2d at page 941:

"* * * the determination that a pension right becomes a part of the contract of employment and is a vested right, does not settle the question as to when the right vests and what the extent of this vested right may be. It is now too well-settled to require extended discussion that the right to a pension does not become vested until the happening of the contingency upon which the pension becomes payable, usually retirement for disability or length of service." (Citing cases.)

In *Kern v. City of Long Beach*, supra, 29 Cal.2d at page 855, 179 P.2d at page 803, the court said:

"Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the

implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

In our case, petitioner, R. T. Wallace, acquired a vested right to a pension at the time of his employment. The nature and extent of that right is to be determined from the charter and ordinances involved and such right is subject to the contingency that his pension payments might be discontinued in the event he was convicted of a felony. As was said in *Estate of Lindquist*, 25 Cal.2d 697, 706, 154 P.2d 879, 884:

"While in California it has been held that upon the granting of a pension to an employee a vested right accrues to the recipient, this simply means that the vesting is subject to contingencies, which may cause a discontinuance of payment, such as conviction of a felony or an automatic decrease in amount (*Douglas v. Pension Board*, 75 Cal.App. 335, 242 P. 756; *Klench v. Board of Pension Fd. Com'rs*, 79 Cal.App. 171, 249 P. 46; *Jordan v. Retirement Board*, 35 Cal. App.2d 653, 96 P.2d 973) if the pension statute so provides."

When petitioner was first employed by the city there was no ordinance setting up a pension system. The first ordinance, No. 1021, contained a provision that no removal of any member from the department after 25 years of service should operate to deprive him of the pension benefits except when such removal was for conviction of a felony or crime involving moral turpitude and in that event the commission was given power in its discretion to deprive such member of the benefits of the provisions of the ordinance. Petitioner, R. T. Wallace, accepted this provision, as well as the provisions in ordinances Nos. 1415 and 3116 relative to the discontinuance of his pension if he should be convicted of a felony, as part of his contract of employ-

ment for many years prior to his retirement and the provisions of Section 11 of these ordinances are applicable to him. The pension board was, by the provisions of Section 11 of Ordinances Nos. 1415 and 3116, granted the power in its discretion to order the pension or allowance to be paid to the dependents of the pensioner upon his conviction of a felony. In the exercise of this discretion, the board ordered the pension paid to petitioner, Clara Wallace, during the period of her husband's incarceration and ordered the payments to cease upon the termination thereof. An abuse of discretion on the part of the board in this respect does not appear. It follows that the trial court erred in issuing a peremptory writ as to petitioner, Clara Wallace.

The judgment denying the writ as to R. T. Wallace is affirmed, and that portion thereof granting the writ as to petitioner, Clara Wallace, is reversed.

Respondents to recover costs.

BARNARD, P. J., and GRIFFIN, J.,
concur.



117 Cal.App.2d 761

**FIREMAN'S FUND INDEMNITY CO. v.
KNORR.**

Civ. 15320.

District Court of Appeal, First District,
Division 2, California.

May 15, 1953.

Hearing Denied July 9, 1953.

Suit by indemnity company which had paid burglary loss, to recover amount of payment from funds later found on burglar's body. The claim of indemnity company was opposed by administrator of burglar's estate. The Superior Court, City and County of San Francisco, entered judgment for defendant and denied plaintiff's motion for new trial, and plaintiff appealed. The District Court of Appeal held that when administrator of burglar's estate had not, in his answer, raised defense of prematurity because of absence of

presentation of claim with estate, or in answer to amended complaint alleging presentation and rejection of claim, presentation of such plea in abatement for first time in amended answer at opening of trial was not seasonable, but there had been an effective waiver of such plea by the administrator.

Judgment reversed.

1. Abatement and Revival ⇐81

The plea that action has been prematurely brought must be specially pleaded in order to be available as a defense, and unless that plea is seasonably made, it will be deemed to have been waived.

2. Abatement and Revival ⇐81

Where claim of indemnity company which had paid burglary loss, to recover as for money had and received, the amount of payment from funds later found on burglar's body, was opposed by administrator of burglar's estate, and administrator's answer contained no plea that action was premature in that it had been filed before presentation of creditor's claim with estate, nor was such plea contained in answer to amended complaint alleging the presentation and rejection of creditor's claim, plea in abatement because of prematurity, filed for first time in amended answer at opening of trial, was not seasonable, and such plea was effectively waived.

Lange & Rockwell, C. Dan Lange and Clyde R. Rockwell, San Francisco, for appellant.

Archie G. Cope, Long Beach, E. O. Leake and J. J. Leake, San Gabriel, for respondent.

GOODELL, Justice.

This appeal is from a judgment for defendant. A motion for new trial was denied.

On December 13, 1948 one of the restaurants of Mannings, Incorporated, in San Francisco was entered by three armed robbers who took \$3,737.35 from the safe. Mannings had a policy of insurance written by plaintiff covering losses by burglary, robbery and theft, and upon due proof of

loss plaintiff paid the \$3,737.35 loss pursuant to the policy.

One of the trio was identified as Floyd W. Knorr, who among other aliases was known as Fred Lennon. A nation-wide search was launched and in early April, 1950, almost 16 months after the hold-up, Knorr was recognized in Bakersfield by an agent of the Federal Bureau of Investigation who, with a State highway patrol officer, pursued him onto the Mojave desert where he was shot to death in resisting arrest. On his person approximately \$9,100 in currency was found, practically all of it in \$100 bills.

On April 29, 1950 plaintiff filed this action based on its subrogation rights arising from the payment of the loss.

The original complaint joined as defendants the coroner of Kern County, an F.B.I. special agent, and several fictitious defendants, since the identity of the legal custodian of the \$9,100 was not then known to the plaintiff.

On April 25, 1950 letters of administration on Floyd W. Knorr's estate were issued by the Superior Court in Kern County to respondent Ellsworth Knorr, who appeared in the action in the place of a Doe defendant. Plaintiff dismissed as to the coroner and the F.B.I. special agent and the case narrowed down to a contest between the Indemnity Company and the estate of Knorr.

The original complaint was filed less than a month after Knorr's death, for the purpose, obviously, of promptly asserting a claim against the \$9,100 fund. As a matter of fact letters of administration on Knorr's estate had been granted four days before suit was filed but plaintiff apparently knew nothing about it at the time.

The complaint alleged: "That on or about the 13th day of December, 1948, Fred Lennon, by armed robbery stole moneys belonging to said Mannings, Incorporated, * * * from said premises at 761 Market Street, San Francisco, California, in the sum of \$3,737.35." On information and belief it alleged that the sum of \$3,737.35 found on Knorr's person "was and now is

the lawful property of plaintiff as assignee and subrogee of said Mannings, Incorporated, * * *." In a second count it alleged: "That on or about the 5th day of April, 1950, defendants and each of them became indebted to the plaintiff in the sum of \$3,737.35, money had and received by them, lawful property of the plaintiff * * *" and "That no part of said sum of \$3,737.35 has been paid though demanded." It did not allege the presentation of a creditors' claim against the estate. Defendant's general and special demurrer was overruled and an answer was filed.

On September 7 plaintiff presented a creditors' claim for the \$3,737.35, which was rejected on October 7. On October 31, 1950 plaintiff filed an amended complaint, repeating its original allegations but alleging also the presentation and rejection of the claim. On November 13 respondent answered this amended complaint, and these two pleadings formed the issues to be tried as they appeared when the parties stipulated (on May 17, 1951) to try the case a week later without a jury.

At the opening of the trial on May 24, 1951 respondent was granted leave to file an amended answer which *for the first time* contained a plea in abatement based on the fact that the action had been filed before any creditors' claim had been presented, and asserted that the original complaint stated no cause of action and that the action had been prematurely commenced.

Plaintiff resisted the filing of this amended answer on the ground that such dilatory plea had been waived. Defendant then countered by moving to strike out that part of the amended complaint which pleaded the presentation and rejection of the creditors' claim. The court reserved its rulings and proceeded with the trial. At its conclusion the court ruled that the amended answer should stand, but granted the defendant's motion to strike. The net result of these rulings was that the plea in abatement was upheld, while the plaintiff was left without any pleadings or proof that it had made timely presentation of its claim. This was fatal to the plaintiff's case as far as the count for money had and received

was concerned, since the presentation of a claim was a *sine qua non* to a recovery on that count.

The court did not find, and could not have found, that plaintiff had not presented *any* claim, but did find: "That plaintiff did not file or present any claim against the Estate of Floyd W. Knorr for the said sum of \$3,737.35 or any other sum *prior to commencement of this action.*" (Emphasis added.)

The court's written opinion indicates that its ruling that the plea in abatement had not been waived, was based on several early cases which held that as long as the objection of prematurity was *in some manner* brought to the trial court's and plaintiff's attention it was timely and sufficient. For instance, in *Hentsch v. Porter*, 10 Cal. 555, 561, one of the cases, it was said: "Where the objection, if true, would only defeat the present right to recover, the defendant, though not compelled to demur or answer, should be obliged to make the objection, by motion or otherwise, before the Court of original jurisdiction, during the term at which the judgment was obtained." The court held herein that the objection that the action was premature because filed before the claim had been presented, was effectively presented at the outset by defendant's general demurrer to the original complaint even though the demurrer did not emphasize such failure by specification. *Burke v. Maguire*, 154 Cal. 456, 98 P. 21.

[1] However, in the recent case of *Kelley v. Upshaw*, 39 Cal.2d 179, 246 P.2d 23, 28, decided on July 7, 1952, *after the decision herein*, the Supreme Court has definitively restated the rule "that the plea that an action has been prematurely brought * * * must be specially pleaded in order to be available as a defense." That decision is not cited in any of the briefs herein, but was called to our attention on oral argument. At page 186 of 39 Cal.2d, at page 27 of 246 P.2d the court says:

"The rule has long been settled that the defense that an action is premature is in the nature of a dilatory plea not favored in the law, and that such defense must be seasonably urged in the trial court or it is waived." *Seches v.*

Bard, 215 Cal. 79, 81, 8 P.2d 835, 836. 'A plea in abatement, without disputing the justness of plaintiff's claim, objects to the place, mode, or time of asserting it, and requires *pro hac vice* that the judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time. It must not only point out the plaintiff's error, but must show him how it may be corrected, or in technical language it *must give the plaintiff a better writ.*' Nevills v. Shortridge, 146 Cal. 277, 278, 79 P. 972. Thus, although a timely plea in abatement, properly proved, requires judgment for the defendant, it is an objection which may be waived if not seasonably urged."

The court then discusses several cases where the courts have used broad language which could be taken to mean that as long as the prematurity of the action is *in some manner* called to the attention of the trial court and the plaintiff it is sufficient, citing, among others, Hentsch v. Porter, supra, and Williams v. Schalk Chemical Co., 11 Cal.App.2d 396, 399, 53 P.2d 1015, where "similarly broad language", to that found in the Hentsch case, was used. The court then says:

"However, a more accurate statement of the rule appears to be 'that the plea that an action has been prematurely brought is in the nature of a dilatory plea which must be specially pleaded in order to be available as a defense.' Verbeck v. Clymer, 202 Cal. 557, 562, 261 P. 1017, 1018; Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 573, 194 P. 1024; Mears v. Jeffry, 80 Cal. App.2d 610, 615, 182 P.2d 294. In Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561, the opinion assumes that an objection based upon prematurity of the action was made in the statement on motion for a new trial. At that time, the bringing of a new suit would have been barred by a statute of limitations. No cause of action existed at the time the suit was commenced. The court held that the defense had not been seasonably urged and was waived. It said that 'this is a mere matter of

abatement, which is waived unless pleaded. Formerly, such pleas could only be interposed before a plea to the merit. Under our Code all defenses may be included in one answer, but, if a defense which is mere matter of abatement is not made by that time, it should be deemed waived. * * * It is simply matter of abatement—a defense which is not favored, and must be made by plea, and in proper time, or it is waived. If so waived, the court will be rarely justified in permitting the defense to be made later.' 124 Cal. at pages 574–575, 57 P. at page 563. Likewise, in Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 405–406, 154 P.2d 399, the court held that the defense of prematurity was not asserted promptly when raised for the first time by a motion for nonsuit. * * * The facts in the Bollinger and Bemmerly cases merely emphasize the reason for the rule, but do not alter the requirement that the defense be asserted promptly and plainly by plea." (Emphasis added.)

It may be conceded that here the defense was eventually asserted "plainly by plea", but by no means can it be held that it was asserted "promptly". The allowance of the plea at the eleventh hour, at the opening of the trial, made this a dilatory plea not only in the technical sense used in the law books but chronologically as well. The defense delayed asserting it until 13 months after the action was commenced and 6 months after issue was joined.

[2] The original complaint could not have pleaded the presentation of a claim since at that time (as in the Bemmerly case) none had been presented.

The answer to that complaint, filed on July 13, 1950, contained no plea that the action had been prematurely commenced. *This was defendant's first opportunity to enter its plea in abatement.*

The first amended complaint, filed on October 31, just 24 days after the rejection of the claim, alleged the presentation and rejection. Defendant could then have moved to strike this part of the amended complaint (as he did six months later, at

the opening of the trial) but did not do so. On November 13 defendant answered, admitting the presentation of the claim on September 7 and its rejection on October 7, but saying nothing whatever with respect to the prematurity of the action. *This was defendant's second opportunity to enter its plea in abatement.* Had it made such plea even then, plaintiff could have commenced a new action, since, under § 714, Probate Code, it had three months (or until January 7, 1951) to sue after the rejection on October 7, 1950.

In *Kelley v. Upshaw*, 39 Cal.2d at page 189, 246 P.2d 23, the court suggests rather tentatively the possibility of a court exercising its discretion in permitting a defendant to avail himself of a plea in abatement after having waived it, but in the instant case it could hardly be urged that the court, in the exercise of a proper discretion, could have permitted this last-minute plea after a waiver, in the face of the chronology just set forth showing two distinct opportunities passed by. Indeed there is no contention on this appeal that the court's decision was made in the exercise of its discretion. The trial court's opinion shows that the court was constrained to follow the line of authority, ante, *Kelley v. Upshaw*, which held that the prematurity point could be raised otherwise than "plainly by plea", when it held that the point had been effectively brought to the attention of court and counsel by the demurrer to the original complaint, the court having relied on *Ellissen v. Halleck*, 6 Cal. 386, *Hentsch v. Porter*, 10 Cal. 555 and *Burke v. Maguire*, 154 Cal. 456, 98 P. 21. This is borne out by the following statement in respondent's brief: "Furthermore, it was wholly unnecessary for the preservation of the point to file the amended answer. At the first opportunity, defendant presented the point by general demurrer, and it is unnecessary, as above pointed out, to represent the same point. Plaintiff was thereupon placed upon notice of defendant's position, and the erroneous ruling of the Court in overruling our demurrer did not protect or excuse plaintiff."

There can be no doubt that *Kelley v. Upshaw*, decided since the judgment here-

in, definitely disapproves the rule on which the trial court relied.

What has been said herein relates only to the count for money had and received. Respondent concedes of course that under the other count based on the trust theory "the allegation as to the filing and rejection of a claim was unnecessary." However, as already indicated, the striking out of that part of plaintiff's amended complaint which pleaded the presentation and rejection of its creditors' claim, ended the case as far as the count for money had and received was concerned. As to that count plaintiff of course did not have to prove that the \$9,100 fund contained the stolen \$3,737.35, but merely that plaintiff had a valid claim, as any other creditor of a decedent might have, against the assets of Knorr's estate. The prejudicial error in removing that cause of action from the case is self-evident.

The judgment is reversed.

NOURSE, P. J., and DOOLING, J.,
concur.



117 Cal.App.2d 735

YOUNG v. YOUNG.

Civ. 4626.

District Court of Appeal
Fourth District, California.

May 13, 1953.

Wife brought divorce suit against husband and was awarded a divorce decree giving her custody of child. The Superior Court of Fresno County, Edward L. Kellas, J., entered a judgment modifying custody provisions of decree in order to give divorced husband custody with right of divorced wife to have child in her home from June 15 to September 1 of each year, and she appealed. The District Court of Appeal, Mussell, J., held that changed circumstances were suffi-

cient to justify Superior Court in modifying custody provisions.

Affirmed.

1. Divorce ⚭303(2)

Court, in modifying custody provisions of divorce decree proceeds on new facts considered in connection with facts formerly established, change of circumstances, conduct of parties, and best interests of child. Civ.Code, § 138.

2. Divorce ⚭303(3), 312.6(6)

Application for modification of custody provisions of divorce decree is addressed to sound legal discretion of trial court, and it is only where an abuse of such discretion is shown that determination of trial court will be disturbed on appeal. Civ.Code, § 138.

3. Divorce ⚭298(6)

Court is given wide latitude of discretion in determining in divorce suit whether other things are equal within meaning of statute providing that in awarding custody of minor children court is to be guided by what appears to be for best interests of child and that as between parents adversely claiming custody, neither is entitled to it as of right, but other things being equal, if child is of tender years, it should be given to the mother. Civ.Code, § 138.

4. Divorce ⚭298(1, 4)

Welfare of child and not shortcomings of parents is determinative in determining custody of child in divorce suit. Civ.Code, § 138.

5. Divorce ⚭303(3)

In proceeding to modify custody provision of divorce decree, burden is on moving party to satisfy court that conditions have so changed as to justify modification. Civ. Code, § 138.

6. Divorce ⚭312.6(3)

All presumptions are in favor of reasonableness of custody provisions of divorce decree, and, in absence of a showing that compels conclusion that decree should be modified, an appellate court cannot interfere with trial court's refusal to modify custody provisions. Civ.Code, § 138.

7. Divorce ⚭303(2)

Where evidence on application of divorced husband for modification of custody provisions of divorce decree showed that at time of interlocutory decree divorced husband was in military service and was not in position to have custody of child, and that at time of hearing for modification divorced husband had remarried and had established a home where child could be adequately cared for, and that his present wife was able and willing to take the child into the home, court was justified in modifying custody provision to award custody to divorced husband with right of divorced wife to have child in her home from June 15 to September 1 of each year. Civ.Code, § 138.

8. Divorce ⚭303(3)

On application for modification of custody provisions of divorce decree, a finding as to unfitness of divorced husband or divorced wife is not essential. Civ.Code, § 138.

Martin C. Thuesen, Fresno, for appellant.

Stanton M. Levy, Fresno, for respondent.

MUSSELL, Justice.

This is an action for divorce in which the custody of the minor child of the parties was, by the terms of the interlocutory and final decrees, awarded to plaintiff. Thereafter the trial court, on motion of defendant, modified these decrees by awarding the custody of the child to defendant, granting plaintiff the right of visitation by permitting her to have the child in her own home from June 15th to September 1st of each year. Plaintiff appeals from the order of modification and contends that the court erred in admitting evidence in support of the motion and that the evidence was insufficient to sustain the order.

The action was filed on August 30, 1950, and on September 1, 1950, the parties entered into a property settlement agreement which provided in part that the parties should have joint care and custody of the minor child, John Harry Young, then three

years of age, and that the defendant pay \$50 per month for his support and maintenance. The defendant was then a member of the United States Marine Corps and was stationed in Korea from September to November, 1950. He filed an answer denying certain allegations of the complaint and a written stipulation, dated October 18, 1950, was executed providing that the action might be tried as a default matter, waiving findings of fact and conclusions of law.

Defendant stated in his affidavit for modification that plaintiff executed an agreement, in part, as follows: "Therefore, it is agreed between the parties that at such time as the second party has established a home for himself and his family, that he shall be allowed to keep the child of the parties for the period of the school year, and that the first party shall keep the child for the period of the school vacation"; that this agreement was executed by plaintiff in consideration of the promise of defendant not to contest the divorce.

At the hearing on the default matter the trial court affirmed the property settlement agreement and made it a part of the decree, except insofar as it concerned the custody of the child and its support.

Evidence was introduced at the hearing on motion for modification on April 25, 1952, showing that defendant was then permanently stationed at Camp Pendleton as a practical instructor in infantry, teaching infantry tactics; that on April 12, 1952, he married one Donna Cochran; that he had a family home in Laguna Beach and came home every night; that his present wife had two children of her own, aged 8 and 4 years. Defendant's present wife testified that she was acquainted with the minor child of the parties and felt that she could give him the love, care and affection of a true mother.

Plaintiff's former wife testified that on March 27, 1952, she married a Mr. Anderson, a farmer, residing near Reedley, California; that she and the child were then living on his ranch; that the child seemed to be contented and well adapted to his present home and environment and got along well with Mr. Anderson's son by a former marriage, who was then 14 years old.

[1] Considerable evidence was introduced, over the objection of plaintiff, as to the execution of the agreements by the parties respecting the custody of the child. However, the same trial judge who heard the default matter presided at the hearing on the motion for modification and was properly concerned with ascertaining what facts were or were not established at the former hearing. As was said in *Foster v. Foster*, 8 Cal.2d 719, 732, 68 P.2d 719, 725:

"The case of *Crater v. Crater*, 135 Cal. 633, 67 P. 1049, 1050, lays down as the proper rule for a trial court in considering a modification of a custody decree the following: 'The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child.' See, also, *Simmons v. Simmons*, 22 Cal.App. 448, 452, 134 P. 791. It is obvious, we think, that this is the correct rule."

[2] An application for modification of an award of custody of a minor child is addressed to the sound legal discretion of the trial court and it is only where an abuse of such discretion is shown that the determination of the trial court will be disturbed on appeal. *Munson v. Munson*, 27 Cal.2d 659, 666, 166 P.2d 268; *Cowen v. Cowen*, 100 Cal.App.2d 366, 368-369, 223 P.2d 666.

[3, 4] Section 138 of the Civil Code provides that in awarding custody of minor children the court is to be guided by what appears to be for the best interests of the child and that as between parents adversely claiming custody, neither is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother. The court is given a wide latitude of discretion in determining whether other things are equal within the meaning of the code section. It is the welfare of the child and not the shortcomings of the respective parties which is determinative. *Clarke v. Clarke*, 35 Cal.2d 259, 261-262, 217 P.2d 401.

[5, 6] Appellant argues that there was no substantial evidence of a "change in cir-

cumstances" or that the plaintiff was less fit to have the custody of the minor child at the time of the modification than at the time of the entry of the divorce decree, or that the best interests of the minor child will be served by modifying the decree of divorce. In *Prouty v. Prouty*, 16 Cal.2d 190, 193, 105 P.2d 295, 297, it is stated that:

"* * * in every proceeding to modify a provision for the custody of a minor child the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification. All presumptions are in favor of the reasonableness of the decree, and in the absence of a showing that compels the conclusion that the decree should be modified, an appellate court cannot interfere with the trial court's refusal to modify it. *Gavel v.*

Gavel, 123 Cal.App. 589, 11 P.2d 654."

However, in *Foster v. Foster*, supra, 8 Cal. 2d at page 728, 68 P.2d at page 723 it was held that the "change of circumstance" rule is not an absolutely iron clad rule, and that there might be a case in which, despite the fact that there was apparently no change of circumstances, nevertheless the welfare of the child might require that the previous order of custody be changed. Citing *Bogardus v. Bogardus*, 102 Cal.App. 503, 283 P. 127.

[7,8] In the present case the evidence shows that at the time of the interlocutory decree the defendant was in military service and was not in a position to have the custody of his child; that at the time of the hearing on the motion for modification he had remarried and established a home where the child would be adequately cared for and that his present wife was able and willing to take the child into the home. These circumstances did not exist at the time of the original hearing and were sufficient to justify the trial court in entertaining the motion for modification. *Clayton v. Clayton*, 117 Cal.App.2d 7, 254 P.2d 669. A finding as to the unfitness of either party, as between the father and mother of the child, is not essential. *Clayton v. Clayton*, supra, 117 Cal.App.2d 7, 254 P.2d 669.

A review of the entire record before us leads us to the conclusion that a clear abuse of discretion on the part of the trial court was not shown.

Order and judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



117 Cal.App.2d 691

WILSON et al. v. CORRUGATED KRAFT CONTAINERS, Inc.

Civ. 19236.

District Court of Appeal, Second District,
Division 2, California.

May 8, 1953.

As Amended on Denial of Rehearing

June 3, 1953.

Hearing Denied July 2, 1953.

Action by buyers of corrugated boxes under contract which required them to submit all their requirements to seller for breach of the contract based upon defendant's cancellation of the contract wherein defense was that the contract had been canceled because plaintiffs had breached their contractual obligation to submit all requirements to defendant. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Fox, J., held, inter alia, that such failure was a material breach justifying cancellation even if defendant were operating at capacity to fill the orders it had.

Affirmed.

I. Sales ⇐417

In action by buyers of corrugated boxes against seller, which had canceled the contract on ground that buyers had breached it, for breach of contract, which required buyers to buy all their requirements from seller to a certain limit and to submit orders for boxes in excess of such limit to seller before attempting to buy them elsewhere, evidence supported trial court's determination that seller was entitled to select from excess requirements in order to fill minimum requirements and that rejection of certain offers from buyers did

not release buyers from their contractual obligation to submit to seller for acceptance by it orders for all their requirements.

2. Estoppel ⇨90(2)

Buyers, who were suing seller of corrugated boxes for breach of contract which required buyers to purchase all their requirements from seller up to certain limits and to submit orders for all requirements to seller before seeking to buy boxes elsewhere, were in no position to contend that seller did not have right to choose from among orders so long as it fulfilled its obligations as to quantity under the contract where buyers had acquiesced in such practice.

3. Contracts ⇨170(1)

The practical construction placed upon an instrument by conduct of parties is entitled to great weight by trier of facts in resolving a possible uncertainty of meaning.

4. Sales ⇨71(4), 98

Where contract provided that buyers of corrugated boxes would buy all their requirements from seller to a certain limit and would order all their requirements from seller before seeking to buy boxes elsewhere, and seller was obligated to fill orders to the stipulated limit, buyers were not required to purchase a single box, but if they had requirements, they were bound to submit them to seller, and willful departure from such obligation constituted material violation of the contract and justified seller in cancelling the contract, though seller was operating at capacity to fill the orders it had.

5. Contracts ⇨260

Where contract is indivisible and plaintiff's default in performance goes to the very root of the consideration bargained for, such breach amounts to failure of consideration entitling defendant to rescind.

6. Sales ⇨98

Fact that seller of corrugated boxes might have sold its product elsewhere did not minimize materiality of buyers' violation of contractual obligation to purchase

their requirements from seller, and, therefore, such violation justified seller's cancellation of the contract.

7. Contracts ⇨317

A willful default of contract may be material though no economic loss ensues.

8. Contracts ⇨260

Failure of consideration resulting from willful failure of plaintiffs to perform integral part of entire contract entitles defendant to cancel the contract.

9. Sales ⇨417

In action by buyers of corrugated boxes under contract which required buyers to submit all their requirements to seller for breach of contract based upon seller's cancellation of the contract, wherein seller defended on ground that it had canceled because buyers failed to submit their requirements to seller, evidence supported trial court's finding that buyers' departure from contractual obligation was material and justified seller in considering itself discharged from further performance.

Hanna & Morton, Harold C. Morton, James M. McRoberts, Los Angeles, and Max K. Jamison, Porterville, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

FOX, Justice

Plaintiffs appeal from a judgment for defendant in an action for an alleged breach of a sales contract.

Plaintiffs are wholesale jobbers of corrugated paper products and other packaging material whose business operations are concentrated in the Southern California area. Defendant is a manufacturer of corrugated boxes. During 1944, a period of great scarcity prevailed with respect to the supply of corrugated boxes, with all indications suggesting that this shortage would be protracted. On December 15, 1944, the parties entered into a written contract which, in one of its opening clauses, recognized the existence of "an emergency

situation pertaining to the supply of paper board." By its provisions, defendant agreed to sell and plaintiff to buy *all of plaintiffs' requirements* of corrugated paper products during the period January 1, 1945, to December 31, 1949, not exceeding 200 carloads yearly or approximately 4,000,000 square feet per month. Should plaintiffs desire to purchase more than 200 carloads during any year, the contract specified that such excess requirements must first be offered for acceptance to defendant; in the event of defendant's refusal to accept such orders, plaintiffs were privileged to purchase from other sources the orders rejected by defendant. In one part of the contract, plaintiffs were referred to as "a jobber who buys exclusively" from defendant. Plaintiffs also agreed (1) to submit to defendant a list of its present customers; (2) before soliciting a prospective customer, to ascertain whether such prospect was buying from defendant; and (3) to refrain from soliciting business from cannery firms without procuring defendant's consent.

During the year 1945, plaintiffs submitted to defendant all of their requirements, of which defendant accepted and filled only orders amounting to 155 carloads, or 41,450,000 square feet. During 1946, plaintiffs tendered orders in excess of 200 carloads, of which defendant accepted and filled the amount of 153 carloads, consisting of 46,418,480 square feet. However, although in each of these years defendant rejected some orders and accepted others on a selective basis, plaintiffs interposed no objection to this procedure nor did they at any time claim it was in violation of the contract. Commencing early in May, 1946, plaintiffs began to make very substantial purchases of war surplus corrugated boxes from outside sources without first submitting the orders to defendant. Plaintiffs alleged they made these purchases, which cost \$362,466.28, with defendant's knowledge. However, the trial court found that defendant had not consented to such purchases and only discovered the facts late in December, 1946, at which time it informed plaintiffs it would no longer proceed with the contract. In

February, 1947, defendant formally cancelled the contract pursuant to its earlier notice of termination. Thereafter plaintiffs brought this action, alleging that defendant's wrongful refusal to perform had resulted in a substantial loss of profits and good will to plaintiffs.

By way of clarification it must be observed that from the viewpoint of the manufacturer there is a great disparity in desirability between the production of certain types of simple boxes as opposed to others requiring a more complex type of fabrication. Stock boxes, which are the most commonly used and for which there is a relatively constant demand, are an especially attractive item of manufacture, since an amount greater than the ordered quantity will normally be produced during a particular "run," thus serving to reduce expenses by spreading the cost of setting up the machine for the "run" over a larger number of boxes, with reasonable assurance that the excess will be later sold. Special boxes, which are tailored to fit the peculiar needs of a customer, lack this advantage in that they are produced to order with less possibility of spreading out the "setting up" costs.

The record shows that on April 22, 1946, plaintiffs wrote a letter asking defendant for permission to make a purchase of boxes from an outside source. On the following day, defendant replied that it had no objection, but stated that its permission was restricted to that single item. Less than three weeks later, plaintiffs undertook their large-scale program of "outside" buying without tending these orders to defendant. These clandestine purchases continued for six months until defendant's discovery of the situation precipitated its termination of the contract between the parties.

The testimony indicated that the shortage of paper products began to ease up shortly after the end of the year 1946. During the latter year, defendant was filling orders from its various customers to the extent of its capacity, allocating supplies to them on a quota basis, but whenever possible endeavoring to give preference to orders for boxes which it considered most

advantageous and attractive for it to make, in view of the shortage both in material and labor supply.

Plaintiffs contend that their failure to submit all of their requirements to defendant did not constitute a breach of contract under the circumstances here present. In support of this argument, they first assert that defendant was obligated under the contract to manufacture plaintiffs' requirements up to 200 carloads per annum and defendants did not have the right "to pick and choose," from among the first 200 carloads ordered, which of plaintiffs' requirements it desired to manufacture. They urge that the trial court erred in placing upon the contract an interpretation which allowed defendants to select from the "excess requirements" in order to fill the "minimum requirements." With these contentions we are unable to agree.

[1-3] The court found that "As permitted by the contract, defendant, on occasions, rejected offers from plaintiffs to purchase corrugated paper products, but defendant did not * * * thereby release plaintiffs from their contractual obligation to submit to defendant for acceptance by it orders for all of their requirements of corrugated paper products before purchasing the same or any part thereof from other vendors, and this was understood by plaintiffs." This finding is fully supported by the evidence. At no time did plaintiffs treat defendant's rejection of any of their orders as a breach of contract or give any indication that this was a violation of the terms of the agreement. On the contrary, the evidence plainly demonstrates they acquiesced fully in such procedure. On this state of the record, plaintiffs are in

no position to argue at this time that defendant did not have the right to choose from among plaintiffs' orders so long as it fulfilled its obligations as to quantity under the contract. The practical construction placed upon an instrument by the conduct of the parties is entitled to great weight by the trier of facts in resolving a possible uncertainty of meaning. *Rosenberg v. George A. Moore & Co.*, 194 Cal. 392, 229 P. 34; *Robinson v. Arthur R. Lindberg, Inc.*, 140 Cal.App. 669, 35 P.2d 1057.

[4, 5] Plaintiffs also argue that the fact that defendant picked and chose from among the orders given and the fact that it was operating at capacity to fill the orders it did select establishes that the failure of plaintiffs to submit all of their orders to defendant was not a material breach of contract. However, it is fully apparent from an analysis of the provisions of the contract, the language used therein to designate the relations between the parties and the circumstances under which it was executed, as well as from the interpretation given it by the parties themselves, that the agreement imposes upon plaintiffs the obligation of submitting all their requirements to defendant. This is inescapable if proper effect is to be given the provision that "Buyer hereby agrees to purchase * * * all of Buyer's requirements," not in excess of 200 tons from defendant, and to first offer all requirements in excess of that figure to defendant.¹ It is fortified by the designation in the contract of plaintiffs as jobbers buying exclusively from defendant. Though plaintiffs were not required to purchase a single box, yet, if they had requirements, they were bound to submit them to defendant. Yet this is precisely

1. The contract in this respect provides as follows:

"(1) The Seller hereby agrees to sell and deliver and the Buyer hereby agrees to purchase, accept and pay for all of Buyer's requirements of corrugated paper products for Buyer's own use and for the purpose of resale not, however, to exceed two hundred (200) carloads per annum or approximately four million (4,000,000) square feet per month during the term and period of five (5) years,

commencing January 1, 1945, and terminating December 31, 1949. In the event, however, that Buyer shall desire to purchase more than two hundred (200) carloads per annum, it shall first offer such excess purchases to Seller for acceptance by it. In the event that Seller shall refuse to accept such excess orders in whole or in part, then Buyer shall be privileged to make such purchases as shall have been turned down by Seller from other sources of supply."

what plaintiffs failed to do. This was the core and crux of the contract from the defendant's standpoint. At a time when a seller's market prevailed, it is clear the dominant measure of advantage to defendant in entering into such a contract was (1) the right to accept the most desirable orders in meeting its obligation to furnish plaintiffs with at least 200 cars per year of its total requirements, and (2) the right to fill as much as it desired of plaintiffs' requirements in excess of 200 carloads per year. That plaintiffs' willful departure from a fundamental obligation under the contract constituted a material violation thereof is too apparent to admit of controversy. *Blahnik v. Small Farms Imp. Co.*, 181 Cal. 379, 381, 184 P. 661. Where, as here, the contract was manifestly an entire and indivisible one with interdependent covenants, *Lewis v. Shell Oil Co.*, 220 Cal. 80, 29 P.2d 413, and plaintiffs' default in performance went to the very root of the consideration bargained for, such breach amounted to a failure of consideration, entitling defendant to rescind. Civ.Code, sec. 1689(2); 4 Cal.Jur., p. 785; 6 Cal.Jur., pp. 391-2; *Grismore on Contracts*, pp. 208-13. See *De Burgh v. De Burgh*, 39 Cal.2d 858, 863, 250 P.2d 598. Plaintiffs' attempt to gainsay the significance of this breach by asserting that defendant could not and would not have filled more than 200 carloads of goods is singularly without force in the light of the fact that the evidence shows that they initiated their outside purchases of boxes, much of which defendant testified it would have produced for them, even before they had submitted to defendant orders for 200 carloads of corrugated goods.

[6] Finally, plaintiffs argue that defendant was not justified in canceling the contract, despite their outside purchases, since defendant did not suffer any pecuniary damage. The fact that defendant might have sold its product elsewhere under the fortuitous circumstances here prevailing does not minimize the materiality of plaintiffs' violation of its fundamental obligation under the contract; nor should it affect defendant's right to insist on receiving from plaintiffs the crucial benefit

flowing to it under its bargain. To embrace the validity of such an argument would give rise to an anomalous result. On this theory, plaintiffs might have refused all performance by abstaining from submitting any requirements to defendant, yet, despite a total breach, could urge it was of insufficient materiality to warrant termination simply because defendant had another market for its total product. It would create the absurd effect of binding defendant to a contract in which plaintiffs' obligation is illusory and chimerical, while permitting a plaintiff in wilful default to make capital of his own wrong.

[7-9] The existence of financial detriment to the innocent party is not essential in order to excuse his further performance. A wilful default may be material though no economic loss ensues. See *Lewis v. Shell Oil Co.*, *supra*; *May v. New York Motion Picture Corp.*, 45 Cal.App. 396, 187 P. 785. The occurrence of a failure of consideration resulting from the wilful failure of plaintiffs to perform an integral part of an entire contract is sufficient to entitle defendant to cancel. *Sterling v. Gregory*, 149 Cal. 117, 118, 85 P. 305; *Torrey v. Shea*, 29 Cal.App. 313, 319, 155 P. 820. It has repeatedly been held in this state that a breach of a requirements contract by trafficking with outside sources or competitors is by its very nature material and will give the injured party the right to cancel. *Twomey v. People's Ice Co.*, 66 Cal. 233, 5 P. 158; *Sterling v. Gregory*, *supra*; *Lewis v. Shell Oil Co.*, *supra*; *Robinson v. Boulevard Express, Inc.*, 17 Cal.App.2d 492, 62 P.2d 424. In *O'Bryan v. Mengel Co.*, 224 Ky. 284, 6 S.W.2d 249, plaintiff had agreed to buy all of its requirements of boxes from defendant. During the term of the contract and without defendant's knowledge, plaintiff purchased from another concern a large quantity of boxes of the kind covered by the contract. Defendant learned of this purchase and gave notice of its intention no longer to be bound by the contract. Plaintiff sued to recover damages for defendant's refusal to continue under the contract. In holding that defendant was within its rights in refusing further performance, the court stat-

ed: "When a party to a contract, in violation thereof, buys from others in material amounts the articles covered by the contract, he thereby enables the other party rightfully to cancel the contract, and destroy the benefits thereof to the other so far as it remains unexecuted." 6 S.W.2d at page 252. In the case at bar, plaintiffs purchased from other suppliers corrugated paper products in 1946 in the amount of \$362,466.98 without first tendering such orders to defendant as was its duty under the contract. During the same year its total purchases from defendant were \$510,540.73. There is thus substantial evidentiary support for the trial court's finding of the material character of plaintiffs' departure from its contractual obligations. For the reasons already stated, defendant was justified in considering itself discharged from further performance under the agreement.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



117 Cal.App.2d 740

ALMA INV. CO. et al. v. KRAUSSE et al.

Civ. 4630.

District Court of Appeal,

Fourth District, California.

May 13, 1953.

Rehearing Denied June 9, 1953.

Hearing Denied July 9, 1953.

Action by tax sale purchasers to quiet title to interest in mining rights in and all oil, gas and other hydrocarbon substances under certain land. The Superior Court, Kern County, rendered judgment for tax sale purchasers and tax delinquent owners appealed. The District Court of Appeal, Barnard, P. J., held that possession of owner in fee of land, who was a co-owner with tax delinquent owners of oil, gas and hydrocarbon rights in land was possession of all tax delinquent owners so that statutes limiting time within which defense to tax deeds might be maintained did not preclude tax delinquent

owners from showing they had no notice that mineral interests had been assessed separate from land and that mineral interests were not assessed in their names.

Judgment reversed.

1. Taxation ⚡421(1)

An assessment of land is fatally defective if it contains such a falsity in designation or description of parcel assessed as might probably mislead owner and prevent him from ascertaining by notices that his land was to be sold or redeemed. Revenue and Taxation Code, §§ 175, 3521, 3522, 3725, 3726.

2. Limitation of Action ⚡60(10)

A limitation statute with respect to action to quiet title does not run against one in possession of land and person in possession of land cannot be required under penalty of forfeiture to bring action against one claiming adverse interest or title to such property. Revenue and Taxation Code, §§ 175, 3521, 3522, 3725, 3726.

3. Taxation ⚡805(4)

Possession of owner of fee in land who was a co-owner with tax delinquent owners of oil, gas and other hydrocarbons in or under land would be deemed possession of all tax delinquent owners of such mineral rights so that statutes limiting to one year time in which defense to tax deed might be maintained did not apply and did not preclude such tax delinquent owners from asserting in action to quiet title that, as record owners of mineral rights, they had no knowledge that mineral rights were assessed separate from land and that such mineral rights were not assessed in their names. Revenue and Taxation Code, §§ 175, 611, 2803, 3521, 3522, 3725, 3726.

H. J. March, H. F. Clary, A. E. Stebbings, Los Angeles, Conron, Heard & James, Wayne M. Hamilton, Bakersfield, for appellants.

West, Vizzard, Howden & Baker, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title. Fifteen of the thirty-one defendants appeal from a

judgment quieting the plaintiffs' title to "a 98% interest in the mining rights in, and all the oil, gas and other hydrocarbon substances under" a certain 40 acres of land in Kern County.

This land was acquired in 1936 by William J. Williams and Bertha Williams, his wife, as joint tenants. They conveyed oil and gas rights to a number of persons, these conveyances covering in the usual language an undivided fractional interest in "all oil, gas and other hydrocarbons in or under" this land. In January, 1939, the Williams conveyed the surface rights in this property, together with 2% of the oil and gas rights, to T. A. Putnam and Carrie Putnam, his wife, as joint tenants, reserving to themselves and their assignees 98% of such oil and gas rights. Mr. Putnam later died, and Mrs. Putnam became the owner of and still owns the surface rights and 2% of the oil and gas rights in this land. Mr. Williams died in 1939, and Mrs. Williams became the owner of such part of the 98% of oil and gas rights as had not theretofore been transferred to others. Thereafter, she made further transfers of such fractional interests in the oil and gas rights. Finally, on April 22, 1941, she quitclaimed all her remaining interest in such oil and gas rights to her son Billie N. Williams. In May, 1941, Billie N. Williams conveyed all his interest in said oil and gas rights to various persons, these conveyances being recorded during that month. None of the various deeds conveying oil and gas royalty interests to the defendants contained any such words as "mine", "mining" or "mining rights."

Prior to March, 1939, this land, without any severance of oil or mineral rights, was assessed to Mr. Williams and all such taxes were paid. In March of 1939, 1940 and 1941, the whole property, without any severance, was assessed to Mr. Putnam, and these taxes were paid. In March, 1942, the assessor made a severance assessing the land "exclusive of 98 percent interest mining rights" to Mr. Putnam, and assessed "98 percent interest mining rights" in this land to Billie N. Williams, on which separate interest a tax of \$2.02 was levied. A tax statement was mailed to Billie N.

Williams in care of his father, who was dead. None of the owners of the 98% interest in the oil and gas rights received any notice of the severance or of the tax on the severed interest, and that tax was not paid. A similar condition continued through and including the year 1950, the severed interest being assessed to Billie, tax statements being mailed to him, no tax being paid, and the owners of the severed interest receiving no notice.

By a deed dated June 30, 1948, and recorded July 14, 1948, the tax collector conveyed the severed interest to the State of California, the description in this deed reading "98 per cent interest mining rights" followed by a description of this land. By a deed dated March 3, 1950, and recorded March 17, 1950, the tax collector conveyed the severed interest to these plaintiffs, the description in the deed being the same as that in the deed to the state but followed by the words "last assessee Billie N. Williams." None of these defendants, who owned various percentage interests in these oil and gas rights, had received any notice that the "98 per cent interest mining rights" or any other interest had been severed from the fee title and separately assessed, or had been sold to the state or to these plaintiffs, until they were served with the complaint and summons in this action. The land involved is improved with a residence and outbuildings, and has been farmed during all of the period here in question. The Williams and the Putnams or their lessees have been in undisturbed occupancy and possession of the land continuously since May, 1936. In June, 1936, the Williams had leased the land for the purpose of prospecting for and producing oil and gas to one Anderson. There was no production of oil or gas, and no exploration or drilling for oil or gas on the property during the period in question. In 1942, the right which had been given to Anderson to prospect for oil was surrendered by quitclaim deed.

This action was brought on April 13, 1951. The complaint alleged that the plaintiffs are the owners of and sought to quiet their title to "a 98% interest in the mining rights in, and all the oil, gas and

other hydrocarbon substances under" this land. (Italics ours.) The plaintiffs over objection, entered in evidence the deed to the state and the deed to the plaintiffs above described, and rested. The defendants moved for a nonsuit contending that the complaint sought to quiet title to an interest in real property not conveyed by these deeds, being "all the oil, gas and other hydrocarbon substances under" this land. The court took this motion under submission and continued to hear evidence. When the defendants began to introduce evidence of their title and of irregularities in the various proceedings, an objection was made that all such evidence was barred by sections 175, 3522 and 3726 of the Revenue and Taxation Code. The court took this objection under submission and continued to hear evidence.

The defendants then introduced evidence tending to show that the phrase "mining rights" cannot be reasonably interpreted to include rights to the proceeds of oil and gas; that if that phrase is so interpreted as to include such rights it would be indefinite and misleading under the custom of conveyancing and common usage in that county; that the defendants were in actual possession of their interest in improved and cultivated land by and through the possession of their cotenants, which possession had never been disturbed; that no notice had ever been given to the defendant, prior to the commencement of this action, of such severance in assessment; and that various irregularities existed in the tax proceedings in that proper notices had not been given, that no attempt had been made to assess the severed interest to the owners of that interest whose conveyances were recorded, and the severed interest was assessed to a person who was not the last assessee and had no claim or interest in the land. The court then denied the motion for a nonsuit; granted a motion to strike all of the evidence produced by the defendants; found that the plaintiffs are the owners of "A 98% interest in the mining rights in, and all the oil, gas and other hydrocarbon substances under" this land; and found as a conclusion of law that any defense to the action based upon any in-

validity or irregularity of any proceeding leading to the execution of the deed to the state, or leading to the execution of the deed from the state to the plaintiffs, is barred by the provisions of section 175, 3522 and 3726 of the Revenue and Taxation Code. Judgment was entered accordingly, from which this appeal was taken.

These sections of the Revenue and Taxation Code have the general effect of limiting the time in which a defense to a tax deed may be maintained to one year. Sections 3521 and 3725 place a corresponding limitation on the time within which an action attacking the validity of such deeds may be brought. There is a real question, however, as to whether these statutes may be held applicable under some circumstances. In *Tannhauser v. Adams*, 31 Cal. 2d 169, 187 P.2d 716, 720, 5 A.L.R.2d 1015, involving the question as to whether section 3521 was applicable, the court discussed cases in other states holding that such limitation statutes were inapplicable to one in possession and quoted with seeming approval from a New York case, *Meigs v. Roberts*, 1900, 162 N.Y. 371, 56 N.E. 838, as follows:

"It is questionable whether, as to an owner in actual possession of land, the record of a hostile conveyance in the clerk's office is sufficient to set a statute of limitations running against him, so as to destroy his title."

In *McCaslin v. Hamblen*, 37 Cal.2d 196, 231 P.2d 1, 3, in considering section 175, the court suggested that this rule might have application where the plaintiff is "the original tax-delinquent owner in undisturbed possession," but should not be applied in favor of such an owner's grantee who took conveyance with knowledge of the intervening rights of a third party. This holding was followed in *McKenna v. Ping*, 105 Cal.App.2d 752, 234 P.2d 246. Other circumstances may be imagined where the applicability of these statutes might well be questioned.

An unusual and obviously unjust situation here appears. For years after many small royalty interests in this land had been conveyed to others and recorded, the property as a whole was taxed to the fee owner

and the taxes fully paid. The assessor for years had ignored these conveyances. When he finally decided to segregate and separately assess some sort of interest in this land, he arbitrarily taxed 98% of such interest to one who then owned no interest of any kind and who had never owned more than a small part of the interest thus separately assessed. All notices were sent to that person who was away in the army for four years, and thereafter were sent to him at a wrong address although his correct address was known. The defendants, who owned an interest in the land, would naturally be deceived and believe that the taxes were being paid as before. They were left in complete ignorance until this suit was brought, the plaintiffs having received a final tax deed and then waited until a year had expired. The defendants thus lost their interest in this land, a type of interest which is substantial and of importance throughout the whole state and nation, without any actual notice that any such tax had been levied, or that the method of assessment under which all taxes had been previously levied and paid, had been changed. This startling result follows from the court's liberal interpretation of the language of the assessment and tax deeds, and strict interpretation of the limitation statutes, with the result of shutting out any possible defense however good in itself. It may well be doubted that these statutes were ever intended to be applicable to such a situation, and it would seem that the courts should be able to find some way to avoid such a result.

[1] A real doubt existed as to whether the assessment here relied on was sufficient to affect the particular interests which the defendants owned. In *Jacoby v. Wolff*, 198 Cal. 667, 247 P. 195, 198, the court said, quoting from a New York case, *Tallman v. White*, 2 N.Y. 66:

"An assessment of land is fatally defective and void, if it contains such a falsity in the designation or description of the parcel assessed as might probably mislead the owner and prevent him from ascertaining by the notices, that his land was to be sold or redeemed. Such mistake, or falsity,

defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax.'"

The description of these interests as "mining rights" in the assessment and deeds appears to be uncertain, indefinite and misleading under the circumstances. Apparently, the plaintiffs recognized this as they sought in this action to have that meaning clarified and extended by judicial interpretation. It would seem that when an interest in real property is segregated and separately assessed for the first time, it should be sufficiently described so that the owner thereof would know that his interest was being assessed without having to wait for a final decision by the highest court. Webster's New International Dictionary does not contain a definition of the various "mining rights", but defines "mine" and "mining" as working in a mine or digging metals, coal or precious stones out of the earth. Black's Law Dictionary defines "mining" as the process or business of extracting from the earth the precious or valuable metals either in their native states or in their ores. It was held in *In re Rollins Gold, etc., Min. Co., D.C.*, 102 F. 982, that the term "mining" as ordinarily used does not include the sinking of wells or shafts for oil or gas, unless expressly so declared by statute. In *Cornwell v. Buck & Stoddard, Inc.*, 28 Cal.App.2d 333, 82 P.2d 516, after discussing the meaning of "mining purposes," the conclusion was expressed that while oil is classified as a mineral the process of extracting it from the ground is not generally understood to mean "mining", and it was held that the phrase "mining purposes" as used in section 2980 of the Civil Code did not include oil wells or oil drilling operations. While this section was later amended for obvious reasons not material here, the reasoning of that case is applicable here, and we have no statute in this state declaring or indicating that "mining rights" is to be interpreted as including ordinary oil rights. In *Smith v. Cooley*, 65 Cal. 46, 2 P. 880, a mining right is defined as a right to enter upon land and work the ground for the purpose of obtaining minerals or ores which may be

found therein. This idea of mining rights has long prevailed and is what would be understood by people in general when such rights are referred to. Even if any oil rights were thought of by the ordinary person, in connection with the term "mining rights," the right of a lessee to enter the land and drill for oil would naturally be understood, rather than the right to share in the proceeds of oil after it is produced. This latter right is a profit *à prendre*, *Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871, and while it is an interest in land, it is one which is separate and distinct from the right to drill involved in an oil lease. If any separate mining right here existed it would seem to have been the limited right given to Anderson to drill for oil on this land. Not only was there a real question as to the meaning of the language used in the assessment and tax deeds, and as to whether the interests owned by the defendants were covered thereby, but that question should be determined in the light of common usage and the way that language would be understood by people in general throughout the whole state, and not because a different understanding may possibly have prevailed in limited circles in Kern County. These defendants resided in various parts of the state, and purchasers and owners of such interests in land are more apt than not to be scattered over the whole state and elsewhere. If defendants' interest in this land was not sufficiently described, taxed and sold these statutes would not apply, and it seems unthinkable that they should be held to be so applicable as to prevent an owner from even presenting a defense on the ground that his property had not been assessed or sold.

Even if it be assumed that the language used in this assessment and followed in the tax deeds was not, in itself, so indefinite as to be misleading, the making of the segregation for the first time in this manner would naturally be deceptive. All interests in this land were assessed together for years and the taxes fully paid. While there were prospective rights to share in any oil produced, no oil had been pro-

duced and no wells had been drilled. These prospective rights were of little present value, as shown by the amount of the assessment, and the owners of those rights would naturally rely on a continuance of the usual and customary assessment and payment of taxes, until a different situation was brought to their attention. Section 2803 of the Revenue and Taxation Code provides for the segregation of certain interests in land after the assessment has been made, at the request of the owner of such an interest, but requires the presentation of record evidence of such ownership. The assessor may have the right to segregate and separately assess such an interest as that owned by the defendants, if such a separate interest appears of record, but it should inevitably follow that he should be required to assess it, especially for the first time, to the persons owning such interest as shown by the record, or give them notice in some way, so that such owners would have an opportunity to pay the segregated taxes and protect themselves. Section 611 provides that in the case of real property it shall be assessed in the name of an absent owner, if that name appears of record in the office of the county recorder. The defendants were such absent owners, owning an interest in real property, and their conveyances were on record. This statute was not followed and the making of such a new assessment for the first time, which was in no way brought to the attention of the owners of the interests thus separately assessed, might well result, in a very real sense, in depriving these owners of their property without due process of law. The statutes here in question were doubtless intended to cover the ordinary case where land is assessed in the usual manner, and the subsequent proceedings are outlined in the pertinent statutes. It may be seriously questioned whether they were intended to, or should be held to, have application to such an assessment as that here in question, the procedure for which is not too well outlined in the statutes, unless there appears a full and complete compliance with the usual and ordinary rules governing the notice required by due process.

[2,3] A further question with respect to the application of these statutes appears in connection with the matter of possession. In the Tannhauser and McCaslin cases, above referred to, it was strongly implied that such statutes should not be held applicable to a "tax-delinquent owner" who was in undisturbed possession of the land. In McKenna v. Ping, *supra*, it was said [105 Cal.App.2d 752, 234 P.2d 249]:

"It appears to be a general rule that a limitation statute, with respect to an action to quiet title, does not run against one in possession of land, and a person in possession of land cannot be required under penalty of forfeiture to bring an action against one claiming an adverse interest or title to such property."

Each of these percentage interests in the oil and gas was an interest in the land, and each of the defendants was an owner of one of these interests. Mrs. Putnam, who owned the fee, also owned such an interest. She and the defendants were cotenants with respect to this interest in the land. She was at all times in actual possession of the land itself, which physically contained any oil or gas that might be involved in the interest held by her cotenants. She was in actual possession with respect to the right attempted to be separately assessed, so far as anyone could be, until oil is actually removed and becomes personal property and thus subject to a different form of assessment. Being one of the cotenants with respect to this interest in the land, her possession should under familiar rules be deemed the possession of all of them. The defendants are the "original tax delinquent owners" and they should be held to be in possession of the property, within the meaning of the suggested rule, and as against the plaintiffs who had no actual possession of any kind.

Whether or not it should eventually be held that these statutes are not applicable to an original tax delinquent owner in possession, so as to prevent him from defending against a tax title held by one not in possession, it must be held that they are not so applicable as to prevent the owner of an interest in the land from raising the

defense that the assessment as made, and the sale based thereon, was of some other interest and did not cover or affect his particular interest. At most, these statutes create a time limitation on the right of presenting a defense based upon the invalidity of the tax proceedings. They do not purport to make any such limitation on the right of an owner to make a defense based on the contention that the proceedings, even if valid, did not apply to or affect the land or interest in land which he owns. The appellants were entitled to make such a defense here and were not barred by these statutes from so doing. Questions of fact were presented which should have been determined, and it was error to strike out all the evidence introduced and offered except the two tax deeds.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.



117 Cal.App.2d 639

VARTANIAN v. CROLL

Civ. 15429.

District Court of Appeal, First District,
Division 1, California.

May 6, 1953.

Proceeding to have vacated and set aside a judgment in favor of defendant, on ground that such judgment had been entered out of mistake, inadvertence and excusable neglect of plaintiff, and by reason of fraud perpetrated on court by defendant. The Superior Court, County of Alameda, A. J. Woolsey, J., entered order vacating and setting aside judgment as petitioned, and permitting plaintiff to file an amended complaint, and defendant appealed. The District Court of Appeal, Peters, P. J., held that affidavits, to effect that plaintiff's then counsel was negligent in failing to discover and produce witnesses, when considered with affidavit to effect that one basic witness was caused to have an aversion towards testify-

ing as result of threats made by defendant, supported order of trial court.

Order affirmed.

1. Appeal and Error ⇨982(1)

Judgment ⇨363, 375

A motion to vacate and set aside a judgment on ground of mistake, inadvertence and excusable neglect, and by reason of fraud perpetrated upon court, is addressed to the sound discretion of the trial court, and its determination will not be disturbed in absence of clear showing that this discretion has been abused. Code Civ. Proc. § 473.

2. Appeal and Error ⇨982(1)

Where trial court sets aside entry of default on ground of excusable neglect, etc., appellate courts will seldom reverse because of strong public policy favoring trials on their merits. Code Civ.Proc. § 473.

3. Appeal and Error ⇨982(1)

Where same judge who tried case on the merits sets aside a judgment therein on ground of excusable neglect, etc., appellate courts will affirm if there is any substantial showing of excusable neglect on part of moving party, or some unconscionable conduct on part of adverse party. Code Civ. Proc. § 473.

4. Judgment ⇨368

Mere fact that an attorney does not make a skillful presentation of his client's case will not, standing alone, usually warrant relief from judgment adverse to client on ground of mistake, inadvertence and excusable neglect. Code Civ.Proc. § 473.

5. Appeal and Error ⇨982(2)

Judgment ⇨364, 368

Although client is generally chargeable with negligence of his attorney, negligence on the part of attorney will, under some circumstances, justify relief from adverse judgment on ground of mistake, inadvertence, and excusable neglect; and a mistake of the attorney, if it is one of law as distinguished from mere ignorance of the law, may be sufficient to justify the granting of such relief, and in some cases, the reversal of order denying such relief, even

without any participation by adverse party. Code Civ.Proc. § 473.

6. Judgment ⇨375

Activity on part of counsel opposing a party against whom an adverse judgment is rendered, which prevented, directly or indirectly, a fair trial on the merits, constitutes the type of fraud which will justify vacating judgment on ground of mistake, inadvertence, and excusable neglect of said party, and by reason of fraud perpetrated upon court by his opponent. Code Civ. Proc. § 473.

7. Judgment ⇨367

Relief in the form of the vacating of a judgment on ground that it had been entered out of mistake, inadvertence and excusable neglect, will not be granted to one who was grossly careless of his own affairs. Code Civ.Proc. § 473.

8. Judgment ⇨390

In proceeding by plaintiff to vacate and set aside adverse judgment on ground that it was entered out of mistake, inadvertence and excusable neglect, and by reason of fraud perpetrated upon court by defendant, affidavits, to effect that plaintiff's then counsel was negligent in failing to discover and produce witnesses, when considered with affidavit to effect that one basic witness was caused to have an aversion towards testifying as result of threats made by defendant, supported order of trial court vacating judgment. Code Civ.Proc. § 473.

9. Affidavits ⇨17, 18

Affidavits, if objected to, must state the facts and circumstances and must not allege mere conclusions, but incompetent statements in an affidavit become competent evidence when admitted without objection.

10. Appeal and Error ⇨224

Appellant could not raise for first time on appeal the question of the competency of affidavits which appellee had used to support his motion to have judgment vacated on ground of excusable neglect, etc., but which appellant had not objected to in the trial court. Code Civ.Proc. § 473.

11. Affidavits ⇨18

In proceeding to have judgment vacated on ground of excusable neglect, etc., evi-

dence, in petitioner's affidavit, to effect that petitioner's opponent, in a loud and threatening manner, had warned affiant to forget that she knew that said opponent had been petitioner's agent in transaction which was subject-matter of the law suit, supported inference that opponent was seeking to suppress the testimony out of a consciousness of liability, and constituted an admission by conduct which rendered affidavit admissible even if the assertion of agency were a conclusion. Code Civ.Proc. § 473.

Richards & Rankin, Oakland, for appellant.

Robert H. Kroninger, Oakland, for respondent.

PETERS, Presiding Justice.

This is an appeal from an order made under section 473 of the Code of Civil Procedure vacating and setting aside a judgment in favor of defendant on the ground that such judgment had been entered out of mistake, inadvertence and excusable neglect of the plaintiff and by reason of fraud perpetrated upon the court by the defendant. The same order permitted plaintiff to file an amended complaint. The original trial on the merits was before the court without a jury, and before the same judge who granted the motion. Defendant appeals, contending that, in granting this relief, the trial court abused its discretion as a matter of law.

The complaint upon which the cause proceeded to trial was for an accounting for secret profits allegedly secured by appellant, who is a real estate broker, while acting as the agent of respondent. The complaint alleges that respondent employed appellant to purchase a motel in Calistoga; that appellant represented that the property could not be purchased for less than \$65,000; that appellant concealed the fact that the motel could be purchased for \$40,000, and appellant did in fact purchase it for that sum but sold it to respondent for \$65,000; that in reliance on these representations respondent delivered to appellant a deed to certain Oakland property worth \$25,000 and was induced, by false repre-

sentations, to make this deed to appellant. The prayer requests that appellant either account for the Oakland property or pay to respondent the \$25,000 secret profit.

The appellant filed a general denial, and the cause proceeded to trial. The trial record was not introduced in this proceeding, only the judgment roll in that action now being before us. The findings in that case are to the effect that respondent did not employ appellant as his agent to buy the motel; that appellant made no representations that the property could not be obtained for less than \$65,000; that the Oakland property was not delivered to appellant to be used as part of the purchase price of the motel; that the Oakland property was not worth more than \$7,500; that respondent and appellant in fact agreed to exchange properties; that appellant then had an option to buy the motel; that the parties dealt with each other as principals and at arm's length; that respondent knew that appellant was not his agent in the deal; that the motel could not then have been secured for \$40,000. Judgment denying respondent any relief was entered July 18, 1951, and a motion for a new trial was in due course denied. Respondent then changed lawyers. On January 7, 1952, eleven days before the six-month period prescribed by section 473 of the Code of Civil Procedure would have expired, respondent, through his new counsel, filed his notice of motion to vacate the judgment, and to permit the filing of an amended complaint. Respondent predicated his claim for such relief on his own inadvertence and excusable neglect, and on the further ground that appellant had perpetrated a fraud upon the court. Several affidavits were filed in support of these claims. In his own affidavit he averred that his first lawyer turned him over to his son who was not a lawyer, but that affiant thought that he was dealing with a lawyer; that he told the son the facts and showed him documents which, had they been introduced into evidence, would have resulted in a judgment in his favor; that such facts and documents were not introduced because the lawyer who tried the case was unfamiliar with the facts and did not fairly, properly or adequately represent respondent;

that as a result the court was not fully apprised of the true facts. Respondent further averred that he can now definitely prove that appellant was his agent, had no valid option on the motel, and made a secret profit of \$25,000, the value of the Oakland property. In support of these allegations that appellant was his agent, defrauded him, and made a secret profit, several other affidavits were filed. Helen Long, the former owner of the motel property, averred that at no time did she give appellant an option on the property; that she and her attorney negotiated with appellant as respondent's agent; that as a result of those negotiations the motel property was conveyed to respondent for \$40,000; that appellant represented himself as respondent's agent; that she had no knowledge at all that the Oakland property was involved in the deal. The lawyer for Mrs. Long averred that appellant had no option on the motel property, and that appellant told him he was respondent's agent. This affiant incorporated a letter executed by the affiant and Mrs. Long and addressed to appellant, stating that they agreed to the sale of the property to respondent.

In support of the charge of fraud on the part of appellant the affidavit of Helen Dusio, secretary and property manager for Helen Long, was filed. It avers that her office adjoins that of appellant in Oakland; that in October of 1949, at the direction of Joe Long, deceased husband of Helen Long, a listing of the motel directed to appellant "as real estate broker" was prepared by her and delivered to appellant; that about this time appellant became respondent's agent for the purpose of purchasing the motel; that she notarized the deed from respondent to appellant of the Oakland property; that from respondent's then demeanor it was her belief that he did not understand the true nature and consequences of the transaction; that in April, 1950, the month the main action was filed, defendant stated to her "If anybody asks you about the Calistoga deal, you don't know anything," to which affiant replied "Well, that would be true, because I don't know anything about it except that you were Mr. Vartanian's agent." The affidavit contin-

ues: "Walter Croll then stated, in a loud and threatening manner, 'That's exactly what I don't want you to say. And if you know what's good for you, you'll keep your mouth shut.'" The affidavit then concludes: "That by reason of said threat, affiant desired and continues to desire to avoid being a witness in, or to give evidence in any dispute which has arisen or which might arise as a result of said transaction."

Appellant filed two counter-affidavits alleging that the facts averred by respondent were available to respondent at the time of trial; that Helen Long, Helen Dusio, and Mrs. Long's attorney were all present in Alameda County prior to and during the trial; that at some undisclosed date he secured an option on the property from Joe Long, now deceased. He denied the conversation set forth in Helen Dusio's affidavit.

The former attorney for respondent averred that, prior to trial, he talked the case over with respondent; that at the times here involved his son was a law student who investigated some of the facts of the case for him; that the son made a synopsis of such facts and delivered it to affiant before trial, plus all pertinent letters and documents; that in his opinion the case was competently handled; that he had delivered all pertinent papers and documents in his file to respondent's new counsel in October and December, 1951.

Respondent also filed a proposed amended complaint setting forth, in four causes of action, in considerable detail, the claimed fraud and misrepresentations.

On these affidavits, after argument, the trial court made its order vacating the judgment, finding that such judgment had been rendered against respondent "by reason of his mistake, inadvertence and excusable neglect and by reason of fraud on the part of the defendant, [appellant] Walter Croll, perpetrated upon the court"; that respondent had a good cause of action on the merits, and that good cause appeared for the filing of the amended complaint, leave to file such pleading being granted.

[1-3] It is appellant's main contention that the facts, as a matter of law, were

insufficient to warrant the trial court in setting the judgment aside. In passing on this contention certain general principles must be kept in mind. A motion for relief under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court. Its determination will not be disturbed in the absence of a clear showing that this discretion has been abused. See for a good statement of the rule, *Beard v. Beard*, 16 Cal.2d 645, 107 P.2d 385. There are relatively few reversals in this field. Of course, where there has been the entry of a default and the trial court sets it aside the appellate courts seldom reverse because of the strong public policy favoring trials on their merits. That policy is not applicable here because in the instant case there has been a trial on the merits. Even in such cases, however, where the judgment is set aside by the same judge who tried the case, the appellate courts will affirm if there is any substantial showing of excusable neglect on the part of the moving party or some unconscionable conduct on the part of the adverse party.

[4] In the instant case the respondent relies on the negligence of his first counsel in failing to produce available evidence as excusable neglect. Stated thus baldly, that alone is probably not sufficient to warrant relief under section 473. It is a general rule that a client is chargeable with the negligence of his attorney, and that his redress, if any, is against that attorney. The mere fact that an attorney does not make a skillful presentation of a client's case will not, standing alone, usually warrant relief under section 473. *Smith v. Tunstead*, 56 Cal. 175; *Nicol v. City & County of San Francisco*, 130 Cal. 288, 62 P. 513; *Bonestell v. Western Automotive F. Corp.*, 69 Cal.App. 719, 232 P. 734; *Dineen v. City & County of San Francisco*, 38 Cal.App.2d 486, 101 P.2d 736; *Romero v. Snyder*, 167 Cal. 216, 138 P. 1002; *Slemmons v. Paterson*, 14 Cal.2d 612, 96 P.2d 125. Most, but not all, of these cases are affirmances of the order denying such relief.

[5] But even the rule that a client is chargeable with the neglect of his attorney has its exceptions. The most obvious one is that the attorney's mistake of law,

as distinguished from mere ignorance of the law, may be sufficient to justify the granting of relief, and in some cases, the reversal of an order denying relief, even without any participation by the adverse party. *Waite v. Southern Pacific Co.*, 192 Cal. 467, 221 P. 204; *Brill v. Fox*, 211 Cal. 739, 297 P. 25; *Roehl v. Texas Co.*, 107 Cal.App. 708, 291 P. 262; *Beard v. Beard*, 16 Cal.2d 645, 107 P.2d 385; *Harbaugh v. Honey Lake Valley Land & Water Co.*, 109 Cal. 70, 41 P. 792; *Douglass v. Todd*, 96 Cal. 655, 31 P. 623; *Tuttle v. Scott*, 119 Cal. 586, 51 P. 849; *Fickeisen v. Peebler*, 77 Cal.App.2d 148, 174 P.2d 883; *Svistunoff v. Svistunoff*, 108 Cal.App.2d 638, 239 P.2d 650. But the exceptions are not limited to cases involving mistakes of law. Negligence on the part of the attorney will, under some circumstances, justify the trial court in granting relief. Thus in *Stub v. Harrison*, 35 Cal.App.2d 685, 96 P.2d 979, a default was set aside by the trial court, and the order affirmed on appeal, in a case where an attorney failed to file an answer because he was required to leave his office for a time because of an accident to his son, and, when he returned, forgot the case because of accumulated work. It was held that this was excusable neglect on the part of the attorney and sufficient to justify the trial court in setting aside the default.

A much more extreme case is *Hallett v. Slaughter*, 22 Cal.2d 552, 140 P.2d 3. This case did not involve a motion under section 473, which, of course, is made in the main action, but was an independent action in equity made to set aside a default judgment, which action was filed after the six-month period provided by section 473 had expired. There a defendant was served in the action and promptly notified his attorney. The attorney promptly prepared the answer. He and his secretary averred that the answer was mailed to the court, and a copy mailed to the attorney for plaintiff. Neither was received. The plaintiff entered defendant's default, but did not take judgment by default until after the six-month period had expired. The trial court set aside the default. The Supreme Court found that, while the attorney had been negligent in not sooner discovering that his

answer had gone astray, whether such negligence was excusable or inexcusable was a question of fact. By a four-to-two vote (four-to-three on rehearing) it affirmed. In so holding, the court stated 22 Cal.2d at page 556, 140 P.2d at page 6: "We are in accord with the following views set forth in *Soule v. Bacon*, 1907, 150 Cal. 495, 497, 498, 89 P. 324, 325: 'There are many cases holding that the party may have relief in equity from the consequences of his mistake of fact, although he was somewhat negligent in making the mistake, if his negligence in no way prejudiced the opposing party. [Citations.] * * * At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances. That court has decided the question in favor of the plaintiff, and we are satisfied with its conclusion.'" (See criticism of the case in 31 Cal. L.Rev. 600.)

Of course, if such negligence on the part of the attorney will justify the granting of relief in an independent action in equity, it is more than sufficient in a proceeding under section 473.

[6] The above cases deal primarily with situations where only negligence on the part of the attorney was involved, although the *Hallett* case looked with disfavor on the action of the opposing counsel in waiting six months after the default before having the judgment entered. Of course, if opposing counsel are also at fault and prevent, directly or indirectly, a fair trial on the merits, such participation constitutes the type of fraud that will justify relief under the section. *Gale v. Witt*, 31 Cal.2d 362, 188 P.2d 755; *Godfrey v. Godfrey*, 30 Cal. App.2d 370, 86 P.2d 357; see cases collected 15 Cal.Jur. p. 18, § 124; 31 Am.Jur. p. 241, § 671 et seq.

The conversation set forth in the affidavit of Helen Dusio constituted a direct threat against that prospective witness. It certainly would have a tendency to prevent her from offering herself as a witness. While it is not averred that the witness did not testify because of fear, it is averred that be-

cause of the threat she had, and still has, an aversion to becoming a witness.

[7] But, says appellant, respondent has failed to show the required diligence, in that the affidavits do not show why the evidence of Helen Dusio and the other witnesses was not discovered prior to trial. Such cases as *Weinberger v. Manning*, 50 Cal.App.2d 494, 123 P.2d 531; *Gill v. Peppin*, 41 Cal. App. 487, 182 P. 815; *Ross v. San Diego Glazed C. P. Co.*, 50 Cal.App. 170, 194 P. 1059, and *Slemons v. Paterson*, 14 Cal.2d 612, 96 P.2d 125, are cited in support of this contention. Undoubtedly these cases support the rule that relief will not be granted to one grossly careless of his own affairs.

[8] This rule, however, is not here applicable as a matter of law. Here we have a case where the key question on the merits is whether appellant was respondent's agent or dealt with him at arm's length. According to the affidavits believed by the trial court there was very substantial evidence available to show that appellant was an agent, made the misrepresentations relied upon by respondent, and made a secret profit on the deal. Respondent convinced the trial court on the motion that he had a meritorious cause of action. The record upon the first trial, with which the trial court was entirely familiar, and which caused it to find that appellant was not an agent, is not before us. The trial court became convinced, upon reading the affidavits on the motion, that a miscarriage of justice had occurred, and that had this evidence been produced a different result would probably have occurred. This evidence was available at the time of the trial in the sense that the witnesses were physically present in the county of trial. But respondent's then counsel did not discover or produce that evidence. Standing alone, that would not warrant the granting of relief. But it does not stand alone. One basic witness has averred that appellant threatened her if she should testify, and that this caused her to have an aversion towards testifying. The trial court could reasonably infer that these threats were reasonably calculated to and did prevent this affiant from offering herself as a wit-

ness. This participation by appellant, which had a tendency to prevent a full trial on the merits, coupled with the negligence of respondent's counsel in failing to discover and to produce the evidence, support the order of the trial court vacating the judgment.

[9, 10] Appellant, for the first time in his reply brief, contends that all the affidavits are technically insufficient in that, in averring that appellant was the "agent" of respondent, they merely set forth incompetent conclusions. Of course, affidavits, if objected to, must state the facts and circumstances and must not allege mere conclusions. (See cases collected 2 Cal. Jur. 2d 629, § 19.) The only affidavit to which objection was made was that of Helen Dusio. No objection was made to the other affidavits. Appellant is in no position now (and certainly not for the first time in a reply brief) to raise the question of the competency of these unobjected to affidavits. It is elementary law that incompetent statements in an affidavit become competent evidence when admitted without objection. This rule was stated as follows in *Falk v. Falk*, 48 Cal.App.2d 780, 789; 120 P.2d 724, 729: "The appellant contends that plaintiff's affidavit is incompetent evidence for the reason that it contains averments which are hearsay and which amount to mere conclusions. Even conceding that many of the averments of the affidavit are conclusions or hearsay, they became competent evidence for the reason that they were admitted without objection." See, also, *Soares v. Ghisletta*, 1 Cal.App.2d 402, 36 P.2d 668; *Wright v. Mutz*, 61 Cal.App.2d 292, 142 P.2d 781; *Fallon v. Fallon*, 86 Cal.App.2d 872, 195 P.2d 878.

[11] The affidavit of Helen Dusio was objected to on the ground that the assertion that appellant was respondent's agent was a conclusion. This objection was properly overruled, even if it be conceded, without deciding, that the assertion of agency was a conclusion. That is so because the conduct of appellant, as disclosed in the facts set forth in the affidavit, clearly constituted an admission of agency. According to the affidavit, appellant started the conversation by warning the affiant that,

if interrogated, she was to say nothing about the motel deal. When affiant replied that all she knew was that appellant had been respondent's agent, appellant, "in a loud and threatening manner," told her that that was what he did not want her to say, and if she knew "what's good for you, you'll keep your mouth shut." The introduction of the subject, the tone and threats made by appellant as disclosed by the affidavit, support the inference based on such conduct that appellant was seeking to suppress the testimony out of a consciousness of liability. This constituted an admission by conduct. (Examples of similar admissions by conduct are to be found in *People v. Mullen*, 115 Cal.App.2d 340, 252 P.2d 19; *Longuy v. La Societe Francaise*, 52 Cal.App. 370, 198 P. 1011; *People v. Chin Hane*, 108 Cal. 597, 41 P. 697. Thus, all the affidavits were admissible and the averments contained therein relevant.

The other contentions of appellant are so lacking in merit that no further discussion is required.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



117 Cal.App.2d 701

PEOPLE v. MARTINEZ et al.

Cr. 4905.

District Court of Appeal, Second District,
Division 1, California.

May 11, 1953.

Hearing Denied June 4, 1953.

Defendant was convicted of the unlawful possession of narcotics. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment, and defendant appealed. The District Court of Appeal, White, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Indictment and Information ⇨75(1)

Poisons ⇨9

Information charging defendants with unlawful possession of "flowering tops and leaves of Indian Hemp (*cannabis sativa*)" in violation of specified sections of Health and Safety Code was sufficient as against contention that it did not charge possession of a "narcotic" and as against contention that it offended constitutional requirement that all judicial proceedings be conducted in no other language than English. Const. art. 4, § 24; Health and Safety Code, §§ 11001, 11003, 11500; Pen.Code, §§ 950, 952.

2. Poisons ⇨4

The word "possession", in statute forbidding possession of narcotic, means an immediate and exclusive possession under dominion and control of defendant, and is physical control with intent to exercise control, and a defendant having such control must have knowledge of presence of narcotic, and such knowledge must precede intent to exercise, or exercise of, such control. Health and Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

3. Poisons ⇨4

Conviction for unlawful possession of narcotics does not require proof that accused had prohibited article on his person. Health and Safety Code, § 11500

4. Poisons ⇨9

Conviction for unlawful possession of narcotics was sustained by evidence. Health and Safety Code, §§ 11003, 11500.

5. Poisons ⇨9

Burden is upon party accused of unlawful possession of narcotics to prove his possession of license or prescription constituting complete defense. Health and Safety Code, § 11500.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles county, defendants were accused of violating Section 11500 of the Health and Safety Code, a felony. It was alleged that on or about May 25, 1951, defendants did willfully, unlawfully and feloniously have in their possession "flowering tops and leaves of Indian Hemp (*cannabis sativa*)", in violation of the aforesaid code section.

Following the entry of not guilty pleas by defendants, the cause proceeded to trial before a jury, resulting in a verdict finding defendant, Pat Louise Martinez, not guilty, and her codefendant guilty as charged. A motion for a new trial was denied and judgment was pronounced against him. From the judgment of conviction and from the order denying his motion for a new trial defendant, Arthur Martinez, prosecutes this appeal.

Epitomizing the evidence as reflected by the record herein it appears that about 8:30 P.M., on May 25, 1951, Deputy Sheriff C. J. McKinney, attached to the Narcotic Detail of the Los Angeles Sheriff's office, accompanied by another Deputy Sheriff, saw the appellant at his residence in the city of Los Angeles. Appellant and another man, also named Martinez, were approaching the front porch of the former's house, a two-unit dwelling. The appellant was asked if he was Arthur Martinez, to which he replied, "Yes". He was asked where he lived and he indicated the front door of the aforesaid house. Appellant was informed by the officers that they desired to go into the house where he lived. Thereupon, appellant knocked on the door and it was opened by his wife, the codefendant, Pat Louise Martinez. To the latter the officers identified themselves, whereupon she asked, "What's up?" or "What's wrong?"

The two officers walked towards the bedroom accompanied by appellant and his wife. At this time, they were joined in the house by six other officers. A search was made of the bedroom and a small cardboard box was found which had a collection of tiny green-like substance adhering to the

structure of the box on the inside. This box was marked People's Exhibit No. 1 at the trial. A duly qualified chemist testified that the green leafy substance was fragments or parts of the plant *cannabis sativa*, commonly known as marihuana. There was also found a Zig Zag wheat straw brown cigarette paper and also white cigarette paper. These were placed inside of People's Exhibit No. 1.

The appellant and his wife were asked if they knew anything about the box and they denied any such knowledge. The officers took some keys from appellant's trouser pockets including a General Motors key. At this time appellant was asked if he drove a 1941 Buick Sedanette and he said, "I do not". He was asked if he had ever driven such a vehicle and he said, "No". He was then asked what vehicle the key fitted and he asserted that it fitted the ignition of an old '33 or '34 Plymouth automobile in his back yard.

Appellant was then taken to the garage in the rear of his residence, where the officers went to a Buick automobile and taking the key which they had abstracted from appellant's pocket, fitted it into the ignition of the Buick. Thereupon appellant was questioned concerning the fact that the key fitted the Buick automobile and he said that the vehicle belonged to his brother, Fortunato Martinez. He was asked where his brother was and stated that he did not know.

A search was made of the garage and from an opening in the loft, a brown metal suitcase was removed. This was People's Exhibit No. 2 at the trial. When it was brought down and opened it was found to contain approximately fourteen brown paper bags. The Deputy Sheriff accompanying Officer McKinney started back to the cubby hole in the loft, saying to appellant, "Is there any more there?" and at this time appellant said, "That is all there is".

A chemist examined the fourteen bags contained in this brown metal suitcase and found that they contained crushed fragments of the plant *cannabis sativa*, commonly known as marihuana. These bags were examined in the presence of appellant

and were found to contain a substance resembling marihuana. When appellant was asked if there was any more there he said, "That is all".

A further search was made of the loft and a small metal tool box was found there. This was marked People's Exhibit No. 3. This box had a lock hanging in the hasp. The box was brought down by the Deputy Sheriff in such a manner that the appellant could not see whether or not it was locked. When asked if he had a key for the lock appellant replied, "It isn't locked". Inside this metal tool box was found a scale (People's Exhibit No. 3a), some empty brown paper sacks folded flat (People's Exhibit No. 3b), together with a brown paper sack containing a quantity of the same green leafy substance which was contained in the paper bags in the suit case (this was People's Exhibit No. 3c). The chemist testified that this green leafy substance also contained *cannabis sativa*, known as marihuana.

The appellant was then taken back to the house. There some keys were taken from the top of the dresser and were tried on the metal tool box and one of them opened the lock thereon. The lock and keys were introduced as People's Exhibit No. 6. The appellant and his wife were told to accompany the officers to the office of the Narcotic Detail. Appellant then asked if he could take his shirt and he was allowed to go to a closet and obtain the same. At the office of the Narcotic Detail the shirt was taken from appellant, the pockets were turned wrong side out and a small collection of green leafy fragments was found in the shirt pockets. The shirt and these fragments were introduced at the trial as People's Exhibit No. 5. There was testimony by the chemist that the aforesaid green leafy fragments contained marihuana; that the contents of the shirt contained pocket debris along with green leafy fragments which were part of the plant *cannabis sativa*, commonly known as marihuana. When asked about the fragments found in his shirt, appellant stated he knew nothing about them.

For the defense, Fortunato Martinez testified that he was a brother of Arthur and

owned the property on which the latter resided. That the aforesaid Buick automobile was his. That the garage in question was used by him to store different articles and that his other tenants on the property also had permission to use the garage as a storeroom and work shop. That other tenants did so use it for storage purposes and as a place to work on their automobiles. That the garage was never locked and could not be locked. That he had given his brother, the appellant, notice to vacate the premises and had loaned him the Buick automobile with which to transport his belongings on the day following the latter's arrest.

Pat Louise Martinez, codefendant and wife of appellant, testified that she saw the small cardboard box (People's Exhibit No. 1), that her little daughter had brought it into the house on the day of the arrest and was playing with it. That she had taken it away from the child. Mrs. Martinez was asked if she saw People's Exhibits No. 2 and 3, the suitcase and tool box, to which she replied that she had. She testified she had never seen the small bags until the preliminary examination, that she saw no cigarette papers on the dresser.

Testifying on his own behalf, appellant denied ownership of any narcotics. He stated that neither the suitcase or the marihuana in it belonged to him. That the cigarette papers in the dresser drawer did not belong to him. That the shirt which he put on just prior to leaving the house with the officers had just been returned from the cleaners on the day before his arrest. That he knew nothing of any marihuana found in the pockets of the shirt. That none of the boxes or contents taken from the attic in the garage belonged to him. That the cigarette papers found in the dresser drawer were kept there for use by his father on occasions when the latter visited at appellant's home. That he never used the aforesaid Buick automobile prior to his arrest. That he had an automobile of his own. That he never used marihuana and never knowingly had any in his possession.

As his first ground for a reversal, appellant urges that the information fails to

state a public offense. In this regard he asserts that, "The only words in the English language contained in the information are the 'flowering tops and leaves of Indian Hemp'". That while narcotics may be made from Indian hemp, the latter of itself is not a narcotic and may be used for making cloth, floor coverage and cordage. That the information does not charge the possession of a "narcotic" in violation of Section 11500 of the Health and Safety Code. However, the information did charge appellant with having in his possession flowering tops and leaves of Indian hemp (*cannabis sativa*) in violation of the code section just mentioned. And Section 11001, Subd. "h" of the Health and Safety Code includes within the definition of "narcotics" as therein used, the following:

"All parts of the plant *Cannabis sativa* L., (commonly known as marihuana), whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin; except as otherwise provided by law."

Cannabis sativa is defined in Section 11003 as follows:

"'Cannabis sativa,' as used in this division, means the male or female of any species commonly known as *cannabis sativa*, hemp, Indian hemp, or marihuana."

[1] It is therefore manifest that the information sufficiently advised appellant of the offense with which he was charged. Penal Code, secs. 950, 952.

But, complains appellant, the information offends Article IV, Section 24 of the California Constitution, which provides in part that all judicial proceedings "shall be conducted, preserved, and published in no other than the English language." This contention has been previously made and decided adversely to appellant. While the Latin botanical term "*cannabis sativa*" is employed in Section 11001 of the Health and Safety Code, the term is therein referred to as "commonly known as marihuana", and is expressly defined in Section

11003 as meaning, "hemp, Indian hemp, or marihuana." The contention that the information and the statutes upon which it is framed are not certain and definite and that the statutes are unconstitutional, is untenable, *People v. Oliver*, 66 Cal.App.2d 431, 434, 435, 152 P.2d 329; *People v. Beesly*, 119 Cal.App. 82, 88, 89, 6 P.2d 114, 970; *People v. Savage*, 64 Cal.App.2d 314, 315, 148 P.2d 654.

Furthermore, appellant's contention that he was not fairly advised of the nature of the charge he was called upon to meet is also answered by the following stipulation entered into between his counsel and the District Attorney immediately after the jury was sworn to try the cause.

"Mr. Stowe (Attorney for appellant): Before we start, your Honor please, may it not be well for us to stipulate, Mr. Galliano and myself, that the word 'marihuana' is included in the charge in this particular case. They speak here of Indian hemp and cannabis sativa.

"Mr. Galliano (Deputy District Attorney): I think it is understood that Indian hemp is marihuana.

"Mr. Stowe: Well, I understand, but the testimony will bring out, and the word that will be used will be 'marihuana'; so let us have it so there will be no technical question raised. We are willing to stipulate that the word 'marihuana' is synonymous with cannabis sativa and—

"The Court: And Indian hemp.

"Mr. Stowe: Another name for it.

"The Court: Is it so stipulated?

"Mr. Galliano: Yes, it will be so stipulated."

Appellant's next ground of appeal is that the evidence is insufficient to support the verdict, and that the latter is contrary to the law and the evidence. In this connection, appellant asserts that there is no evidence of a narcotic being in his possession, and likewise contends that there was no proof that Indian hemp is a narcotic forbidden by section 11500 of the Health and Safety Code. This latter contention is dis-

posed of by reference to Section 11003 of the aforesaid code defining the term "cannabis sativa". The chemist testified as heretofore noted, that he examined the fourteen bags contained in the brown metal suitcase and stated that they contained crushed fragments of the plant cannabis sativa, also known as marihuana. That a small collection of green leafy fragments taken from the pockets of appellant's shirt contained marihuana. Furthermore, the stipulation entered into between appellant's counsel and the District Attorney, and heretofore adverted to, militates strongly against appellant's contention that the evidence did not disclose that Indian hemp is a narcotic.

[2,3] Appellant's claim that the narcotic was found in an open garage on property rented by him and that therefore was not in his exclusive possession, is answered by the fact that the law does not require proof that the accused had the prohibited article on his person, *People v. Sinclair*, 129 Cal.App. 320, 322, 19 P.2d 23. The essence of the offense is, "knowledge of the presence of the object as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute." *People v. Gory*, 28 Cal.2d 450, 455, 456, 170 P.2d 433, 436.

[4] When consideration is given to the uncontradicted testimony that narcotics were found in the pockets of appellant's shirt and the circumstances of the occupancy by appellant of the premises upon which other narcotics were found, together with his admissions, equivocal statements and actions at the time of his arrest, and subsequent thereto, we are persuaded that the evidence was sufficient to warrant the jury in finding that appellant was aware of the presence of the contraband on his premises and in the pockets of his shirt, and was in that possession of the narcotics which is denounced by law. *People v. Gory*, supra, strongly relied upon by appellant, does not aid him. In that case, the Supreme Court stated, 28 Cal.2d at page 452, 170 P.2d at page 434, "A review of the record convinces us that the evidence was

sufficient", but concluded that the failure of the court to instruct the jury "fully and clearly" resulted in such prejudice as to require a reversal.

[5] Appellant's claim that it was incumbent upon the prosecution to negative the exception in the statute, namely, that the accused did not have the written prescription of a physician, dentist, chiropractist, or veterinarian, licensed to practice in the state of California is without merit. As far back as the case of *People v. Boo Doo Hong*, 1898, 122 Cal. 606, 55 P. 402, it has been the law that when a license or prescription would be a complete defense, the burden is upon the accused to prove that fact so clearly within his knowledge. See also *People v. Moronati*, 70 Cal. App. 17, 21, 22, 232 P. 991; *People v. Bill*, 140 Cal.App. 389, 392, 393, 35 P.2d 645; *In re Lord*, 199 Cal. 773, 776, 250 P. 714.

Equally without merit is appellant's argument that the court erred in failing to define a narcotic in the English language. This claim is disposed of by what we have heretofore said in answer to appellant's claim that the information herein contravenes Article IV, Section 24, of our State Constitution. Appellant's contention that the challenged instruction contained an element not charged in the information, to wit: marihuana, is unavailing in view of the stipulation heretofore set forth and entered into by him at the outset of the trial. An examination of the record discloses that the court fully, fairly and correctly instructed the jury on all the issues raised by the information or presented by the pleadings.

The final contention of appellant, that he was charged with an offense "not made out by the information", and accordingly was denied "due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States", is also untenable. The information clearly charged a violation of Section 11500 of the Health and Safety Code, in that appellant had in his possession at the time specified, flowering tops and leaves of Indian hemp (*cannabis sativa*).

For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN, J., concurs.



117 Cal.App.2d 653

PEOPLE v. STEPHENS.

Cr. 4863.

District Court of Appeal, Second District,
Division 1, California.

May 6, 1953.

Rehearing Denied May 19, 1953.

Hearing Denied June 4, 1953.

Defendant was convicted of forgery. The Superior Court, Los Angeles County, entered judgment of conviction and entered order denying new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that where re-recordings of conversations between defendant and others were played at trial but conversations were on many occasions inaudible and unintelligible and contained evidence as to matters extraneous to offense charged, defendant was deprived of a fair trial, in view of fact that evidence seemingly was insufficient to support judgment of conviction.

Attempted appeal from verdict and sentence dismissed; judgment and order denying motion for new trial reversed, and cause remanded.

1. Principal and Agent ⚡52

Possession of bona fide bill of sale for automobile, which document bore genuine signatures of owners, invested possessor with authority to deal with automobile, as far as owners were concerned, as possessor desired.

2. Criminal Law ⚡741(1)

It is function of jury to appraise weight of evidence.

3. Criminal Law ⚡1159(2)

It is function of District Court of Appeal to appraise legal value of evidence in record.

4. Criminal Law §260(11)

District Court of Appeal may, as a matter of law, set aside findings of trial court if there is no substantial or credible evidence in record to support them, if prosecution's evidence is so improbable or false as to be incredible, or if evidence so clearly preponderates against the verdict as to convince District Court of Appeal that verdict was result of passion or prejudice.

5. Criminal Law §400(1)

Re-recordings made from tape and wire recordings of conversations between defendant and others are admissible in criminal prosecutions and such re-recordings are not to be excluded by reason of best evidence rule.

6. Criminal Law §438

In criminal prosecutions, in order for re-recordings made from tape and wire recordings of conversations between defendant and others to be admissible, the conversations as re-recorded should be audible and intelligible.

7. Criminal Law §400(1)

In criminal prosecutions, if recordings of conversations between defendant and others are not audible and intelligible, witness who heard conversations should be called to testify.

8. Criminal Law §438, 1169(1)

In prosecution for forgery of bill of sale for automobile and of order in writing for delivery of merchandise, where re-recordings made from tape and wire recordings of conversations between defendant and others were played but recordings were on many occasions inaudible and unintelligible and contained evidence as to matters extraneous to offense charged, defendant was deprived of a fair trial, in view of fact that evidence seemingly was insufficient to support judgment of conviction. Pen.Code, § 470.

Ray L. Smith, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in Count I of the crime of grand theft, and in Count II of the crime of forgery.

Following the entry of a plea of not guilty to each count, the cause proceeded to trial before a jury, resulting in a verdict finding defendant guilty of the offense of forgery as charged in Count II. As to Count I, the jury was unable to agree upon a verdict, and the charge therein contained was subsequently dismissed.

Defendant's motion for a new trial as to Count II was denied and he was sentenced to State Prison for the term prescribed by law. Defendant appeals from the verdict, the judgment, and sentence, and from the order denying his motion for a new trial.

Count II of the information charged that defendant forged a certain bill of sale of an automobile and order in writing for the delivery of merchandise, with intent to defraud and cheat Alfred Johnson and his wife, Celestine Johnson.

Epitomizing the factual background surrounding this prosecution, the record reflects that defendant was a man 56 years of age, actively engaged as a real estate broker and notary public in the City of Los Angeles. Mr. and Mrs. Johnson had known defendant for a number of years, and the latter had handled many real estate and other business transactions for them. Following the separation of Mr. and Mrs. Johnson, defendant continued to handle the latter's business affairs. There was considerable testimony that the Johnsons were both alcoholics. While en route to an eastern destination Mrs. Johnson died, on or about September 25, 1951.

The vehicle involved in the forgery accusation was a 1950 Chevrolet which was purchased during the marriage of Mr. and Mrs. Johnson. On or about September 21, 1951, Mrs. Johnson decided to sell the automobile and consulted with defendant. He in turn introduced her to one Eric Rabone, who had been a friend of defendant for some ten years. Because Rabone

was a milkman serving customers on a route which he maintained, it was felt he might secure a purchaser for the vehicle from among his customers.

Mr. Rabone, called as a witness for the prosecution, testified that accompanied by defendant, Mrs. Johnson came to his home on September 22, 1951. That he had met her the preceding evening. That Mrs. Johnson told him she desired to sell the Chevrolet automobile for about \$1,400 or \$1,450. That upon that occasion she gave the witness the pink slip to the vehicle (this was the pink slip allegedly forged), and asked him to sell the vehicle. Rabone identified the pink slip at the trial (People's Ex. 1), and stated that it was in the same condition at that time as when he received it from Mrs. Johnson, and that it had the two signatures of the Johnsons on it when delivered to him. The vehicle remained at Rabone's house when defendant and Mrs. Johnson left. Mr. Rabone offered the car to some of his customers for \$1,400, without success. He talked to Mrs. Johnson and she told him to deal with the defendant. On Tuesday, September 25, 1951, Rabone took the automobile to Perrino's Auto Sales in the City of Los Angeles, and then had a telephone conversation with defendant, telling the latter of an offer of \$1,175, whereupon, defendant told him to close the deal. After accepting the offer of \$1,175, Rabone called defendant and asked him to come to the sales agency, with which request defendant complied. When they left Perrino's Auto Sales they had a check for \$1,175 in payment for the automobile. The check was made payable to Rabone and the latter delivered the pink slip to the buyer. Defendant and Rabone then went to the bank where the latter cashed the check, and both of them drove to defendant's home where Rabone gave defendant the money and the latter then gave Rabone \$50, as a commission for selling the vehicle. Later that day defendant went by airplane to Detroit to take delivery of a car he had purchased. Upon his return from Detroit about October 5, 1951, defendant found a card requesting him to call Police Officer Collins. He thereupon telephoned the officer, and ascertained from the latter that

an inquiry was in progress with reference to the aforesaid automobile, which had been reported as stolen by Mr. Johnson. Defendant told the officer that he would send Rabone over to explain the transaction. Rabone contacted Police Sergeant Collins, gave him a statement as to the transaction and left the papers given him by defendant, at the Police Station.

Rabone further testified that defendant had advised him to tell the police that he, Rabone, had given Mrs. Johnson \$1,000 for the car, and also requested Rabone not to mention defendant's name, but to say that he, Rabone, had sold the car.

Police Officer Mason W. Collins testified to a telephone conversation with defendant on October 5, 1951, concerning the report of the theft of the aforesaid automobile; that defendant told him he had no knowledge whatsoever as to the vehicle; that he did not know where it was or who had gotten it from Mrs. Johnson. The officer also had a conversation on the telephone with defendant on October 6, 1951, saying, "Didn't that fellow contact you yet?" and then, "I don't know his name"; that defendant said he had found out that Mrs. Johnson had sold the car to some "fellow", who in turn had sold it to a used-car dealer. The defendant told the officer, the "fellow" had paid Mrs. Johnson \$1,000 for the car and that he had resold the car for \$1,175. The officer further testified that defendant said he would try to find out where the used-car lot was. The officer further testified that on October 9 he talked to the defendant, who said that he did not know the name of the used-car lot; that it was on 51st and Figueroa; that he did not know the name of the man who bought the car from Mrs. Johnson.

Frank J. Kowalski, an acquaintance of defendant and the Johnsons', testified defendant had made the statement that "he might as well get whatever he can before somebody else gets it".

Attorney Paul Taylor, who represented the Johnsons, testified he telephoned to defendant on September 25, 1951, advising the latter that Mrs. Johnson was dead, and a few days later he again called him asking him if he knew the whereabouts of the

Johnson car, and the defendant said he did not.

In connection with the charge of forgery there was introduced into evidence a card admittedly signed by the defendant as an exemplar of the latter's handwriting. There was also introduced in evidence a document containing typewriting made by the typewriter in defendant's office, and a document containing pen and ink handwriting made by Mr. Johnson.

Donn E. Mire, employed by the Los Angeles Police Department, and who, it was stipulated, was an expert on matters of questioned documents, testified as to the signatures and typewriting. He testified that he examined the exemplar of Mr. Johnson's handwriting with the writing on the aforesaid pink slip, and that in the opinion of the witness, Mr. Johnson did not write the signature, Alfred W. Johnson, on the pink slip. It was the opinion of the expert that the signature on the pink slip had been traced thereon. The witness testified that from an examination of the other documents which admittedly had the defendant's name on them, it was his best judgment that the person who wrote the foregoing documents *could* have written the name Alfred W. Johnson on the pink slip, and in his opinion, "probably did". The expert witness further testified that he compared the signature of Celestine Johnson on People's Exhibit 3 with the signature on a check admittedly written by Mrs. Johnson, and determined that the name Celestine Johnson appearing on the bill of sale for the automobile was a tracing of her signature on the aforesaid check. The witness then compared the typewriting on the bill of sale with the typewriting on the paper which was taken from the typewriter in defendant's office, and expressed the opinion that the same typewriter made the impressions on both the sheet of paper and the bill of sale.

There was testimony that the bill of sale to the automobile was executed by Mr. and Mrs. Johnson in the presence of Constance Hunsicker whose name appears thereon as a witness. The latter denied she signed the document, but handwriting expert Donn

Mire, called by the prosecution, testified that in his opinion the signature of Celestine Johnson on the bill of sale "was, in fact, written" by her. There was also testimony that Mr. Johnson had accepted \$200 for his interest in the vehicle and signed a receipt therefor.

With reference to the pink slip, the expert witness Donn E. Mire testified, "It is my best judgment that the person who wrote Exhibits 11 and 12 (exemplars of defendant's handwriting) could have written the name 'Alfred W. Johnson' on People's Exhibit 1 (the pink slip) and he probably did"; that his opinion was a "qualified one". It is noteworthy that the expert witness had no exemplars of the handwriting of either Mr. Rabone or Mrs. Johnson.

Defendant did not take the witness stand in his own defense, but it is significant, as appears from the uncontradicted affidavit presented on the motion for a new trial, that defendant was represented by an attorney recommended to him by Mr. Rabone, the principal, if not chief witness for the prosecution. That, "during all of the time the above case was on trial, the said Mr. Newton (attorney for defendant) was representing and handling affairs for the said Mr. Rabone". It was also before the court and uncontradicted on the hearing of the motion for a new trial, "That throughout said trial and on many occasions when conferring with said attorney, affiant expressed the desire to take the witness stand and explain every matter that needed any explanation but in each instance, his said attorney advised him that he had nothing to worry about and that the Law only required him to show 'authority' to constitute a defense to the charge of forgery. That affiant's attorney was of the opinion that by introducing a Bill of Sale signed by Mr. and Mrs. Johnson that this constituted a defense and therefore affiant need not take the witness stand."

As his first ground for reversal appellant asserts that the evidence is insufficient as a matter of law to sustain the conviction of forgery of the bill of sale to the automobile as charged in Count II of the information.

The elements necessary to establish the claim of forgery, Penal Code, sec. 470, are:

- (1) signing the name of another;
- (2) with intent to defraud; and
- (3) without authority to do so.

In Count II of the information appellant was specifically charged with forgery of the bill of sale to the automobile and the prosecution's own expert witness testified that in his opinion the signatures of both Mr. and Mrs. Johnson on the bill of sale were genuine and were written thereon by them.

As to the pink slip, the testimony of the prosecution's main witness, Mr. Rabone, was that the pink slip was delivered to him by Mrs. Johnson herself, and at the time he received it, had the signatures of both herself and her husband on it. Mrs. Johnson also delivered the vehicle to Mr. Rabone simultaneously with the delivery of the aforesaid pink slip. True, the prosecution's handwriting expert testified that in his opinion Mr. Johnson did not write his name on the pink slip, and that such signature had been traced thereon, but as to appellant having signed the name the expert's opinion was that the former "could" have written the name and "probably did". But the expert testified he could not give a "definite" opinion and that his opinion was a "qualified" one. It is also significant that from the time Mrs. Johnson gave the pink slip to Rabone with both signatures on it, there is no evidence showing appellant's possession of the document, nor even of his being present when the pink slip was also there.

It is true that Mr. Johnson, an admitted alcoholic, testified that he did not sign his name to the pink slip, but there was positive evidence that he signed the bill of sale and received the sum of \$200 for his interest in the automobile.

[1] It is without conflict in the evidence that Mrs. Johnson gave Mr. Rabone the signed pink slip with the signatures of herself and her husband upon it. That Mrs. Johnson told Rabone to deal with appellant regarding the sale of the automobile. Rabone sold the vehicle to Perrino's Auto Sales with appellant's consent. It should

be remembered that appellant was in possession of a bona fide bill of sale for the automobile, which document admittedly bore the genuine signatures of Mr. and Mrs. Johnson, owners of the vehicle. Manifestly, insofar as Mr. and Mrs. Johnson and appellant were concerned, this document invested the latter with authority to deal with the automobile as he desired. It is also noteworthy that Mr. Johnson did not report the automobile stolen until after the death of his wife.

In reviewing the record in the light of the Attorney General's claim that "There was ample evidence to connect the defendant with the forgery of the bill of sale and the related document, the pink slip to the vehicle in question", we are constantly met with the admitted fact that Mrs. Johnson desired to sell the automobile in question and delivered it, together with the pink slip, to the prosecution's main witness, Mr. Rabone. It is difficult to reconcile the conduct of Mrs. Johnson with a conclusion that appellant sought to defraud her and her husband. The latter's signature on the bill of sale was genuine according to the testimony of the prosecution's own expert witness, and its genuineness is further enhanced by the testimony that Mr. Johnson received \$200 for his interest in the vehicle.

[2-4] It is axiomatic, of course, that to appraise the weight of the evidence is the function of the jury, while ours is to appraise its legal value, but it is axiomatic as well that an appellate court may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support them, or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict or decision as to convince this court that its rendition was the result of passion or prejudice upon the part of the triers of fact. When a case presents any of these features this court deals with it as a matter of law.

Conceding that such a situation can only be presented on appeal in extreme cases, we are disposed to say that the instant case does not present the usual and ordinary sit-

uation where the evidence was in conflict as to the main or only issue, but on the contrary, tenders to us a case where the evidence relied upon by the prosecution to establish guilt seemingly falls short of that quantum of reasonableness and substantiality required to satisfy the reason and judgment of those bound to act conscientiously upon it as to the existence of guilt beyond a reasonable doubt and to a moral certainty.

We have dealt with the evidence in this rather exhaustive fashion because we are convinced that, in the light of claimed errors occurring at the trial, and which we shall proceed to review, it seems quite likely that a miscarriage of justice occurred in this case.

Appellant next complains of the admission into evidence of certain conversations had with him. Tape and wire recordings were made of these conversations, and re-recordings were made from these records. It was the re-recordings that were played back in court. The records covered three separate conversations: (1) from Rabone to appellant by telephone, from Officer Phelps' office in the police station; (2) conversation of appellant and Officer Phelps in the police station; and (3) conversation at the home of Rabone between him, his wife, appellant and one Georgetta Williams.

[5-7] It would appear to be the law that such recordings are admissible in evidence and that the best evidence rule is not applicable; that the recordings are more reliable and satisfactory evidence than testimony of conversations given from memory by those who overheard them. *People v. Porter*, 105 Cal.App.2d 324, 330, 331, 233 P.2d 102. Be that as it may, we are impressed with the fact that to be admissible in evidence, the conversations as recorded should be audible and intelligible. And if not, the witness who heard the conversations should be called to testify.

Much of the recorded conversations related to the grand theft count on which the jury disagreed, and which need not concern us on this appeal. It is conceded that as to the forgery charge now before us, appellant made no admissions against himself,

but on the contrary stoutly denied committing any forgery. In ruling on an objection as to the admissibility of the recorded conversations the trial judge said, "* * * and I haven't heard anything yet that sounded like a confession from the defendant * * *."

That the conversations were not only inaudible but unintelligible is indicated by reference to the reporter's transcript wherein on many occasions the official reporter inserts the word "unintelligible". Apparently, the reporter recorded what she heard and could understand, but left out what she could not. How many different versions of "what was said" there were in the jury room is a matter of conjecture.

On one occasion, while the recordings were being played, a juror interrupted to inquire, "Did he say 'stole' or 'sold' the car?" to which the court replied: "You will have to get that from the record—I won't interpret".

Another unusual incident occurred during the playing back of the recordings when appellant's counsel stated, "Your Honor, I understand there seems to be copies of these transcriptions". Thereupon the following colloquy occurred:

"Mr. Veitch (Deputy District Attorney): There is a copy the District Attorney has, and he is going to keep it. It is a confidential record.

"Mr. Newton (appellant's counsel): I wonder if there is an extra copy?

"Mr. Veitch: No, sir; there is not.

"Mr. Newton: I believe there has been a copy supplied to the Court?

"The Court: Yes, I have a copy.

"Mr. Newton: I wonder if there could be a copy supplied to counsel for the defendant?

"Mr. Veitch: If you want one, you will have to make it; but if you will just sit still, we will have the daily record for you. I am not giving the District Attorney's papers to counsel. This happens to be the property of the District Attorney."

On a subsequent occasion defense counsel endeavored to obtain a copy of the

recordings, complaining to the court that some of the records contained reference to other transactions not material to the cause on trial. Counsel's apparent anxiety was that without a copy of the recordings he would be powerless to prevent incompetent, immaterial and prejudicial matters getting before the jury, but that with a copy similar to the one in the possession of the judge and district attorney he would be in a position to object to playing records that contained matters subject to objection. Counsel urged further that because of the unintelligibility of many of the recordings, "I am completely in the dark as to what was said in about fifty per cent of that record * * *". To which the District Attorney replied, "Now it is clear, it is true that in a considerable portion of this, it is more or less unintelligible—I think that is the correct word to use—and that is no part of any evidence in this case. * *

"Now, I want to say to counsel here again, these copies that have been prepared for my use, one of which I have loaned to your Honor, are the private property of the District Attorney in connection with the investigation into this, *as well as other matters*, and they are not records of the court in any sense. I have furnished my copy to the Judge for his help as the matter went along, in the event of objections or demands or requests to reread, so as to have some idea what was said. But certainly these are not evidence in the case, for the reason that to get such records as this has required hours and hours of checking, and very careful electronic work by the District Attorney's experts and the police. Now, I am stating to the Court that it is the preference of the District Attorney that the papers that the District Attorney handed to the Court be not handed to the counsel for the defendant. If the Court cares to part with them, the District Attorney would request that the Court hand them back to the source from which they came." (Emphasis added.)

Finally, the trial judge, with reference to the copy of the recordings furnished him by the District Attorney said: "Well, notwithstanding the fact that I have it here, I

don't rely upon it at all, because it isn't what has been transpiring here in court. * * * I would just as soon hand back my report to the District Attorney right now, *because it is of no great help to me, because I wanted to confine myself to what would be evidence in the court. These things are not evidence.*" (Emphasis added.)

With every opportunity to present witnesses who heard the recorded conversations, we find the jury listening to recordings that were in many instances inaudible and unintelligible. As heretofore pointed out, how many different and varied interpretations were placed upon what the recordings conveyed by the various jurors is a matter of pure conjecture.

In connection with the forgery charge and with reference to appellant's ability to write, there was presented on the motion for a new trial two photographs of his hands showing an apparent arthritic condition in his fingers on both hands. While there was an exemplar of appellant's handwriting introduced into evidence, and there was testimony that he "did very well" when he wrote on the card, the District Attorney encountered some difficulty himself in deciphering some of appellant's writing on the aforesaid exemplar, and the officer who fingerprinted appellant testified that he typed on the card, "Can't open hands for printing". When asked why he made that notation the officer testified, "His hands were in a position of this sort (indicating)."

"Q. Indicating a doubled-up position? A. Yes sir.

"Q. I see. A. It made it impossible to get a clear impression of his four fingers, which is mandatory on those cards."

Another officer, in identifying appellant's handwriting on a card, testified, "It is a little hard to decipher, all the letters in his handwriting". But no such difficulty is presented in deciphering the signatures claimed to have been forged by appellant. The last named officer further testified,

"Q. Did you notice whether the defendant had any difficulty in writing?

A. I think he had a little trouble with his hand. He told me he had arthritis."

We deem it useless to pursue the discussion any further. The case is one wherein there is lacking that element of fairness essential to due process. The case against appellant is far from being so clear and convincing that in spite of the atmosphere which surrounded the trial, there was no miscarriage of justice.

When we speak of administering "justice" in criminal cases, under the American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty.

"The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'" *People v. Wilson*, 23 Cal. App. 513, 524, 138 P. 971, 975.

[8] It is not for us to say whether we think that the accused is guilty, and nothing said here is to be taken as indicating any opinion on the question of his actual guilt. We do hold, however, that the conditions under which this trial was conducted, in view of the state of the evidence, may well have turned the scale in favor of the prosecution and resulted in a miscarriage of justice.

The attempted appeal from the verdict and sentence is dismissed. For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are and each is reversed, and the cause remanded for a new trial.

DORAN, J., concurs.

OWENS v. RING.

Civ. No. 15309.

District Court of Appeal, First District,
Division 2, California.

May 7, 1953.

Hearing Denied July 2, 1953.

Action to quiet title against administratrix of estate of alleged grantee who claimed title on ground that plaintiff's decedent had delivered deed to tract in question to grantee prior to death of plaintiff's decedent. The Superior Court, County of Alameda, Cecil Mosbacher, J., rendered judgment for plaintiff, and administratrix appealed. The District Court of Appeal, Goodell, J., held that whether there had been a delivery of deed was question for trier of fact.

Affirmed.

1. Deeds ⇨208(4)

Prima facie proof of delivery arises from recordation of deed.

2. Evidence ⇨589

In action to quiet title against administratrix of alleged grantee who claimed title on ground that plaintiff's decedent had delivered deed to tract in question to grantee prior to death of plaintiff's decedent, even if testimony of administratrix that she had seen deed in home of alleged grantee's mother before death of plaintiff's decedent was uncontradicted by direct testimony, court was not bound to accept it.

3. Deeds ⇨194(2)

Presumption of non-delivery of deed arises from finding of deed in grantor's home after grantor's death.

4. Deeds ⇨194(5)

Finding of deed in grantor's home after grantor's death and subsequent removal therefrom by alleged grantee created presumption of non-delivery sufficient to dispel presumption arising from recordation.

5. Property ⇨7

Continued possession and encumbrance of property are "acts of ownership." Code Civ.Proc. § 1963, subd. 12.

See publication Words and Phrases, for other judicial constructions and definitions of "Acts of Ownership".

6. Deeds ⇨56(2)

"Intent" is paramount element of delivery of deed.

See publication Words and Phrases, for other judicial constructions and definitions of "Intent".

7. Appeal and Error ⇨991

Whether grantor intended to divest himself of title is a question of fact to be determined by trial court in consideration of all evidence.

8. Deeds ⇨66

In action to quiet title against administratrix of alleged grantee who claimed title on ground that plaintiff's decedent had delivered deed to tract in question to grantee prior to death of plaintiff's decedent, whether there had been a delivery of deed was question for trier of fact.

9. Trial ⇨382

Where no evidence is introduced in support of an issue, finding should be made thereon against party who has burden of proof.

10. Appeal and Error ⇨991

Question of laches is primarily for trial court.

11. Trial ⇨382

Where no evidence was introduced to support issue raised by defendant as to whether plaintiff's suit to quiet title was barred by laches, trial court properly entered findings on issue against defendant.

12. Appeal and Error ⇨1050(1)

In action to quiet title against administratrix of alleged grantee who claimed title on ground that plaintiff's decedent had delivered deed to tract in question to grantee prior to death of plaintiff's decedent, wherein one of plaintiff's witnesses testi-

fied that after grantor's death, grantee searched home of plaintiff's decedent for deed and that after grantee found paper he said, "the search is over," which was objected to as hearsay and on ground that no proper foundation had been laid, testimony was not such as undoubtedly influenced court in holding for plaintiff, and hence admission of such testimony was not reversible error.

Ray E. Montrose and Simeon E. Sheffey, San Francisco, for appellant.

Lillian M. Wollitz, Oakland, for respondent.

GOODELL, Justice.

Plaintiff sued to quiet title to real property and from a judgment in her favor this appeal was taken.

The property is on Putnam Street in Oakland, with a frontage of 37½ feet and a depth of 105 feet. It was acquired in 1921 by Elizabeth Rudell, who occupied it as her home until she died on October 8, 1946. A week after her death a gift deed dated and acknowledged on June 8, 1940 was recorded, purporting to transfer the title from her to David Ring and William Ring, her nephews. This litigation turns on the question whether it was ever delivered.

The evidence indicates that at the time of Mrs. Rudell's death the deed was in her possession. A few days after her death it was found in her home and taken therefrom by David Ring, one of the grantees named therein, and promptly recorded. The original deed was introduced in evidence by the defense, and in the footnote will be found a description of it.¹

1. The deed in question is on one of Hardy's printed deed of gift forms. The description of the property is typewritten. The name "Alameda" (County) is written in pencil. The rest of the deed is filled in by ink handwriting which, according to the defendant Grace Ring, William's widow, was the writing of Mrs. Rudell. In the space for the name of the party of the first part appears the name "Elizabeth Rudell" and in the space for the names of the parties of the sec-

ond part appear the names "David Ring Jr and William Ring Jr, Nephews of the Party of the First Part." Beneath the name "Elizabeth Rudell" was written, apparently at a different time and in different ink, the names "David Ring Jr and William Ring Jr" with ink lines drawn through them, and beneath the names "David Ring Jr and William Ring Jr Nephews of the Party of the First Part" was written, apparently at a different time and in different ink, the name "Eliza-

The court found: "That there was never a valid delivery of the alleged deed of June 8, 1940, from Elizabeth Rudell to David Ring and William T. Ring or to either of them, or to any other person in their behalf, during the lifetime of said grantor, or at all, within the contemplation of law." And further: "That at the time of her death Elizabeth Rudell, plaintiff's intestate, was the owner and in possession, and entitled to the possession" of the property.

Appellant contends that the evidence is insufficient to sustain these findings.

A few days after Mrs. Rudell's funeral respondent Mary Owens, Agnes Ring and Margaret Smith, Mrs. Rudell's sisters, and David Ring, William Ring and Carlon Smith, her nephews, went to the decedent's home, the property in question, to "straighten things out" and search for a will. No will was found, but in the course of the search the deed was found by David Ring in a purse in the china closet off the dining room. He put it in his pocket and he and his mother and brother returned to their home in San Francisco where he showed it to his mother and then turned it over to his brother. It was then recorded at the request of the grantees.

At the time of the trial both grantees had died, David in 1947 and William in 1950.

[1] The only evidence on which appellant can rely with respect to delivery is found in the testimony of Mrs. Agnes Ring and Mrs. Grace Ring, in addition to the prima facie proof arising from recordation. Agnes Ring testified that one day she received the deed through the mail unaccompanied by any letter and without any instructions as to what should be done with it. She placed it in a glass receptacle in her home where she kept the dishes, and there it remained for several months until

beth Rudell" with ink lines drawn through it—in short, a transposition of the names of grantors and grantees. It would appear, however, judging by the alignment of the writing with relation to the printed form, that the deed was originally filled out with Elizabeth Rudell as the party of the first part and David and William of

Mrs. Rudell requested its return. It was returned to her at once. Mrs. Ring was not certain as to the time, but testified it was before her son William married, which was in 1943. She testified that while the deed was in her possession she showed it to David and William both of whom had it in hand while examining it.

Mrs. Agnes Ring testified:

"Q. You had it in your home after she made it out? A. And she changed her mind and sent for it and I mailed it back to her.

"Q. But she had given it to your son, David, before she died, hadn't she? A. No, she mailed it over to me.

"Q. And after she mailed it over to you, she mailed it over to you for the boys? A. Yes, I remember so well showing it to the boys. We laughed about it. We didn't believe it at all. I said, 'What will I do with this paper?' And they said, 'Oh, put it in that cup and keep it,' and I was glad I did when she wrote and wanted it back * *

"Q. And while you had it, you showed it to David and to Will, did you not? A. Oh, yes.

"Q. And David had had it in his hands, hadn't he? A. Yes.

"Q. And so did Will? A. Yes, that is how I remember, when I showed it to the boys.

"Q. When the deed came over? A. Yes.

"Q. And you were very grateful to Mrs. Rudell, for making out the deed to the two boys? A. I didn't believe it then * * *

"Q. When the deed came to you, did you hand it to David or to William? A. Oh, I can't remember. I just showed it to both of them.

the second, and this is borne out by the habendum clause filled out in the plural number (i. e. parties and "their" heirs) and by the concluding clause, filled out in the singular number (i. e. "In Witness Whereof the said party of the first part has hereunto set her hand" etc.).

"Q. How do you mean you showed it to them? They just took it and looked at it? A. Yes.

"Q. But they didn't keep it in their possession? A. No. They just felt as I did, they couldn't believe it, and they just said, 'Oh, put it in there and save it.'

"Q. And then she wrote, several months after, you say, wanting the deed back? A. Yes."

When asked: "What did your sister say to you about the property?" she answered: "When she wanted the deed back she said in the letter she thought her sisters should have it, and there was nothing more said about it when I saw her again."

[2] Appellant moved to strike this answer but the court refused to do so, remarking "It does go to the intent", having theretofore remarked that "intent is the paramount element of delivery". In this colloquy this was said:

"Mr. Sheffey: What happened after the delivery couldn't affect the deed. It is incompetent, irrelevant and immaterial.

"The Court: What we are trying to establish is whether there was ever a delivery.

"Mr. Sheffey: That is established by this witness' testimony.

"The Court: The action of the grantor in relation to the deed certainly would show whether or not there was delivery or whether or not there was conditional delivery.

"Mr. Sheffey: That may be so, at the time of the delivery, Your Honor; but it wouldn't be so several months after.

"The Court: You are assuming the time of delivery is established. That is the question at issue—was there delivery or not delivery. Therefore, the manner in which this deed was treated by the grantor would certainly indicate what her intent was, and the Court is quite in the dark as to why the deed was mailed to Mrs. Ring. It was not mailed to the grantee. It was not

mailed with instructions. That is the record as it now stands."

Appellant testified that in 1945 her husband, William, showed her the deed in the Ring home in San Francisco, where they lived with his mother, and her counsel point out that that was before the grantor's death. They claim that this testimony was uncontradicted, but this is not so, since Agnes Ring testified that it was before William's marriage in 1943 that the deed was in her possession in the home, where it remained for only a few months and was then mailed back to Mrs. Rudell. Obviously either witness could have been mistaken as to the year, and the trial court could have accepted either version. Even if Grace Ring's testimony was uncontradicted by direct testimony the court was not bound to accept it, *Blankman v. Vallejo*, 15 Cal. 638, 645; *Lohman v. Lohman*, 29 Cal. 2d 144, 149, 173 P.2d 657; *Berg v. Journeymen's etc. Union*, 5 Cal.App.2d 582, 584, 42 P.2d 1091.

Appellant argues that after the episode when Agnes Ring had the deed in her possession for a few months in 1943 or before that, and returned it to Mrs. Rudell, it might have been again sent back by Mrs. Rudell to San Francisco, but Agnes Ring testified emphatically that the deed was in her home on but one occasion prior to the time when her sons brought it back after their visit to Mrs. Rudell's home in Oakland following her death.

[3,4] Grace Ring testified that after her husband's death she found the recorded deed in his desk, but the testimony respecting the finding of the deed in the grantor's home after her death, from which there is a presumption of non-delivery, *Donahue v. Sweeney*, 171 Cal. 388, 390, 153 P. 708, and its removal therefrom by David Ring, afforded a sufficient explanation of the way it happened to be put on record and how it came into William Ring's possession after the grantor's death, and sufficed to dispel any prima facie showing or presumption of delivery arising from recordation.

There was evidence other than the testimony of Agnes Ring and Mary Owens on which the court could have based its finding of non-delivery. As was the case in

Donahue v. Sweeney, *supra*, the grantor exercised acts of dominion over the property after the date of the deed, which were inconsistent with a divestiture of her title.

First, Mrs. Rudell lived in the house, in sole possession thereof, continuously until her death, which was over six years after the date of the deed, during which time the record title was vested in her. It is true that appellant alleged that there had been an oral agreement between Mrs. Rudell and David and William Ring that she had the right to remain and live on the property as long as she lived, but there was no proof of any such agreement.

Secondly, on April 1, 1943, Mrs. Rudell and her husband (who predeceased her) joined in executing a deed of trust on the property to secure a promissory note for \$2,100.

[5] There is a presumption "That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership", § 1963, subd. 12, Code Civ.Proc. Continued possession by the grantor and the encumbrance of the property by her are such acts, see, again, Donahue v. Sweeney, *supra*, 171 Cal. at page 391, 153 P. 708.

[6-8] As the trial judge remarked, "intent is the paramount element of delivery" and, as said in Williams v. Kidd, 170 Cal. 631, 639, 151 P. 1, 3, "this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence". That question having been resolved by the trial court against the appellant, its finding "cannot be set aside by this court on the ground that it is not sustained by the evidence". Mah See v. North American etc. Co., 190 Cal. 421, 426, 213 P. 42, 44, 26 A.L.R. 123. See also Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602-603, 86 P.2d 829; Webster v. Board of Dental Examiners, 17 Cal. 2d 534, 539-540, 110 P.2d 992; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

The cases just cited answer appellant's argument that this court should draw its own inferences from the facts.

In Neely v. Buster, 50 Cal.App. 695, 195 P. 736, cited by appellant, the trial court

found that there had been a good delivery to a third person without right of recall before the grantor's death; here the trial court found the contrary. In the Neely case all the appellate court held was that there was sufficient evidence to support the finding of delivery. There is nothing in Chaffee v. Sorensen, 107 Cal.App.2d 284, 236 P.2d 851, cited by appellant, in conflict with the rule stated in the four cases cited above.

[9-11] Appellant claims that this action is barred by plaintiff's laches.

The demurrer first raised that issue, but we are satisfied that the face of the complaint does not show such a case, and hence that the demurrer was properly overruled. The complaint contained the averments usually found in a quiet title action. It is true it alleged the death of William Ring on January 14, 1950, three months before the complaint was filed, but that is not sufficient to show laches.

The answer set up the defense of "laches and inequitable conduct of plaintiff and those whom plaintiff allegedly represents." It alleges the deed; that David died on June 25, 1948 [meaning 1947] and that his estate had been distributed to his mother, Agnes Ring. It alleges William's death on January 14, 1950, and that his estate was in course of probate. It alleges an oral agreement between Elizabeth Rudell and David and William reserving a life estate (which, as already noted, was not proved). It then alleges: "that at the death of said Elizabeth Rudell, William T. Ring, and David Ring took possession of said property under and by virtue of said deed and since said date have paid all taxes levied and assessed against said property, have kept said property, insured and have paid insurance premiums thereon for such insurance, have maintained said property in a state of repair, and have expended substantial sums of money in the maintenance, repair and upkeep of said property, and have paid and discharged an indebtedness of Elizabeth Rudell, secured by a deed of trust on said real property", in the sum of \$1,724.36. It alleges further: "That all the above facts were known to plaintiff and those whom she represents at all times since the date of the

death of said Elizabeth Rudell, but said plaintiff and those whom she allegedly represents have made or asserted no claim to said property until after the death of all the parties connected with said deed and the circumstances under which the same was delivered to William Ring and David Ring."

There was no proof whatever of the possession of the property by David or William, or of the payment by them of taxes or insurance, or of their maintenance or repair of the property.

Under examination by respondent's counsel, appellant was asked: "You alleged in the answer to the complaint, that certain payments were made on a deed of trust covering this property; that these payments were made by David and William Ring, did you not?" to which she made no audible answer; the record shows "A. (Nodding head)." This question did not inquire whether such payments had been *in fact* made, but simply whether she had so alleged. This was not followed up by proof by appellant of such payment or by proof of any other outlays.

While it is true both David and William had died before this action was commenced, the defense was not thereby deprived of the means of proving possession as alleged in the answer. The same may be said with respect to payments and outlays for taxes, insurance, maintenance and repairs, and the alleged payment of \$1,724.36 on the indebtedness.

The court found generally: "That all of the allegations and averments of plaintiff's complaint are true and *all of the denials of defendant's answer and all of the allegations and averments of said answer inconsistent with plaintiff's complaint are untrue.*" (Emphasis added.) And specifically: "That it is not true that plaintiff's cause of action is barred by laches or inequitable conduct."

In view of appellant's failure to prove the allegations of her special defense, the findings just quoted cannot be successfully attacked since it is settled that where no evidence is introduced in support of an issue findings should be made thereon against the party who has the burden of proof (24 Cal. Jur. p. 945). The question of laches is

primarily one for the trial court. Hopson v. National Union etc. Co., 116 Cal.App.2d 320, 253 P.2d 733; 10 Cal.Jur. p. 527.

There is no need to discuss the numerous authorities cited by both sides on the question whether laches can be pleaded as a defense in this type of action, in view of appellant's failure to prove the allegations of her defense of laches.

[12] Appellant claims error in the admission of certain hearsay testimony. Mrs. Owens testified that as she waited in the dining room of the Rudell home in Oakland, David went into a closet adjoining the dining room and "He came out with a paper and the search was ended. It was all over
* * *

"Q. And he took the paper and put it in his pocket? A. Yes."

The following then occurred:

"Q. What did he do? A. He put it in his pocket and he said, 'The search is over.'"

"Mr. Sheffey: Just a moment. I ask that the statement of the witness that was made by David Ring, as she asserts, be stricken out, as hearsay.

"The Court: Wait just a minute, please. I don't think it is hearsay. He is a party in interest. However, no proper foundation has been laid.

"Mr. Sheffey: I also object on the ground of no proper foundation.

"Miss Wollitz: I think we can come back to that, Your Honor, and tie it in." (Emphasis added.)

The part of the testimony which we have emphasized is claimed to be hearsay. The court ruled that it was not, but went on to rule that no proper foundation had been laid, which from the colloquy just quoted, brought the matter to an end in any event, since plaintiff's counsel abandoned the inquiry. With the record in that condition it cannot be said that "this testimony undoubtedly influenced the court in making its decision."

Appellant also assigns as error the testimony of the witness Melvin Gross respecting a conversation he had with Mrs. Rudell in May, 1945, about the deed. Counsel say that such conversation "had no bearing on

the intent of the grantor in 1940 when she mailed the deed to Agnes Ring. It did not contradict the testimony of Grace Lynette Ring nor refute the presumption of delivery arising from the fact of possession of the deed by the grantees." Respondent answers by citing the cases of *Casey v. Casey*, 97 Cal.App.2d 875, 880, 218 P.2d 842; *O'Dea v. Hibernia S. & L. Society*, 119 Cal.App. 622, 7 P.2d 391, and *Katz v. Enos*, 68 Cal. App.2d 266, 275-276, 156 P.2d 461, see, also, *Whitlow v. Durst*, 20 Cal.2d 523, 127 P.2d 530 and *Hansen v. Bear Film Co.*, 28 Cal. 2d 154, 168 P.2d 946 all of which, hold that statements of a grantor made after the date of execution, as well as before, are admissible on the question of intent.

We find no error in this record.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



**GARCIA et al. v. INDUSTRIAL ACC.
COMMISSION et al.***
Civ. 19400.

District Court of Appeal, Second District,
Division 3, California.
May 6, 1953.

Hearing Granted July 2, 1953.

Workmen's compensation proceedings wherein the Industrial Accident Commission granted an unemployment compensation lien against a compromise award, and the employee and his employer's insurer appealed. The District Court of Appeal, Shinn, P. J., held that even though workmen's compensation applicant's consent to allowance of lien constituted prima facie evidence of validity of lienor's claim, appellate court could not give it conclusive effect, for purpose of affirming allowance of lien, when consent had been ignored throughout hearing before commission and in proceeding for review.

Award annulled and matter referred to commission with directions.

* Subsequent opinion 263 P.2d 8.

1. Workmen's Compensation ⇨1004

Where lien claimant presents consent of workmen's compensation applicant to allowance of lien, commission has broad powers to require proof of validity of lien if there is any reason to suspect that consent was not given freely and with full understanding. Labor Code, §§ 4900, 4903 (f, g), 4904.

2. Workmen's Compensation ⇨1752

Industrial Accident Commission must make findings sufficient to support its award in workmen's compensation proceedings, including allowance of lien against compensation.

3. Workmen's Compensation ⇨1004

Burden would be upon workmen's compensation applicant to show cause, if any, why he should not be bound by his consent to allowance of lien to Department of Employment for unemployment compensation benefits. Labor Code, §§ 4900, 4903 (f, g), 4904.

4. Workmen's Compensation ⇨1004

Even though workmen's compensation applicant's consent to allowance of lien constituted prima facie evidence of validity of lienor's claim, appellate court could not give it conclusive effect, for purpose of affirming allowance of lien, when consent had been ignored throughout hearing before commission and in proceeding for review. Labor Code, §§ 4900, 4903(f, g), 4904.

5. Workmen's Compensation ⇨1004, 1130

Amount of agreed settlement is "compensation" against which lien for unemployment benefits may be allowed. Labor Code, §§ 4900, 4903(f, g), 4904.

Victor C. Rose and Herlihy & Herlihy, Los Angeles, for petitioners.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Deputy Atty. Gen., and Vincent P. Lafferty, Deputy Atty. Gen., for respondents.

SHINN, Presiding Justice.

Everardo Garcia was an employee of Sale's Fulton and Plaza Markets; Pacific

Indemnity Insurance Company was the employer's insurer; August 3, 1950, Garcia filed with the commission an application for adjustment of claim for an injury allegedly sustained March 17, 1950, when his car was hit by a truck. On August 3rd the State of California, Department of Employment, (herein called the Department), filed a notice and request for allowance of lien in the sum of \$25 per week beginning June 27th, not to exceed \$746, against any amount payable as compensation for Garcia's injury of March 17th. Garcia signed a statement endorsed on the filed notice, reading: "I consent to the requested allowance of a lien against my compensation." December 12, 1950, the Department amended its claim of lien, specifying the payment of \$496, consisting of \$400 paid between June 27th and October 16th, and \$96 hospital benefits paid between July 4th and July 16th. February 1, 1951, Garcia filed two additional applications, each claiming separate injuries on November 26, 1948, and February 2, 1949. Each claim alleged that the applicant did not quit work after either injury. Following numerous continuances granted at the instance of the parties there was a partial hearing February 21, 1952, at which time, on the suggestion that a compromise was being negotiated, the referee ordered the matters off calendar after the receipt in evidence of certain medical reports. It was shown at the hearing on February 21st that Garcia received \$5,000 in settlement of his claim against a third party for his injuries of March 17, 1950, of which \$200 was paid to Pacific Indemnity. March 31, 1952, an agreement between Pacific Indemnity and Garcia was filed which recited that temporary indemnity had been paid in the sum of \$90, that there was a dispute as to liability, and that any and all of Garcia's claims were compromised for \$1,250, subject to approval of the commission. An order was made approving the compromise and release without disposing of or mentioning the claim of lien of the Department of Employment. April 23, 1952, the Department in writing requested disposition of its claim of lien. May 5th the referee in writing notified the Department that there was nothing in the record which

would enable the commission to pass on the merits of the lien, but that proof on the issue might be given within ten days. The Department responded to the effect that it was not required to produce any evidence. The referee in writing again requested the production of evidence. The Department in reply agreed that it was necessary to have evidence on which the commission could base a finding as to the merits of the claim of lien. Further hearing was noticed for August 7, 1952, for the purpose of determining whether the order approving the compromise should be amended to dispose of the claim of lien. On that date applicant was present with his attorney; Pacific Indemnity and the Department of Employment also were represented. The record of this hearing consists of 21 pages of discussion between the attorneys and the referee. No evidence was introduced. At the request of the parties for a finding on the issue the referee found as follows: "In all three cases there is no evidence to establish that applicant has sustained any injury which arose out of and occurred in the course of his employment or that he suffered any period of disability as result of any such injury, nor is there any evidence that will establish that he is entitled to any compensation by reason of any such period of disability," and reported that the compromise and release should be approved and the Department of Employment granted a lien of \$496. The findings and order of the commission were in accordance with the report of the referee. September 18th Pacific Indemnity filed a petition for reconsideration, which was denied. It then joined with Garcia in this proceeding for review.

Under § 4903(f) of the Labor Code, the Department was entitled to a lien for the amount paid as unemployment compensation disability benefits if, pending a determination under division 4 of the Labor Code, there was uncertainty whether the benefits were payable under the Unemployment Insurance Act or the Workmen's Compensation Law, or, under § 4903(g), for unemployment compensation paid erroneously for a period for which the employee received temporary total disability payments as workmen's compensation.

Throughout the entire proceeding before the commission no evidence was introduced as to whether Garcia had suffered a compensable injury and all parties overlooked, or disregarded, the fact that he had, by a writing filed with the commission, consented to the allowance of the claim of the Department as a lien against his compensation. Pacific Indemnity and the Department each claimed that where a compromise was effected it was under no duty to produce any evidence to prove or disprove that the disability during the period for which the applicant received unemployment insurance was one for which he had a right to workmen's compensation. They make the same contentions in the proceeding in this court, and ignore Garcia's consent to allowance of the lien, it being merely remarked by the petitioners in their reply to the answers that Garcia consented to the allowance of a lien only in the event the proof established that the Department was entitled to a lien.

At no time during the hearing was the attention of the referee called to the fact that Garcia had consented to allowance of the lien. It was not mentioned in any report or finding of the referee or the commission and the order allowing the lien was not based upon the consent.

[1-5] Had the Department of Employment expressed its reliance upon the consent as a sufficient basis for allowance of its lien, it would not have been required to make any further showing of its right to a lien so long as the validity and effect of the consent was not brought in question. Upon the other hand, had the department based its claim of lien primarily upon the consent, the petitioners here would have had a right to offer any proof or any reasons why Garcia should not be held bound by it. Under these circumstances the award, insofar as it allowed the lien of the Department, may not be affirmed upon the ground that Garcia consented that it might be allowed. Considering the state of the record, we regard the consent as prima facie evidence of the validity of the claim of the Department, but we cannot give it conclusive effect when it was ignored throughout the hearing before the

commission and also has been ignored in this proceeding in review.

Moreover, in view of the nonassignability of a claim for compensation, Labor Code, § 4900, the ineffectiveness of any agreement for attorney's fees or medical or hospital expense, § 4904, and the requirement that settlement agreements must have the approval of the commission, we believe that where a lien claimant presents the consent of an applicant to allowance of a lien, the commission has broad powers to require proof of the validity of the lien if there is any reason to suspect that the consent was not given freely and with full understanding.

It is an indispensable requirement that there be findings of the commission upon matters in issue sufficient to support its awards. Agreements of settlement approved by the commission are, of course, sufficient so far as the parties to the agreements are concerned, but the rights of third parties, such as lien claimants who are not parties to the agreements, must be determined in the usual course. Here, the agreement between the applicant and the insurer did not of itself establish the validity of the claim of lien of the Department. The burden of producing the evidence upon that issue in case of a compromise does not rest upon the commission, although it should require the parties to produce any necessary evidence. Here, the burden was upon the applicant and his insurer to show cause, if any they had, why they should not be bound by Garcia's consent to allowance of a lien to the Department. If, in further proceedings, the commission should give approval to the consent it would be a sufficient basis for allowance of the lien. If it should for good reason withhold approval the lien would have to be established as in any other case. The amount of an agreed settlement is "compensation" against which a lien may be allowed. *Aetna Life Insurance Co. v. Industrial Accident Comm.*, 38 Cal.2d 599, 241 P.2d 530. Findings of facts establishing a right to a lien are as necessary to allowance of the lien in case of a compromise as they are where no agreement is made.

It appears from the report of the referee after the final hearing that the omission of a disposition of the lien claim from the order approving the compromise was inadvertent. This being so, objections to the informality of the requests of the Department for adjudication of its claim may not be sustained.

The award of a lien to the Department of Employment is annulled and the matter is referred to the commission for further proceedings in accordance with the views herein expressed.

PARKER WOOD and VALLÉE, JJ.,
concur.



117 Cal.App.2d 718

PIERCE et al. v. WRIGHT et al.

Civ. 15474.

District Court of Appeal, First District,
Division 1, California.

May 12, 1953.

Rehearing Denied June 11, 1953.

Hearing Denied July 9, 1953.

Suit by owner against surety on contractor's bond. The Superior Court, City and County of San Francisco, Jordan S. Martinelli, J., rendered judgment for owner and surety appealed. The District Court of Appeal, Bray, J., held that where owner and contractor provided in original and supplementary contracts that contractor would give bond, surety was bound by his signature on surety bond despite fact that original and supplementary contracts had been executed and work had been begun prior to execution of surety bond.

Judgment affirmed.

1. Principal and Surety ⇨34

Where no premium is paid and suretyship contract is entered into subsequently and entirely apart from principal contract, consideration given to principal alone for already executed contract is regarded as past consideration in relation to suretyship contract and unless there is new consideration, surety is not bound.

256 P.2d—66½

2. Contracts ⇨305(1)

Contractor's performance bond was for benefit of owner and owner could waive time for filing bond.

3. Principal and Surety ⇨159

Contractor's performance bond is presumptive evidence of consideration. Civ. Code, § 1614.

4. Principal and Surety ⇨159

Burden of showing want of consideration for contractor's performance bond was on party attempting to overcome presumption of consideration. Civ.Code, § 1614.

5. Evidence ⇨590

A court or jury is not bound to believe interested witness as against presumption.

6. Principal and Surety ⇨34

Where owner and contractor provided in original and supplementary contracts that contractor would give performance bond, surety was bound by his signature on performance bond despite fact that original and supplementary contracts had been executed and work had been begun prior to execution of performance bond.

7. Principal and Surety ⇨161

In suit against surety on contractor's performance bond, evidence was sufficient to sustain finding that surety knew what he was doing when he executed surety bond and that he did not sign bond while he was intoxicated.

8. Guaranty ⇨20

Principal and Surety ⇨41

Fraud of principal debtor will not relieve guarantor or surety who acted at request of debtor from liability if creditor did not have notice of fraud and did not participate therein.

9. Contracts ⇨306(4)

Owner was not required to give notice to contractor who abandoned job of building owner's home and became fugitive from justice before finishing construction of home despite provisions of contract that if contractor failed to supply sufficient material or workmen to complete contract after five days' notice from owner or if contractor discontinued or abandoned work

for more than ten days, owner, on five days' notice to contractor, could finish work.

10. Contracts ⇨290

A party waives his right to arbitrate an issue by failing to plead such right.

11. Bonds ⇨1

Contractor's performance bond for construction of residence was not void for uncertainty despite fact that bond was one originally intended for public works contract, that certain blanks were left unfilled, that certain words were misspelled and that it contained statement that principal and surety were bound unto "—— hereinafter called the Owner" and contained later references to "Owner, its officers and agents".

12. Trial ⇨395(5), 396(1)

A finding does not necessarily have to be in exact language of pleading and finding of ultimate fact or facts is sufficient.

13. Mechanics' Liens ⇨317

Contractor's performance bond is contract of indemnity against liability rather than one of indemnity against loss sustained and paid, and failure of contractor to keep property free from liens justifies owner in suing on bond even though owner has not satisfied claims of lienholders.

Joseph A. Brown, San Francisco, for appellant.

W. O. Weissich and Leland H. Jordan, San Rafael, for respondent.

BRAY, Justice.

Defendant Bertie Parkhurst appeals from a judgment against him in the sum of \$5,185.50 on a surety bond.

Questions Presented.

1. Was the bond given without consideration?
2. Was it procured by fraud?
3. Effect of alleged failure to comply with contract provisions.
4. Was the bond void for uncertainty?
5. Did the court fail to find on material issues?

Evidence.

In May, 1949, plaintiffs were getting bids for the construction of a home and were introduced to Wright, a contractor. June 2, plaintiffs applied to the San Francisco Federal Savings and Loan Association¹ for a construction loan. Their architect insisted on plaintiffs requiring a performance bond, and provided in the specifications "the contractor will furnish the owner a performance bond—before submission of the bid." June 8, plaintiffs entered into a contract with Wright in which he agreed to construct the house according to the plans and specifications for \$10,371. There is no mention of a bond in the contract itself, except a statement to the effect that changes in the work for which provision was made would not invalidate the agreement "nor exonerate any surety upon any guaranty or bond given in connection herewith * * *." June 25, a supplementary written contract was entered into between plaintiffs and Wright. It expressly incorporates the first contract, recites that plaintiffs have applied to the association for a loan to be secured by a first deed of trust upon the property and the improvements to be constructed thereon, states that it is being expressly made primarily for the benefit and protection of the association and a title company, and in further consideration of their making a loan and issuing title insurance; "That this agreement amends, modifies and alters the construction contract, Exhibit 'A' hereof, in part, and supersedes said agreement in each and every respect, in which the two agreements are or may be inconsistent, but not otherwise"; "The Contractor hereby agrees to give the owner a personal surety for the satisfactory completion of the construction free from any claim or liability of any nature whatsoever."

On either the first day of June or of July plaintiffs told Wright to proceed to construct the house. Actual work started about the middle of July. Up to this time no bond had been given, although the architects and plaintiffs had asked Wright to do so. Wright apparently was unable to get a surety company bond, and in the supple-

1. Hereafter referred to as "the association."

mentary agreement it was agreed he could give a personal surety bond. August 23, over a month after construction had started, Wright delivered the bond in question here. It is dated August 23, and signed by both Wright and defendant. A portion of the bond follows:

“Performance Bond

“Know All Men By These Presents:

“That Whereas, ——— California, by Resolution No. ———, passed Forrest E. Wright ——— hereinafter designated as the ‘Principal’, a contract for construction one sotre basement and carport residence for Edward Fairchild Pierce and Betty Ann Pierce, at Corte Madera, Parcel 15 KBS tract

“Whereas, said principal is required under the terms of said Contract to furnish a bond for the faithful performance of said Contract,

“Now, Therefore, we, the principal and Bertia Parkhurst [sic] as surety are held and firmly bound unto ——— hereinafter called the Owner, in the penal sum of \$5185.50 (five Thousand one hundred and eighty-five dollars and fifty cents * * *.”

There then follow suretyship provisions in which the surety is designated as “it,” and the instrument recites that the surety “for value received,” waives certain rights, that of notice of a change, alteration or addition to the terms of “the Contract” or work to be performed thereunder or under the specifications accompanying it, and of extension of time.

In late April, 1950, when the work was about 60 per cent completed, Wright abandoned the contract and became a fugitive from justice. Materialmen’s liens were filed against the property. Plaintiffs finished the construction themselves, and then brought suit against Wright for breach of contract and defendant on the bond for the amount necessary to make them whole.

1. Was The Bond Given Without Consideration?

[1-6] Defendant contends that it was, for the reason that both the original and supplementary contracts had been executed and the work begun prior to the execution

of the bond. He supports this contention by reference to the general rule that where, as here, no premium is paid and the suretyship contract is entered into subsequent to, and entirely apart from, the principal contract, the consideration given to the principal alone for the already executed contract is regarded as a past consideration in relation to the suretyship contract, and that unless there is a new consideration, the surety is not bound. See 50 C.J. 49, 72 C.J.S., Principal and Surety, § 67b; Bank of Italy v. Wetzel, 82 Cal.App. 240, 255 P. 254; Leverone v. Hildreth, 80 Cal. 139, 22 P. 72. This rule, however, does not apply here, for the reason that both the original contract and the supplementary one provided that Wright should give a bond. This provision being for his benefit, he could waive the time for filing the bond, which under the specifications was to have been given with the bid. See Bakersfield Improvement Co. v. Bakersfield, etc., Co., 40 Cal.App. 703, 706, 181 P. 851. In none of the above and other cases cited by defendant where the giving of a bond subsequent to the delivery of the contract was held to be without consideration, was there a bond *given pursuant to the provisions of the contract*. It is true that there is no evidence that defendant received from Wright any monetary consideration for signing the bond. This fact, however, is not important. The contract required Wright to put up a bond. Pursuant to it, Wright produced the bond executed by defendant. The bond itself is presumptive evidence of consideration. Civ.Code, § 1614. The burden of showing a want of consideration was upon the party attempting to overcome the presumption. R. H. Herron Co. v. Flack, 46 Cal.App. 374, 189 P. 294. This, under the court’s findings, the defendant did not do. As said in Keating v. Morrissey, 6 Cal.App. 163, 168, 91 P. 677, 679: “* * * it was within the exclusive province of the jury to declare whether the evidence offered to overcome the presumption of consideration for the note was of sufficient strength to do so or not. * * * A court or jury is not bound to believe an interested witness as against a presumption, if the latter satisfies its mind. [Citations.]” The general rule

that without additional security a surety is not bound by his signature made after the execution of the contract by the principals does not apply where the surety is procured in pursuance of a provision of the contract. *Stroud v. Thomas*, 139 Cal. 274, 72 P. 1008; *Leverone v. Hildreth*, *supra*, 80 Cal. 139, 140, 22 P. 72; 50 C.J. 48, 72 C.J.S., Principal and Surety, § 67a; 167 A.L.R. 1185.

2. Was The Bond Procured By Fraud?

[7] Defendant is an alcoholic and contends that his signature was obtained by Wright while defendant was blind drunk. He testified he did not remember signing the bond. Both he, a Mrs. Mattern who is a joint tenant with defendant in the property where he was staying, and her niece, testified that in August, when Wright came to see him, defendant had been drunk in bed in his room for about a week. Defendant could not remember the circumstances but his two witnesses testified that Wright asked defendant if he would sign a character reference. They did not see defendant sign anything, however. On one occasion Wright brought defendant to the job while the house was under construction and both Wright and defendant looked the work over and commented on it. Wright stated that he was glad that defendant "had finally come over to the job." Defendant then appeared to be sober. After Wright had cashed some bad checks and fled, a deputy sheriff came to defendant, and in the conversation defendant admitted that he had signed a surety bond on the house, was "stuck," and that he would have to pay off any balance on the house. Mrs. Mattern was present and neither defendant nor she stated that defendant was drunk when he signed the bond. When the architect phoned him to come in and discuss the Wright situation as he was on the bond, he did not deny it or claim to have signed it while drunk. He stated, "I am a heavy drinking man. I don't have money. There is nothing I can do about the bond." Later the architect mailed a letter to defendant demanding that he make good on the bond, but received no reply. Defendant contends that there is no contradiction of his testimony and that of his two witnesses that at the time he signed the bond he was too

drunk to be able to transact business, and that the court must take their uncontradicted evidence at face value. While there was no direct contradiction, the court had the right to consider the interest of both defendant and the two witnesses, defendant's actions at the job, his statements to the deputy sheriff, and his and Mrs. Mattern's failure to state to the deputy his claim as to his condition at the time he signed the bond. These and all the circumstances in the case were sufficient to support the court's implied finding that he did know what he was doing. These facts show that the refusal of the court to believe defendant and his witnesses was not arbitrary, thereby making inapplicable the rule discussed in the minority opinion in *Stewart v. Silva*, 192 Cal. 405, 221 P. 191.

As to defendant's contention that his signature on the bond was "of a very dubious character," the court saw that signature and compared it with exemplars of his signature taken in court, and apparently concluded that it was not dubious.

[8] It must be remembered that no claim was made that plaintiffs perpetrated the fraud, if any was perpetrated, or had knowledge of it. "The rule is well settled and generally followed that fraud of the principal debtor will not relieve the guarantor or surety who acted at the request of the debtor from liability, if the creditor did not have notice of the fraud and did not participate therein." *Simon Newman Co. v. Tully*, 13 Cal.2d 134, 137, 88 P.2d 131, 132. See *Crumrine v. Dizdar*, 59 Cal.App. 2d 783, 787, 140 P.2d 101.

3. Alleged Failure To Comply With Provisions Of Contract.

[9] Defendant contends that this action must fall because of plaintiffs' failure to comply with two provisions of the contract, the first requiring notice to the contractor in certain contingencies. The 10th and 11th articles of the contract provided that if the contractor failed to supply sufficient material or workmen to complete the contract after five days' notice from the owner, or if the contractor discontinued or abandoned the work for more than ten days, the owner, upon five days' notice to

the contractor, could finish the work. Wright abandoned the job in April. The exact date is not given but it was sometime prior to June 22, when a deputy sheriff testified that Wright, who had been arrested for bad checks, jumped bail, leaving a suicide note. Plaintiffs did not take over the work until October. Obviously, a notice by the owner could not be given under those circumstances. The law does not require an impossibility. In both *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal.App. 632, 112 P. 892, and *New England etc. Co. v. Chicago etc. Co.*, 36 Cal.App. 584, 172 P. 1122, the contracts contained notice requirements similar to those in our case. Both cases held that such notices are unnecessary where the contractor, as here, *entirely abandons the contract*.

[10] The second provision concerns arbitration. The 15th article provides, "Should dispute arise as to the true meaning of the plans and specifications, or respecting the manner or sufficiency of the performance of any work thereunder, or respecting the character or value of extra work or work omitted, the questions in dispute shall, in the first instance, be decided by the architect; but should either owner or contractor be dissatisfied with his decision, the question shall, on written demand of either * * *" provision is made for arbitration. Just how plaintiffs could enter into arbitration with a fugitive from justice, defendant does not explain. More important, however, is the provision for arbitration itself. It does not require arbitration in the event of a total abandonment. The arbitration applies only to a dispute as to certain matters (none of which are in dispute here) between the parties. Moreover, in the event of such dispute the questions in dispute are to be decided in the first instance by the architect. It is only if the owner or contractor is dissatisfied with the architect's decision that the arbitration clause comes into effect, and then only if one of them makes written demand for arbitration. No such demand was made either by Wright or defendant, nor did defendant plead such failure to arbitrate. "In the proceeding in the superior court plaintiffs did not contend, however, that the

question whether the assignment was valid should be determined by the arbitration board; they submitted that issue to the court without reservation. A party waives his right to arbitrate an issue by failing to plead such right." *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 339, 182 P.2d 182, 185. See also *Landreth v. South Coast Rock Co.*, 136 Cal.App. 457, 29 P.2d 225; *Pneucrete Corp. v. U. S. Fidelity & Guaranty Co.*, 7 Cal.App.2d 733, 46 P.2d 1000.

In *Clogston v. Schiff-Lang Co., Inc.*, 2 Cal.2d 414, 41 P.2d 555, there was a clause for arbitration in the contract where "differences" arose between the parties. Plaintiff sued for breach of contract. Defendant demurred for failure to allege that plaintiff had complied with the arbitration clause. The demurrer was overruled. Defendant then set up that failure as a defense. The Supreme Court held that the failure to arbitrate the contractual "differences" barred a recovery. That case, however, is distinguishable from ours, both in the fact that the pleadings in nowise raise the question of lack of arbitration, and in that this action is not based on contractual "differences" but a complete abandonment of the contract.

4. Was The Bond Void For Uncertainty?

[11] It is obvious that the prepared form of the bond was one originally intended for a public works contract. However, it is clear from a reading of the contract that in spite of the blanks left unfilled it was intended as a bond for the performance of the contract for the construction of a "one sotre [story] basement and carport residence for Edward Fairchild Pierce and Betty Ann Pierce, at Corte Madera, Parcel 15 KBS tract." Although it stated that the principal and the surety were bound "unto ——— hereinafter called the Owner" and later referred to the "owner, its officers and agents," it is clear that it was referring to plaintiffs. At the time of signing the bond, both the original and the supplementary contract had been executed and constituted one contract. See *Div. of Labor Law Enforcement v. Safeway Stores*, 96 Cal.App.2d

481, 215 P.2d 773; 6 Cal.Jur. 298. There was no uncertainty as to what contract was meant; it was the contract for the construction of the residence for plaintiffs. Here the original contract and its modification constituted but one contract. Defendant cites cases to the effect that a surety is discharged by any material alterations in the terms of the contract made without his consent. No such alteration was made *after* the execution of the bond. It might be pointed out, too, that the bond provided that no change in, alteration of or addition to the terms of the contract should affect the obligation of the bond and defendant expressly waived notice of any change, alteration or addition. See *Blackwood v. McCallum*, 187 Cal. 655, 203 P. 758, for the effect of such provision.

5. Findings.

There was no issue in the pleadings concerning lack of arbitration. At the end of the case defendant mentioned it to the court as "highly technical" as to which he was "not too sold on that point." Therefore, the court was not required to find that there had been no demand for arbitration, a fact that was freely admitted by everyone.

[12] In paragraph IV of the answer, and in the second separate defense, defendant alleged that if he signed the bond he did so because Wright represented to him that it was merely a recommendation of Wright, and that defendant was in no condition to understand the import of the document. Concerning the allegations of misrepresentation by Wright, the court did not find in the exact words of the answer. However, it did find that at the time defendant executed the bond he was "of sound mind and mentally capable of entering into a contract and was not intoxicated," and that the bond was not procured by Wright by means of fraud or false or fraudulent representations of any kind. This was a sufficient finding that the allegations of misrepresentation in the answer were not true. A finding does not necessarily have to be in the exact lan-

guage of the pleading. A finding of the ultimate fact or facts is sufficient. *Bloss v. Rahilly*, 16 Cal.2d 70, 104 P.2d 1049. In *Publishers Distributing Service v. Southern California School Book Depository*, 14 Cal. App.2d 448, 449, 58 P.2d 401, the court said: "* * * the allegations of fraudulent representations are disposed of by one blanket finding to the effect that 'defendant made no fraudulent representations or inducements to procure said agency contract,' without particularizing as to each alleged item of fraud. The court's general finding that no fraudulent representations or inducements were made to procure the agency contract would of itself be sufficient to support the judgment denying appellant any relief."

[13] At the trial defendant stipulated to the claims of lien filed against the property and their amounts, and that if the lien claimants were called they would testify that the materials for which the claims were made were delivered for and used in the construction of plaintiffs' house. The court gave plaintiffs judgment for the amounts of these claims. In his opening brief defendant calls attention to the fact that the amounts claimed were not paid by plaintiffs at the time of trial. Just what his point is in this behalf if any, does not appear. In *Ceremony v. Drummond*, 37 Cal.App. 446, 174 P. 696, it was held that the contractor's bond is a contract of indemnity against liability rather than one of indemnity against loss sustained and paid, and that the failure of the contractor to keep the property free from liens justifies the owner in suing on the bond even though he has not satisfied the claims of the lien claimants. At the trial he is required to establish the validity of the lien and the amount of the indebtedness. In our case the stipulations did this and no contention was made that the plaintiffs had not met this burden.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

118 Cal.App.2d 9

PEOPLE v. CARDENAS.
Cr. 4976.

District Court of Appeal, Second District,
Division 1, California.
May 20, 1953.

Defendant was convicted of possession of marihuana and a preparation of heroin. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to support judgment of conviction.

Judgment and order affirmed.

1. Criminal Law §1159(2, 4)

Questions as to weight of evidence and credibility of witnesses are not for an appellate tribunal.

2. Poisons §

Evidence sustained conviction for possession of marihuana and a preparation of heroin.

Manuel Ruiz, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged by information in Count I with the possession of what is commonly known as marihuana and in Count II with the possession of "a preparation of heroin". Defendant was adjudged guilty by a jury, a motion for a new trial was denied and the appeal followed.

As recited in appellant's brief, "Appellant contends on this appeal that before a conviction may be sustained, that the record must show that possession of narcotics must be such as to be immediate, accessible and exclusive to the defendant. The case

before the lower court was tried by the prosecution upon such predicate, and it is contended by the appellants on this appeal that the evidence is insufficient to support the verdict."

The record reveals that the officers visited the home of defendant, where "a small room in back of the main house" was searched and there "A large shopping bag containing green leafy substance was found in the adjoining rummage room; one small sack containing the same type of material was secreted behind a speaker hanging on the wall; three more small sacks containing green leafy material, seeds and stems were found in the drawers of the dresser along with brown cigarette papers, which were put into one of the small sacks at the time of the search; a suitcase was found on the floor between the dresser and the bed; a manila envelope containing a white paper bindle which contained a brownish white powder was also found in one of the dresser drawers. The speaker behind which one of the sacks was concealed was part of a record player belonging to defendant". A chemical analysis established the products found by the officers as marihuana and heroin.

[1,2] No citations of authority are necessary to illustrate the well settled rule that questions as to the weight of evidence and the credibility of witnesses are not for an appellate tribunal to determine. Assuming too that others had access to the premises, it should be noted that the jury was fully instructed as to questions resulting from such circumstances. On the whole, the evidence was sufficient as a matter of law to support the verdict even though it was, as in many cases, conflicting. The record does not present a situation where the testimony is inherently improbable.

The judgment and order are affirmed.

WHITE, P. J., concurs.

RILEY et al. v. RILEY.
Civ. 4720.

District Court of Appeal,
Fourth District, California.

May 20, 1953.

Rehearing Denied June 9, 1953.

Hearing Denied July 15, 1953.

Action to impress trust on certain property for purpose of enforcing provisions of agreement to execute will naming plaintiffs as beneficiaries. The Superior Court, Orange County, Robert Gardner, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that agreement of husband and wife terminating trust according to its terms, which trust resulted from property settlement agreement providing that property should be held in trust and that husband and wife each would execute will giving to plaintiffs an undivided one-third interest of his or her rights under the trust agreement, also terminated rights of plaintiffs in the property, and, therefore, plaintiffs, upon husband's failure to bequeath the property to them, could not impress trust upon property.

Affirmed.

1. Trusts $\S$ 61(3)

Agreement of husband and wife terminating trust according to its terms, which trust resulted from property settlement agreement providing that property should be held in trust and that husband and wife each would execute will giving to their three children an undivided one-third interest of his or her rights under trust agreement, also terminated rights of children in the property, and, therefore, children, upon husband's failure to bequeath the property to them, could not impress trust upon property. Civ.Code, $\S$ 1559, 2280.

2. Contracts $\S$ 249

The parties to a contract entered into for benefit of third persons may rescind or abrogate it without assent of such third persons at any time before contract is accepted, adopted or acted upon by such third persons. Civ.Code, $\S$ 1559, 2280.

Bertram H. Ross, Los Angeles, and
Forgy, Reinhaus & Forgy, Santa Ana, for
respondent.

MUSSELL, Justice.

Plaintiffs appeal from a judgment in favor of defendant in an action to impress a trust on a fractional interest in and to certain real and personal property, for the purpose of enforcing the provisions of an agreement to execute a will. The record contains an agreed statement on appeal from which it appears that "the principal question on this appeal relates to the construction given by the lower court to the terms and provisions of a Property Settlement Agreement dated December 6, 1941, of a Declaration of Trust executed the same date in connection therewith, and of a subsequent agreement dated May 26, 1947; specifically the question is whether plaintiffs lost their rights created under said Property Settlement Agreement and said Declaration of Trust by their parents having executed said Agreement dated May 26, 1947."

The material facts stated are these: Plaintiffs are the minor children of Chester J. Riley and Aileen S. Riley, who, on December 6, 1941, entered into a property settlement agreement providing in part as follows:

"1. The parties hereto agree to transfer, assign, convey and set over unto Charles P. Young all of the property, real, personal or mixed, as set forth and described in 'Exhibit A' hereto attached, the same to be held in trust, however, by said Charles P. Young in accordance with the terms and provisions of a certain Agreement and Declaration of Trust dated the 6 day of December, 1941, and executed concurrently with this agreement, a copy of which Agreement and Declaration of Trust is attached hereto marked 'Exhibit B' and by such reference thereto made a part hereof.

"10. Each party further agrees to execute a good and valid will and to at all times keep in force a good and valid will by the terms of which each

Alford P. Olmstead and John N. Hurtt,
Los Angeles, for appellants.

will devise and bequeath unto the three children of the parties hereto, as herein named and set forth, an undivided one-third interest of his or her rights and interests under said Trust Agreement and Indenture, and each agrees further that in the event he or she should fail and neglect to make such a will, or if for any reason it should be determined or adjudicated that any will of theirs be invalid for any reason whatsoever, that then and in that event it is understood and agreed that this instrument shall by the terms hereof constitute a valid transfer, assignment and conveyance of an undivided one-third interest to said three children of the parties hereto in and to his or her interests and rights under said trust agreement, the same to take effect immediately upon the death of said party."

In connection therewith and as part of the same transaction as the execution of said property settlement agreement, Charles P. Young, as trustee, executed a "Declaration of Trust" which contained the following provisions:

"It is understood that this trust shall continue for a period of twenty (20) years from date hereof, or unless sooner terminated by reason of the full payment and satisfaction of all present indebtedness owing by the trustors and until the satisfaction and payment of any encumbrances now upon said property, or any extensions or renewals thereof, in the event of said payment said trust shall at said time terminate. Upon the termination of this trust as to all or any part of said trust property, said trust estate shall vest in and belong to the following persons:

"One-half ($\frac{1}{2}$) thereof to the Trustor Aileen S. Riley, or her heirs, successors or assigns, or any legatees or devisees that she may name in her last will and testament;

"The remaining one-half ($\frac{1}{2}$) to the trustor Chester J. Riley, or his heirs, successors or assigns, or any legatees

or devisees that he may name in his last will and testament;

"It being understood that each of the Trustors hereby agree that upon the death of either of said trustors the children of the parties hereto shall succeed to an undivided one-third of the undivided one-half of each of the trustors.

"It is further understood irrespective of any of the other provisions of this trust, that the same may at any time be terminated upon the mutual consent and approval and agreement of each of the trustors herein."

Pursuant to said property settlement agreement and declaration of trust, the real and personal property described in said declaration of trust was, on December 6, 1941, deeded and conveyed by Chester J. Riley and Aileen S. Riley to Charles P. Young, the trustee mentioned in said declaration of trust. Thereafter, on May 26, 1947, Chester J. Riley, Aileen S. Riley and Charles P. Young, as said trustee, executed an agreement relating to said trust. This agreement recited that the parties had composed their differences and desired to effect a final accounting concerning said trust, the termination and closing thereof and the distribution of the corpus and assets thereof, including any and all accumulated income therefrom; that the third party (trustee) had rendered full and complete accountings of the administration of said trust; that it was the desire of the parties to terminate said trust and to effect the distribution of the corpus thereof. As a result of this agreement, the parties caused all of the trust property that was held by Young as trustee to be conveyed to them in their individual names and Young made, executed and delivered his deeds, bills of sale and assignments of stock to Mr. and Mrs. Riley, conveying and transferring to them, as tenants in common, all of the property constituting the corpus of said trust, including "The Riley Building".

On September 26, 1950, Chester J. Riley executed his last will and testament, wherein he bequeathed no more than the sum of \$1,000 to each of said sons and

wherein he devised and bequeathed the entire residue of his estate, including his one-half interest in the Riley Building, to his sister, Portia A. Riley, defendant herein. Thereafter, on March 16, 1951, Chester J. Riley died and his last will was admitted to probate in Orange county. Proceedings on the estate were still pending during the trial of this action and no order of distribution had been made at the time of the entry of the judgment herein from which this appeal is taken. It was stipulated at the trial that the property of said trust, insofar as it involved Chester J. Riley's interest therein in its converted form comprised that which was as set forth in the inventory and appraisal returned in said probate proceedings.

The trial court found that the trust created by the property settlement and trust agreements of December 6, 1941, was terminated and revoked by the subsequent agreement of May 26, 1947, and concluded that plaintiffs had no right, title and interest or claim in and to the estate of Chester Riley, deceased, except as to the legacies of \$1,000 each as provided in Riley's will.

Appellants argue that the "rights and interests" referred to in the property settlement agreement and declaration of trust are not limited to the beneficial interests of Mr. and Mrs. Riley under the trust but include as well their reversionary interests; that the 1947 agreement did no more than terminate the trust and left unimpaired the provisions of the property settlement agreement and declaration of trust in favor of the children and that the children have enforceable rights irrespective of whether they come within the provisions of Civil Code, § 1559. We conclude that these arguments are without merit.

[1] Section 10 of the property settlement agreement of December 6, 1941, provides that each of the parties agrees to execute a will in favor of the plaintiffs to an undivided one-third interest of his or her rights and interests under said trust agreement and if such will was not executed, the agreement was to constitute a transfer of said one-third interest under the trust agreement to the said children.

The parties did not agree to make testamentary disposition of any specific real or personal property but only to interests and rights under the trust agreement. All of the then known property of the parties was placed in the trust, which, by its terms, was made terminable upon the mutual consent, approval and agreement of the parties irrespective of any of the other provisions of the trust agreement. Thereafter the agreement of May 26, 1947, was executed by the parties terminating the trust in its entirety and all property remaining in trust was conveyed to the parties by the trustee. Therefore, nothing remained in the trust which could be disposed of by will and the trust ceased to exist.

[2] The parties to a contract entered into for the benefit of third persons may rescind or abrogate it without the assent of such third persons at any time before the contract is accepted, adopted or acted upon by such third persons. Civil Code, § 1559 provides that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. In 12 Am.Jur., at page 843, it is stated:

"According to the weight of authority, the parties to a contract entered into for the benefit of a third person may rescind, vary, or abrogate the contract as they see fit, without the assent of the third person, at any time before the contract is accepted, adopted, or acted upon by him, and such rescission deprives the third person of any rights under or because of such contract."

Plaintiffs did not acquire any rights under the 1941 agreements which prevented a rescission of said agreements by the contract of 1947. *Orloff v. Metropolitan Trust Co.*, 17 Cal.2d 484, 487, 110 P.2d 396; *O'Neil v. Ross*, 98 Cal.App. 306, 326, 277 P. 123.

Section 2280 of the Civil Code provides:

"Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust

is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby."

The creators of a trust may revoke it as provided in this section. Title Ins. & Trust Co. v. McGraw, 72 Cal.App.2d 390, 399, 164 P.2d 846.

The trust agreement herein provides that upon termination of the trust, one-half of the trust property is to go to the trustor Aileen S. Riley and the remaining one-half to the trustor Chester J. Riley, and that upon termination of the trust, the trustee execute deeds to the parties accordingly. Under such circumstances, the language in the property settlement agreement with respect to the succession of plaintiffs in the event of the death of either party to the agreement has no application because there was no trust or interest therein which was transferable by conveyance or otherwise after the termination of the trust.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



118 Cal.App.2d 36

UNIVERSAL ENGINEERING CO., Limited,
v. STATE BOARD OF EQUALIZA-
TION and Consolidated Cases.

Civ. 8216.

District Court of Appeal, Third District,
California.

May 21, 1953.

Actions by manufacturers of oil well drilling equipment to recover sales tax paid under protest. The Superior Court, Sacramento County, Grover W. Bedeau, J., entered judgment from which the plaintiffs appealed. The District Court of Appeal, Schottky, J., held that where rock bits leased by plaintiffs to

oil well drillers were rendered useless at end of one rental term unless rebuilt, and purported rental charge was lump sum in excess of cost of bit to plaintiffs, without additional charge if bit was lost, the bits were "substantially consumed" during the rental term, and leases or rentals were "in lieu of sales" within Sales Tax Act provision.

Judgment affirmed.

1. Licenses ⇨15.1(5)

The words "substantially consumed", as used in test for determining whether rentals of personalty are subject to sales or use tax, are not technical words having a peculiar meaning in law, but are words in common use which must be given their plain, ordinary meaning, and an article is "substantially consumed" if it is essentially or materially used up during the term of one rental agreement, and complete consumption is not required. Revenue and Taxation Code, § 6006(a); Administrative Code, Tit. 18, § 2043.

See publication Words and Phrases, for other judicial constructions and definitions of "Substantially Consumed".

2. Licenses ⇨15.1(5)

Where rock bits leased by plaintiff to oil well drillers were rendered unusable at end of lease term unless they were rebuilt, and rental price was a lump sum in excess of cost of tool to plaintiffs, without increase thereof if bit was lost, the bits were "substantially consumed" within meaning of provision of Administrative Code declaring such equipment to be subject to sales or use tax, though leased or rented, if substantially consumed under one lease agreement. Administrative Code, Tit. 18, § 2043, Revenue and Taxation Code, § 6006(a).

3. Evidence ⇨33

District Court of Appeal, when determining whether certain oil well drilling equipment leased to drillers by plaintiffs was subject to sales or use tax, would take judicial notice of fact that in formulating and enacting legislation, Legislature had for many years had assistance and advice of legislative counsel bureau, and that it was therefore aware of the "substantial consumption" test for determining whether such leased articles were subject to tax.

Revenue and Taxation Code, § 6006(a); Administrative Code, Tit. 18, § 2043.

4. Statutes ⇨223.5(1)

Where an administrative officer or board has adopted a regulation defining certain transactions as coming within scope of sales tax statute, and Legislature subsequently re-enacts statute without amendment in that regard, the re-enactment amounts to a legislative confirmation of the prior existing rules of interpretation.

5. Statutes ⇨219

In resolving a question as to import of a statute, a court attaches probative weight to administrative agency's conclusion as to meaning of the law, and court will not ordinarily adopt another construction unless the determination of agency or board is shown to have been clearly erroneous or unauthorized.

6. Statutes ⇨223.5(1)

The "substantial consumption test" promulgated by Board of Equalization for determining what leases and rentals of oil well drilling equipment are "in lieu of sales" and subject to sales or use tax, in effect received approval of Legislature by subsequent amendments to Retail Sales Act, without undertaking a contrary definition of the term "in lieu of sales". Revenue and Taxation Code, § 6006(a); Administrative Code, Tit. 18, § 2043.

7. Licenses ⇨15.1(5)

Under provision of Sales Tax Act defining sale to include transfer of possession for consideration, and stating that transfer of possession includes only transactions found by Board of Equalization to be in lieu of transfer of title, Board was justified in determining that transactions whereby plaintiffs leased rock bits to oil well drillers, at charge which exceeded cost of bit to plaintiffs, without additional charge if bit was lost, with bits having effective life of but one lease, was a lease or rental "in lieu of transfer of title", and subject to tax. Revenue and Taxation Code, § 6006 (a).

See publication Words and Phrases, for other judicial constructions and definitions of "In Lieu of Transfer of Title".

Pillsbury, Madison & Sutro, Frederick H. Hawkins, and Albert J. Shults, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine and Irving H. Perluss, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Plaintiff above named, and Security Engineering Co., Inc., a corporation, Globe Oil Tools Co., a corporation, Hughes Tool Company, a corporation, Byron Jackson Co., a corporation, Chiksan Oil Tool Company, Ltd., a corporation, The Republic Supply Company of California, a corporation, Grant Oil Tool Company, a corporation, Howard Supply Company, a corporation, and Reed Roller Bit Company, a corporation, brought separate suits for the recovery of sales tax paid to defendant under protest on transactions involving the leasing or renting of various types of oil well drilling tools. The complaints alleged the filing of sales tax returns with the State Board of Equalization for various calendar quarters, and the payment of portions of the tax under protest on the ground that the sums received from the leasing of oil well drilling equipment during the various periods in question were not properly subject to sales tax because said leases were bona fide lease and service agreements and not leases and agreements in lieu of sales.

Defendant answered each complaint, denying the allegations that the lease and service agreements in question were bona fide lease and service agreements and not leases and agreements in lieu of sales, and denying that any sum was due from defendant to plaintiffs.

The various cases were consolidated for trial and were decided by the trial court by a single set of findings of fact and conclusions of law and a single judgment. No evidence, either oral or documentary other than a written stipulation of facts, was introduced at the trial of the consolidated cases, and the findings of fact signed by the trial court incorporated this stipulation and found that all facts stated therein were true. By paragraph XI of the stipulation the defendant stipulated that plaintiffs have

judgment against defendant for the amount of sales tax paid during the periods involved on the rental of all types of bits involved in the litigation other than the type of bit known as a "rock bit." The trial court rendered judgment in favor of defendant with respect to the taxes paid on the rental of rock bits, and pursuant to the stipulation plaintiff had judgment against defendant for the amount of taxes paid on the rentals on all types of bits other than rock bits.

Plaintiffs have appealed from that portion of the judgment denying them recovery for the sales taxes paid under protest on the leases and rentals of rock bits, and the sole issue upon this appeal is whether the gross rentals on rock bits furnished by plaintiffs to oil well drillers in the manner set forth in the stipulation of facts are subject to California sales or use tax. The record on appeal consists of an agreed statement of appellants and respondent in lieu of clerk's and reporter's transcripts on appeal.

The factual situation as stipulated to by the parties is substantially as follows:

Plaintiffs are manufacturers of various types of oil well drilling equipment. Under lease and service agreements plaintiffs have furnished oil well drilling equipment to various oil well drillers in the state of California, receiving in return gross rent. For the taxable periods from July 1, 1938, to May 1, 1939, the plaintiffs paid, under protest, sales taxes to defendant on the total rental price received by them on rock bits, disc bits, reamers, underreamers, differential bits, conventional wire barrels and bits, and wire line core barrels and bits. These taxes were paid in accordance with what is now Title 18, section 2043, California Administrative Code, which so reads:

"Oil Well Drilling Tools.—If oil well drilling tools are ordinarily substantially consumed during one run, or under one lease agreement, the charges therefor are taxable, even though designated as rentals. Thus, the tax applies to charges for tools such as roller cutters for under reamers, roller cutters for straight reamers and roller or cone type rock bit cutters. If no segregation is

made between the charges for oil well drilling tools which are so consumed, and rental charges for tools which are not so consumed, the entire charges are taxable." (Effective August 1, 1933. Adopted as of January 1, 1945, as a restatement of previous rulings.)

A rock bit is a type of roller bit furnished by the plaintiffs to oil well drillers for the purpose of drilling through rock formations. It consists of a cylindrical metal shank or body with rotating metal cutters mounted on shafts projecting from the base of the shank or body. These metal cutters rotate with the aid of bearings. Teeth are milled and built up with hard, wear resistant, facing metal on the exterior of the cutters. The cutters of a rock bit represent approximately 50 per cent of the total cost of the bit. The cutter teeth and bearings are the only portion of a bit subject to appreciable wear during one lease agreement. Ordinarily, the cutter teeth become dull after one run, and the bit is returned to the lessor. After the cutter teeth become dull the rock bits could be repaired for re-use in a second run by re-tipping with hard, wear resistant, facing metal and reshaping the new teeth. The cost of repairing is inexpensive, less than half the manufacturing cost. As a practical matter, however, with minor exceptions, none of the manufacturers re-used any part of the rock bits after the cutter teeth became dull. Such bits rather were used by the plaintiffs for research and development purposes, or were sold to reliable steel or salvage companies, thus insuring that none of their used bits would be available to others for refacing and redistributing to drillers.

The rental method of doing business by the manufacturers of oil well drilling equipment was established prior to the enactment of the California Retail Sales Tax Act in 1933. The reason for the adoption of the rental system was to insure the return of the used bits, and to prevent the re-tipping of the bits by drilling crews. The re-tipping done by drilling crews was faulty and this led to widespread dissatisfaction on the part of drillers who failed to distinguish between the performance of new

bits and those retipped by their crews. Consequently lists of rental prices were made available to drillers. The price lists notified the lessee that the bits were rented and not sold. When drillers desired drilling tools, orders were placed with plaintiffs indicating the type of tool and the required place of delivery. The ordered tools were delivered by plaintiffs along with "bit breakers," or wrenches for use in connecting and disconnecting the tools and the drill pipe. The rental price charged by the plaintiff covered the use of these bit breakers, and the delivery of the tools. At the time of delivery a slip was filled out and signed by a representative of the plaintiff renting the tools and by a representative of the lessee.

At irregular intervals plaintiffs picked up dulled tools or tools no longer needed by its lessee. No charge was made for this pickup in addition to the rental charge. Also, at this time a "pickup" slip was filled out and signed by a representative of the plaintiffs and a representative of the lessee. After the pickup, invoices for rental charges were submitted to the lessee, and the charge was paid in a lump sum, not periodically. The rental charged was computed on the number of dulled cutters. This charge covered the entire use of all tools furnished plus plaintiffs' other services, and exceeded the cost of a rock bit to the manufacturer. For some of the tools, in addition to dulled cutter charges, rentals were measured by a flat daily rental, or by other factors. In the event that a tool was lost or rendered valueless, the practice of making an additional charge to the drillers varied with the type of tool. No charge was made in such a case where the tool was a rock bit. Of the other tools once herein involved, an additional charge was made for each one lost or rendered valueless, except in the case of a disc bit.

Subdivisions (b) and (c) of section 2 of the California Retail Sales Tax Act of 1933, St.1933, pp. 2599, 2600, as amended in 1935, St.1935, pp. 1256, 1257, provide as follows:

"(b) 'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any

means whatsoever, of tangible personal property, for a consideration, * *.

"(c) * * * 'lease,' and 'rental' as used in subdivision (b) of this section shall mean and include only such transactions as the board, upon investigation, finds to be in lieu of sales as defined in subdivision (b) of this section without the words 'lease or rental.'" Stats.1935, ch. 357, pp. 1256-1257.

This statute has been amended several times since the 1935 amendment. It is now codified as section 6006(a) of the Revenue and Taxation Code and reads as follows:

"'Sale' means and includes:

"(a) Any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or any means whatsoever, of tangible personal property for a consideration. 'Transfer of possession,' 'lease,' or 'rental' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter."

The trial court concluded: "That plaintiffs' 'leases' and 'rentals' of rock bits were transactions 'in lieu of sales' within the meaning of subsections (b) and (c) of section 2 of the California Retail Sales Tax Act of 1933 (now section 6006(a) of the California Revenue and Taxation Code), and the gross receipts derived by plaintiffs from such transactions properly were subject to sales tax."

In their argument for a reversal of the judgment appellants contend that the rentals in question are not taxable sales whether this question be determined by applying the statutory "in lieu of sales" test or the board's "substantial consumption" test.

Appellants first argue that, properly applied, the respondent Board's "substantial consumption test" does not convert the rentals in question to taxable sales because the tools which are rented are not substantially consumed. Appellants state:

"As shown by the stipulation, the cutters of the rock bits represented about 50 per cent of the total cost of the bits, and these cutters, along with the bearings, were the only portion of

the bits subject to appreciable wear during one lease agreement (Agreed Statement, p. 16, lines 20-23). Furthermore, the bits 'could be repaired for re-use in a second run by refacing the dulled cutter teeth with hard, wear-resistant, facing metal and shaping the new teeth in the same way the original teeth were shaped' (Agreed Statement, p. 17, lines 1-4).

"These rock bits could be repaired at a cost less than the cost of the manufacture of new bits (Agreed Statement, p. 17, lines 4-5). Such repair would increase the useful life of the bits one hundred per cent (Agreed Statement, p. 16, line 25—p. 17, line 4).

* * * * *

"In view of these facts, it appears that within the limits of any reasonable interpretation of the words 'substantially consumed,' these bits cannot be said to be so consumed."

Respondent in reply argues that here the rock bits were "substantially consumed" because there was a substantial reduction in the useful life of the rock bits unless they were rebuilt and such rebuilding never took place as they were never re-used. It points out that there was full utilization of the tools by the lessee and that the effective life of the tools was but one "lease" or rental; that no additional charge was made if the tool was lost; the price was paid in one amount and not periodically; and the charge exceeded the cost of the tool to the manufacturer.

[1,2] The words "substantially" and "consumed" as used in statutory provisions of the kind under consideration are not technical words having a peculiar meaning in law, but are words in common use and must be given their plain, ordinary meaning. 47 Am.Jur., Sales and Use Taxes, sec. 25. "Consumed" means "used up." Webster's New International Dictionary. "Substantially" mean considerably, essentially or materially. We believe that a reasonable and proper construction of the words "substantially consumed" is essentially or materially used up, and under the facts of the instant case the rock bits were "substantial-

ly consumed" during one run or under the lease agreement. We do not believe that "substantial consumption" means "complete consumption."

It is evident that respondent Board in the instant case used the "substantial consumption" test in determining that the so-called "leases and rentals" here involved were "in lieu of sales" and that the trial court in arriving at its conclusion upon the facts appearing in the record used the same test. This test was formulated by respondent Board and adopted as an administrative ruling in 1933. It appears in Title 18, section 2043, of the California Administrative Code, and reads in part as follows: "If oil well drilling tools are ordinarily substantially consumed during one run, or under one lease agreement, the charges therefor are taxable, even though designated as rentals."

We have hereinbefore set forth subdivisions (b) and (c) of section 2 of the California Retail Sales Tax Act of 1933, as amended in 1935, and have pointed out that it was thereafter amended several times and finally codified as section 6006(a) of the Revenue and Taxation Code. These amendments were all since the adoption of the "substantial consumption" test ruling above quoted. Title 18, sec. 2043, of the California Administrative Code.

[3-5] We may take judicial notice of the fact that in the formulating and enacting of legislation the legislature for many years has had the assistance and advice of a well trained and highly efficient legislative counsel bureau and that it was therefore aware of the "substantial consumption" test ruling. It has been held that where an administrative officer or board has adopted a regulation defining certain transactions as coming within the scope of a sales tax statute, and the legislature subsequently reenacts the statute without amendment in this regard, the reenactment amounts to a legislative confirmation of the prior existing rules of interpretation. 47 Am.Jur., Sales and Use Taxes; El Dorado Oil Works v. McColgan, 34 Cal.2d 731, 739, 215 P.2d 4; Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 156 P.2d 1, and cases cited therein. In resolving a question as to

the import of a statute, a court attaches probative weight to the administrative agency's conclusion as to the meaning of the law, and a court will not ordinarily adopt another construction unless the determination of the agency or board is shown to have been clearly erroneous or unauthorized. 10 Cal.Jur. 10-Yr. Supp., Taxation, § 427, p. 533; *Coca-Cola Co. v. State Board of Equalization*, supra.

[6] We believe that the "substantial consumption" test is not only a reasonable one for determining what "leases and rentals" are "in lieu of sales" but that it has in effect received the approval of the legislature.

[7] Appellants contend further that the rentals of the rock bits in question were bona fide rentals and were not "rentals in lieu of sales," "because the plaintiffs had legitimate business reasons for requiring the return of used bits, that is to prevent their faulty repair by drillers and to permit their inspection and improvement by the manufacturers." However, as we view the matter, it is difficult to understand what the legislature meant by the words, "Transfer of possession," "lease," or "rental" includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter, if it did not mean to include transactions of the nature here involved. It may be true, as appellants state, that this so-called rental method of doing business by the manufacturers of oil well drilling equipment was established prior to the enactment of the California Retail Sales Act of 1933, and that it cannot be said that appellants adopted this method of doing business in order to evade the sales tax, but we believe that this so-called rental method of doing business is one of the types of trans-

actions that the legislature meant to classify as a rental in lieu of sale. It is clear to us that appellants for reasons that were sufficient to them chose to dispose of and market their product in this manner, and that to permit them to escape the sales tax under all of the circumstances hereinbefore set forth, would be a discrimination in their favor which was not intended by the legislature. For there was full utilization of the rock bits by the lessees; the effective life of the bits was but one "rental" or lease; no additional charge was made if the bit was lost; the price was paid in one amount and not periodically; and the charge exceeded the cost of the bit to the manufacturer. These facts, together with the other facts and circumstances hereinbefore detailed, fully justified the respondent Board of Equalization in determining that as to the rock bits here involved the so-called lease was not a true lease or rental but was a lease or rental "in lieu of a transfer of title". This determination by respondent Board was a determination of fact and we cannot agree with appellants that such a determination could not reasonably be made upon the facts appearing in the record.

In view of the foregoing we are satisfied that the court correctly determined that plaintiffs' lease and rentals of "rock-bits" were transactions "in lieu of sales" within the meaning of subdivisions (b) and (c) of section 2 of the California Retail Sales Tax Act of 1933, as amended in 1935 (now section 6006(a) of the California Revenue and Taxation Code), and that the gross receipts derived from such transactions properly were subject to sales tax.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



